

What Factors are Associated with Multilateral Environmental Agreement
Noncompliance, and can Agreement Provisions be Designed to Mitigate
them?

Sezaneh M. Seymour

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Joel Peters
Ariel I. Ahram
Shannon A. Brown
Todd E. W. Schenk

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ABSTRACT

This research contributes to gaps in the international relations and international law literature on compliance by engaging practitioners with multilateral environmental agreement (MEA) expertise to answer two questions: 1) what factors are associated with MEA noncompliance; and 2) is there a relationship between the design of MEA provisions and compliance with those provisions.

Practitioners overwhelmingly associate MEA noncompliance with insufficient domestic interagency consultation early in the lifecycle of a multilateral environmental agreement, particularly during its negotiation. The interagency consultative process is the mechanism by which a state identifies the nature of its relevant domestic environmental challenges and the availability of its institutional, financial, and technical resources to address them. Absent a robust process, state delegated representatives engage in negotiating obligations on behalf of their states without a full understanding of the domestic context. Consequently, they may inadvertently negotiate obligations that are impractical or otherwise inconsistent with domestic realities. Under these circumstances, a state may subsequently set itself on a trajectory of noncompliance when ratifying the agreement. Three noncompliance cases under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal are consistent with this finding.

The design of treaty provisions might serve to mitigate some factors associated with MEA noncompliance. Practitioners observe a relationship between the design of treaty provisions and compliance with those provisions. When presented with two different legal design options, practitioners overwhelmingly expressed a preference for obligations of outcome over obligations of action. Preserving state flexibility to determine how to implement obligations may mitigate noncompliance associated with insufficient domestic consultation early in the lifecycle of an MEA, but more research is necessary to draw the conclusion that one legal design produces better compliance results over another.

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GENERAL AUDIENCE ABSTRACT

States actively negotiate multilateral environmental agreements (MEA) to address transboundary environmental challenges. When states fail to comply with their obligations under these agreements, the international community's collective environmental goals are compromised. This research contributes to the literature on compliance by exploring two questions: 1) what factors are associated with MEA noncompliance; and 2) is there a relationship between the design of MEA provisions and compliance with those provisions.

MEA noncompliance is overwhelmingly associated with states' poor preparation to engage in the negotiation and implementation of multilateral environmental agreements. Poor preparation is the result of insufficient domestic interagency consultation, which is the process by which a state identifies the nature of its relevant domestic environmental challenges and its ability to address them. The design of MEA provisions might serve to mitigate some factors associated with noncompliance, particularly if that design gives states the flexibility to later determine how or which domestic measures to take in order to meet the relevant outcome contained in their MEA obligations. However, more research is needed to draw the conclusion that one legal design is better than another.

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Chapter One: Introduction

Compliance with international law is a well-traveled topic in both the international relations and legal disciplines. Academic scholarship considers compliance from three distinct but complementary perspectives: whether international law affects state behavior; when international law affects state behavior; and why. Notwithstanding the significant attention already given to this important topic, there remain significant gaps in both the relevant scholarship as well as in the collective understanding of compliance with international law.

In particular, more work is needed to identify noncompliance factors associated with a subset of international law and legal instruments, specifically binding international agreements. Available scholarship speaks to compliance in the context of both binding and nonbinding instruments, which is problematic for reasons later enumerated. Further, additional research is necessary to consider noncompliance in the context of the distinct character of activities international agreements regulate. Distinguishing among categories of activities is an important prerequisite to drawing generalizable conclusions about compliance, particularly as the incentives to defect from agreements can vary dramatically among them. Finally, there is

very little work available on the relationship between the design of treaty provisions in multilateral agreements and on compliance with those provisions. The literature on the relationship between design and compliance is limited to macro design considerations, such as whether treaties contain enforcement or facilitative mechanisms, like dispute resolution mechanisms or financial instruments respectively.

Research Questions

This research contributes to the above-referenced gaps by engaging compliance and multilateral environmental agreement (MEA) practitioners to explore two questions: 1) what factors are associated with MEA noncompliance; and 2) is there a relationship between the design of MEA provisions and compliance with those provisions.

Organization and Overview

The first chapter provides important context, including a definition of compliance, the premises underlying this project, and the policy relevance of this project and its findings. The definition of compliance is inconsistent across the literature, with scholars sometimes conflating related concepts. For the purpose of this research, compliance is defined as “the degree to which state behavior [fully] conforms to what an agreement prescribes or proscribes.”

This research takes for granted two premises. The first is that international law and its mechanisms – namely multilateral environmental agreements – affect state behavior. Whether international law and its mechanisms affect state behavior or powerful states simply use them to memorialize and advance their independent interests remains a matter of continued debate and will not be re-litigated here. Rather, this research is aligned with the neo-institutionalist view that international institutions and international agreements can and do shape the behavior of states. The second premise is that state interests and behavior are dynamic, where international law and its instruments are comparatively more static and sticky. State interests can shift dramatically in response to changing domestic political cycles and demands. Established international institutions, rules, and norms are more static by comparison; generating the support and interest to pursue changes to them can be difficult and resource intense.

The second chapter provides an overview of compliance literature, summarizing the distinct perspectives from which international relations and legal theorists approach compliance. International relations scholarship examines the relationship between international law and state behavior from a macro perspective, asking whether and under what circumstances

international law constrains or otherwise influences state behavior. Legal scholars, conversely, approach compliance from a micro perspective, examining the application of rules and norms, their efficacy, and prescribing what rules and norms should be. The divergent approach between these two disciplines is largely isolated to academia, as practitioners report not drawing such distinctions in practice, and instead follow contract law best practice in the negotiation and elaboration of international agreements. In addition, this chapter summarizes the most prominent compliance theories, drawing distinctions among them where relevant. Taken together, these theories offer perspectives on when and why states comply (or fail to comply) with international law. Theories range from facilitative, such as the managerial model that emphasizes the role of cooperation in sustaining a compliance culture, to punitive, such as theories that underscore the role of sanctions in inducing compliance when a state might otherwise not be inclined to comply.

The third chapter presents data sources and collection methods, as well as the selected qualitative research methodology, grounded theory. Primary and secondary sources of data inform this research, and significant new data was collected using semi-structured surveys and interviews of compliance professionals with extensive MEA implementation and

compliance experience. In total, 206 professionals were invited to participate in this research; 35 professionals elected to participate by survey (n=33) and/or interview (n=8). Grounded theory is the most appropriate qualitative methodology for this project because of its suitability for investigating and analyzing complex social processes like those related to MEA noncompliance. Data coding and analysis in this project revealed a new pattern in the data, and led to a new line of inquiry: political will as expressed by the character of state engagement during the negotiation phase of a multilateral environmental agreement.

The fourth chapter presents an overview of empirical data collected and corresponding findings, including noteworthy areas of divergence between practitioners and academics. Empirical data supports the conclusion that practitioners limit their assessment of compliance to legally binding agreements (or more specifically, their provisions), unlike the academic literature that does not always limit compliance assessments to binding agreements. The fifth chapter presents an in-depth examination of the major finding of this project that insufficient political will is associated with MEA noncompliance, and the implications of this finding for the future. Practitioners refer to insufficient political will to describe poor state

preparation early in the MEA lifecycle as a consequence of insufficient domestic interagency consultation.

The sixth chapter presents a case study of noncompliance findings under the Basel Convention on the Transboundary Movement of Hazardous Waste, with the goal of triangulating the facts of those cases with empirical data collected in this study. Basel Convention noncompliance cases are particularly suitable as a case study because the Basel Convention has a long-standing and operational mechanism for assessing compliance. This is in contrast to many other multilateral environmental agreements that either lack such a mechanism, or they are more newly established and consequently available data is not as rich. Three Basel Convention noncompliance cases are analyzed in chapter six: Liberia, Central African Republic, and Oman.

The seventh chapter examines practitioner views on the relationship between the design of treaty provisions and compliance, and specifically whether design can mitigate noncompliance associated with insufficient political will. Over 90% of practitioners share the view that the manner in which treaty obligations are designed has a relationship with the extent to which states comply with them. These same practitioners overwhelmingly assert that good design means balancing a degree of flexibility for states to

determine how they implement their obligations while maintaining a level of legal certainty and clarity among the parties with respect to the expected outcomes of their implementation.

The eighth and final chapter contains a summary of research findings and their policy implications. Noncompliance with MEAs undermines the international community's collective environmental policy goals at a time when the consequences of our collective environmental future have become more dire. Any measures to improve, incentivize, or otherwise facilitate compliance with MEAs is therefore an important and relevant public policy objective.

The final chapter also proposes future work, drawing on lines of inquiry that were unable to be fully addressed in this project. Further work should be undertaken to build on existing game theories that purport to explain state-to-state negotiating behavior and also build on the findings of this research, with a view to identifying indicators that might foreshadow a state's likelihood to become noncompliant. The chapter presents two possible indicators that may foreshadow the likelihood a state will be compliant with MEA obligations; both merit additional investigation. Widespread MEA noncompliance is evidence that the level of support necessary for a state to ratify an MEA is not a sufficient level of support to

sustain the domestic measures necessary to comply with obligations.

Whenever practical, narratives are complemented by data visualization.

Premises Underlying this Research

The first premise underlying this research is that international law and its mechanisms – namely multilateral environmental agreements – affect state behavior. And notwithstanding the understanding that multilateral environmental agreements shape state behavior, there are circumstances under which states fail to meet their obligations under those agreements.

The notion that international law and its instruments affect state behavior is extensively litigated across the international relations literature and remains an open issue. It will not be re-litigated here other than to acknowledge it remains a matter of dispute.

The premise that international law and its mechanisms affect state behavior is advanced by international relations scholars aligned with the liberal institutionalist school of thought. Robert Keohane and John Ikenberry argue that states' continued reliance and establishment of institutions since 1940 support a conclusion that international institutions can and do affect state behavior.¹ Institutions and corresponding instruments

¹ Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars, New Edition*; and Keohane, *After Hegemony*.

facilitate international cooperation, including by reducing the transaction costs of cooperation. However, international relations scholars like Kenneth Waltz and John Mearsheimer align themselves with the realist school, and object to this premise. They assert that international legal instruments do nothing more than memorialize the interests of the most powerful states.² In the *False Promise of International Institutions*, Mearsheimer argues that the extent to which international agreements or institutions appear to affect state behavior is only an illusion, made possible by the fact that these institutions are backed by a powerful hegemon.

A second important premise underlying this research is the recognition that state priorities, interests, and behavior are dynamic. While this may be evident, it merits explicit acknowledgement because this project is about compliance with international agreements and their binding provisions that are, relatively speaking, static. The lifecycle of cooperation to negotiate an international agreement is long, and once an agreement is concluded, the lifecycle of the implementation phase is even longer. In parallel, many state domestic political cycles and resultant priorities evolve on much shorter timelines. For example, some state constitutions hold elections on fixed timing; parliamentary and presidential elections are on

² Waltz, *Theory of International Politics*; and Mearsheimer, *The False Promise of International Institutions*.

four and five year terms in many countries. Other countries allow for elections to be called under certain conditions. The inverse nature of these two realities are in stark contrast to one another: dynamic state governments and interests are dynamic while international agreements and the provisions with which states must comply are static and sticky.

Defining Compliance: What does it mean to comply?

The first challenge to understanding compliance is defining it. Not surprisingly, no universally accepted definition exists across the relevant legal or international relations literature. While compliance is a central concept of international law, there is no single consensus understanding of what it means to be in compliance. A further complication is the fact that the concepts of compliance, implementation, and effectiveness are sometimes used interchangeably across the literature. Kingsbury observes competing understandings of compliance, and notes “compliance is thus not a free-standing concept, but derives meaning and utility from theories, so different theories lead to different notions of what is meant by compliance.”³ Establishing a single, globally accepted definition of compliance may not be practical or desirable because compliance is contextual. Nevertheless,

³ Kingsbury, “The Concept of Compliance as a Function of Competing Concepts of International Law,” 346.

precision and ensuring a shared understanding when examining the phenomenon matters.

For the purpose of this research, compliance is defined as “the degree to which state behavior [fully] conforms to what an agreement prescribes or proscribes.”⁴ This definition is taken from the literature, with one amendment – the addition of *fully*. The addition is necessary for clarity given the range of compliance definitions in the literature. The *managerial model* of compliance is arguably one of the most renowned; its authors refer to “acceptable” levels of compliance. The adverb *fully* is added to emphasize the expectation that *all* requirements must be met to be judged compliant.

In addition, compliance in this research is limited to first-order compliance. First-order compliance is defined as compliance with core agreement provisions plus any subsequent amendments, if applicable. Amendments to legally binding agreements are infrequent; they require a significant investment of time and political capital to achieve – much like the original agreement. Second-order compliance is defined as compliance with decisions subsequently taken by treaty parties, and memorialized outside of (first-order) treaty text. Decisions, declarations, and other related

⁴ Young, *Compliance and Public Authority*, 104

documents are typically adopted at Conferences of the Parties, and require less time investment to realize.

Full compliance is defined one of two ways, depending on context. When speaking about compliance with a treaty writ large, full compliance is achieved when state behavior conforms to *all* treaty obligations. Partial compliance is achieved when a state meets some but fails to meet all treaty obligations. Noncompliance occurs when the state fails to meet any of its obligations. Full compliance, which is of direct relevance to this project, refers to the degree to which a state is meeting its obligations with a *specific* treaty provision. States are either in compliance with treaty provisions or not. Full compliance is achieved when state behavior fully conforms to all requirements contained in that provision. States are noncompliant when they have partially met commitments under that provision, or they have not met any of them at all.

A final word on precision of language: a persistent challenge throughout the academic literature is the degree to which scholars use *compliance*, *implementation*, and *effectiveness* imprecisely or even interchangeably. States may be noncompliant because they have not taken sufficient steps to implement their obligations. Slaughter describes implementation as the steps one takes to effectuate a norm, commitment, or

obligation.⁵ It is conceivable that a state takes steps to implement a commitment and is still not in compliance with its obligations.

Effectiveness refers to the degree to which the norm, commitment, or obligation achieves the stated objective. For example, it is possible that an air quality treaty that fails to achieve air quality reduction targets simply does not target all sources of air pollution. Alternatively, it is also possible the treaty targets all appropriate sources but parties are not compliant with their obligations (or that there are significant polluting nonparty states). Importantly, there can be cases where a state has not taken steps to implement obligations but is already in compliance because the treaty obligations are consistent with state practice at the time of ratification. Figure A illustrates the distinction between these three terms.

⁵ Raustiala and Slaughter, "International Law, International Relations and Compliance," 538, 539.

Defining Key Concepts

Key Concept	Definition
Compliance	The degree to which state behavior fully conforms to what an agreement prescribes or proscribes.
Effectiveness	The degree to which the obligations in an agreement advance the agreement's objectives. High levels of compliance do not necessarily correlate with high levels of effectiveness.
Implementation	The steps a state takes to put a specific rule or obligation into practice. Implementation may result in compliance or may not. Implementation is not a necessary condition for compliance if state practice already conforms to a rule or obligation at the time of ratification.

Figure A

Assessing Compliance: Legal form as a determinant of the expectation to comply.

A second challenge to assessing compliance is confirming there is an expectation to comply. Legal form is a direct and reliable manner in which to establish such an expectation exists. International law takes many forms, among them treaties. Article 26 of the Vienna Convention states “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁶ The question of the legal form of agreements and the provisions contained within them is an issue that is central to international

⁶ This principle is also commonly referred to by the Latin title of Article 26, *Pacta sunt Servanda*, which translates to treaties must be obeyed.

political debate for good reason.⁷ The real and perceived distinction is that one category of legal form creates binding obligations on the parties while others do not. Establishing an obligation exists is a prerequisite to assessing compliance.

However, Guzman and Lipson speak about compliance in the context of a variety of international law instruments – some binding and some not.⁸ Guzman asserts legal form is less relevant because any instrument can have a substantial impact on the behavior of states regardless of its form. For this reason, likeminded scholars assert the question of relevance should be whether and why instruments bring about the desired change in a state's behavior regardless of its form. This is in stark contrast to the views of practitioners for whom legal form is centrally relevant to compliance.⁹

Practitioners' fixation with legal form is evident across multilateral environmental negotiations. Examples of practitioners' concern with legal form are evident throughout the international negotiations that led to the adoption of the 2015 Paris Agreement, which was concluded under the

⁷ Treaties are legally binding instruments, though they typically include a mix of binding and nonbinding provisions, colloquially described as either *soft* or *hard* provisions. These are distinguished in the strength of the choice of verbs, such as *shoulds* versus *shalls*.

⁸ Lipson, "Why Are Some International Agreements Informal?", and Guzman, "A Compliance-Based Theory of International Law."

⁹ Academics like Raustiala and Slaughter share the view that legal form matters, and consequently speak about obligations in the context of binding agreements.

auspices of the United Nations Framework Convention on Climate Change. The 2011 Durban Conference established a roadmap for the negotiations that resulted in the 2015 Paris Agreement; the legal form of the future instrument was among the most divisive elements of the agreed roadmap, and it was the final element to fall into place in the negotiation. Years later, again in the final hours of the negotiation, the last question to be resolved in the 2015 Paris Agreement negotiations was on the legal character of a specific provision within the Agreement. In the wake of the Paris Agreement's adoption, one scholar observed the, "obsession with the Paris outcome's legal character may seem curious to scholars...nevertheless, States clearly thought the issue of legal form mattered."¹⁰

Legal form matters because states undertake both binding commitments and aspirational goals. Practitioners with extensive, direct experience assert that the legal form of an agreement matters when it comes to compliance because legal form can establish whether states intended to conclude aspirational goals or binding commitments. Establishing intent is an important prerequisite to assessing compliance. For this reason, an academic theory of MEA compliance must also be limited to legally binding agreements. However, this is not to say that one legal form of agreement is

¹⁰ Bodansky, "The Legal Character of the Paris Agreement."

inherently better than another, but that compliance assessments must be made against the appropriate instruments.

The concern with limiting compliance assessments to legally binding agreements may raise a related question: why and when do states conclude nonbinding agreements? Nonbinding agreements are more common than legally binding ones. States decide to pursue informal agreements over legally binding ones for a variety of reasons. States may choose nonbinding agreements in order to avoid visible pledges and a formal ratification process, or they may do so to maintain greater flexibility to renegotiate commitments under changing circumstances.¹¹

Informal agreements differ from binding ones in important ways. Treaties contain obligations, and they are also designed to raise the profile and credibility of states' commitments by memorializing them in a public and static legal document. Treaties evolve in a protracted process, which includes their negotiation, formal adoption of the text, and a period of time in which they are open to states for signature and ratification.¹² While all international agreements can be sticky and generally costly to amend, legally

¹¹ Lipson, "Why are Some International Agreements Informal?" 501.

¹² The term ratification throughout is used generically to refer to the formal process by which states bind themselves to treaties, and for the purposes of this paper can be used interchangeably with acceptance.

binding agreements are stickier than nonbinding ones because of the more exhaustive and time consuming process that precedes their adoption.

Treaties and other legally binding agreements offer an important distinguishing feature from a compliance assessment perspective; the process by which they are ratified offers a firm signal of political will, intent, and a clear understanding there is an obligation to comply. The legal character of an instrument is important because, plainly, it can irrefutably establish whether there is an expectation that states will comply. Limiting assessments of compliance to legally binding agreements is good practice because they are by definition binding; it makes little sense to assess state compliance with nonbinding instruments. One cannot credibly make the case a state is noncompliant if that state does not formally agree or acknowledge there is an expectation for it to comply. This is the case with nonbinding aspirational declarations, for example.

Why is this Research Necessary?

There remain significant gaps in our understanding of compliance notwithstanding the significant attention international relations and legal scholars have given the subject in recent decades. Each theory and case study provides an important but incomplete view of the compliance phenomenon.

Available scholarship on compliance with environmental agreements is incomplete in part because it does not allow one to draw practical generalizations for three reasons. First, scholars use different and at times competing definitions of compliance. Compliance, implementation, and effectiveness are sometimes used interchangeably across the literature. Some authors even forgo defining compliance entirely. Second, available theories consider compliance in the context of a range of instruments of different legal character. For example, some consider compliance with international law broadly - both customary law and binding agreements. Others narrow their assessment of compliance to explicit, written, and legally binding treaties – but they do not limit those assessments to environmental cooperation.

Finally, theorists sometimes, but not always, consider the nature of the activity with which a state is expected to comply and narrow the scope of their assessments accordingly. The incentives to comply with or defect from cooperative activities are starkly different from collaborative ones. The *status quo ante* for cooperative activities tend to trend toward compliance. An excellent example of an international cooperative activity is cooperation to coordinate transboundary civil aviation patterns. On the other hand, and in stark contrast, incentives to defect from collaborative agreements, such as

those that govern nonproliferation, are considerable. For a compliance theory to be generalizable to a particular phenomenon, I argue there must be consistency across all three of these variables: the legal character of the agreement, how compliance is defined, and the nature of the activities regulated. The logic behind the need to maintain consistency across these three variables is to increase confidence that observations from this study can reliably explain compliance with a similar category of agreements.

Why Focus on Multilateral Environmental Agreements and not Disarmament?

Arriving at generalizable conclusions requires scoping this project to one of two categories of activities governed by multilateral agreements: cooperative or collaborative. There are many prospective substantive areas of study within these two categories, and it is reasonable to ask why one would choose to scope this multilateral noncompliance research to a study of cooperative activities in lieu of collaborative ones. In addition, given the range of cooperative activities on which states comply, why choose environment? This section provides answers to these questions.

Cooperative Activities versus Collaborative Activities

This research is limited to the study of cooperative activities in lieu of collaborative ones for one overriding reason: there are likely to be fewer

confounding variables affecting compliance with cooperative activities, which presents a slight methodological advantage. As established in the preceding section, the *status quo ante* for cooperative activities trends toward compliance. What that means in practice is that all states party to a multilateral agreement governing activities of a cooperative nature are more likely to have their interests aligned. In other words, all states likely agree that the shared objective of the multilateral agreement is in their national interest, while simultaneously acknowledging some states may incur more costs with complying with the obligations that draw the international community closer to realizing that outcome. This shared interest cannot be claimed for activities like nonproliferation or disarmament, which are classified as collaborative. With collaborative activities states are more likely to have conflicting interests and incentives to defect covertly because they gain disproportionately while others comply.

Environment as an Area of Focus

Environment is selected from among the numerous potential cooperative activity areas of substantive focus for two reasons. The first reason is I have previous professional experience working in the multilateral environmental space. As compliance is a diplomatically sensitive topic, professional experience with multilateral environmental agreements could be

a research advantage in that others from the MEA community might be more inclined to view me as trustworthy with sensitive compliance information and therefore more inclined to participate candidly in this research. Having some experience in this area could, arguably, present challenges with respect to researcher objectivity. Several measures were taken to mitigate these risks, and are explicitly addressed in Chapter Three on Methodology.

The second reason environment is an appropriate and timely focus of compliance research is the urgent and increasing demand for transnational environmental cooperation because these issues affect individuals, businesses, governments, and their interests in numerous ways. Scientists and policy makers acknowledge that environmental challenges will only increase in coming years absent aggressive policy and behavioral changes, as will their deleterious effects on the lives of citizens globally. Simultaneously, as the scope and magnitude of environmental challenges grow, their associated costs and damages are “likely to be significant and increase over time.”

States have already shown an interest in cooperating multilaterally to address environmental issues, including through treaty mechanisms. Multilateral environmental cooperation gained global support in the early 1970s. The United Nations Environment Program (UNEP) was established

at the 1972 Stockholm Convention, and a flurry of international institutions, organizations, and multilateral environmental agreements followed – with more under active negotiation today. Hundreds of multilateral agreements are deposited with the United Nations Secretary General, and these are separate from the many other multilateral instruments on deposit with other organizations. Mitchell estimates there are over 700 multilateral environmental agreements alone. It is reasonable to expect that multilateral cooperation and associated agreements intended to mitigate or address environmental challenges will continue and likely increase over time. Notwithstanding the flurry of cooperation and establishment of institutions, success stories are few.

Each multilateral agreement, regardless of its subject matter, is negotiated at great cost to participating states. The relevance of the questions this research seeks to answer is self-evident: legally binding agreements are negotiated with the objective of shaping state behavior or to compel a desired or otherwise agreed upon outcome. Noncompliance undermines this objective. With increased global attention on the environment and the ongoing negotiation of new multilateral environmental agreements, MEA compliance is both a relevant and appropriate area of study with practical applications for policy makers.

A final reason for selecting environment as an area of focus: environmental issues are ones that regularly touch the lives of global citizens and consequently the results of this project may be of greater interest and relevance to their lives. Environmental challenges affect our economies and businesses. Insurance adjusters factor into actuarial tables the increased frequency of catastrophic flooding and corresponding economic loss. Civil engineers must plan for increasing temperatures and other extreme weather events that add stress to already strained infrastructures, including electrical grids. Food supply is directly affected by dramatic shifts in agricultural growing seasons, and farmers now must consider crop resilience to climate change in addition to traditional threats of pest and blight when deciding on which varieties to grow.

Chapter Summary

Additional work is needed to contribute to the collective understanding of compliance with international law. This research is intended to contribute to gaps identified in the literature, specifically by exploring whether generalizable conclusions can be drawn with regard to the factors associated with multilateral environmental agreement noncompliance, and the relationship between compliance and the design of provisions within those agreements and compliance. The following chapter

offers additional context regarding existing academic scholarship of relevance, and situates this research into the broader context.

Chapter 2: Literature Review

Compliance with international law is of interest to scholars from both the international relations and legal disciplines. New work on compliance specific to multilateral environmental agreements is necessary to fill an identified gap in the literature. The purpose of this chapter is to: (1) provide context with respect to how the concept of compliance is treated across two separate but overlapping areas of academic scholarship, (2) summarize relevant compliance theories, and (3) argue that applying contract law best practice to the negotiation and adoption of international, legally-binding multilateral agreements may undermine compliance objectives.

International Relations Approach to Compliance

International relations and legal scholars take divergent but complementary approaches to studying the role and function of law in politics and governance. International relations scholarship is largely interested in compliance from a macro perspective: examining the relationship between regimes and state behavior by asking *whether* and under what circumstances regimes constrain or otherwise influence state behavior. Much of classical international relations literature is concerned with proving or disproving the existence and direction of causal relationships between powerful states, international law, and state behavior.

Taken together the sum of international relations scholarship asks and answers the question: does the international exercise of diplomacy, norm development, and negotiation have an influence on the behavior of states writ large, or do powerful states simply use these mechanisms to advance their self-interests?

International relations scholars from distinct disciplines within the field answer this question in divergent ways. Classical realists advance two seemingly competing but rational arguments. The first is that international law and its regimes are hollow because they cannot be enforced under a global governance structure characterized by anarchy. To the extent there does appear to be good compliance with regimes, classical realists would argue it is merely because that regime reflects the interests of the major global power(s) at the point in time in which it was negotiated.¹³ The second argument is almost an antithesis of the first: states negotiation treaties “for the promotion of their national interests, and to evade legal obligations that might be harmful to them.”¹⁴ The reality of power politics means that in practice only the most powerful states have the leverage to impose unpopular treaties and their obligations on other states. Politics will prevail

¹³ Mearsheimer, “The False Promise of International Institutions.”

¹⁴ Morgenthau, Thompson, and Clinton, *Politics Among Nations*, 259.

in cases where noncompliance is in the interest of a hegemon or regional power, and the existence of a regime – legally binding or not – is largely irrelevant and does not constrain state behavior.¹⁵

A criticism of the classical realist argument comes from international relations academics that categorize themselves as neoinstitutionalists.

Neoinstitutionalists depart from realists in that they argue international politics is as much institutional as it is intergovernmental; they assert that state choices can be influenced by international institutions and cooperation and that a world can be built on consent and mutual partnership.¹⁶

Neoinstitutionalists do not refute classical realists' premise that anarchy is the organizing principle of international relations, but rather point to the myriad examples of mutual cooperation that underpin world order despite it. These scholars take a longer view of their self-interest, recognizing that the development and participation in international rules, norms, and institutions advances their national interest over time. Indeed these rules, norms, and institutions reduce global transaction costs of the state-to-state cooperation that is inevitable.

¹⁵ Mearsheimer, *The Tragedy of Great Power Politics*.

¹⁶ Keohane, *After Hegemony*.

As further evidence of the value of institutions, neoinstitutionalists point to the persistence of international cooperation that followed World War II as transformational.¹⁷ The dynamic period that followed World War II is marked by the rise of the United Nations and other international organizations, which the international community continues to build on today. Interestingly, neoinstitutionalists assert that compliance is not always a byproduct of treaties, but rather treaties are developed to memorialize, “treaty rules have been brought in line with existing or intended future behaviors,” and not vice versa.¹⁸ Indeed, legal scholars also point to this period in global cooperation and history as a formative time, characterizing it by the notion that “international lawyers could be both the architects and executors of a new world order under law.”¹⁹

Legal Approach to Compliance

Unlike international relations scholars, legal scholars largely take for granted the relevance and influence of international law on state behavior. Where international relations scholarship looks for directional relationships

¹⁷ Ikenberry, “After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars, New Edition”

¹⁸ Mitchell, "Compliance Theory," August 7, 2008, 37.

¹⁹ Koh, “The 1994 Roscoe Pound Lecture,” 191. *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. (1996)

between regimes and state behavior, legal scholarship focuses on *describing* the rules, *examining* their application, and *prescribing* what the rules should be.²⁰ The two disciplines differing approaches to compliance are largely isolated to academia. In practice, there is a tendency for international relations practitioners to look to legal best practice when drafting treaties and other legally binding agreements. This tendency may be a symptom of the reality that diplomats and bureaucrats often have prior legal training, typically in the civil or commonwealth legal traditions, and many are practicing lawyers.²¹ Harold Koh and Abram Chayes are two well-known practitioners, lawyers, and long-time academics; both had influential political careers advancing U.S. foreign policy objectives through treaty mechanisms at the U.S. State Department and the Executive Office of the President respectively. Abram Chayes was a U.S. international legal scholar who served under the John F. Kennedy administration. Chayes is known for his managerial theory of compliance. Koh's transnational theory of compliance and Chayes' managerial theory of compliance will be discussed in greater detail in the subsequent sections.

²⁰ Koh, 191.

²¹ Interviews 2 and 3

Law and its practice have been characterized as a balance between certainty and uncertainty. The law and instruments of law like contracts are characterized by a degree of uncertainty *ex ante* their challenge in litigation, for example. Legal certainty follows *ex post*, with clarity memorialized in legal precedent or judgment.²² Lawyers specializing in contract law pursue precision and detail in contracts to encourage compliance and reduce uncertainty with respect to the outcome of potential litigation challenging a contract. This approach departs from legislators or other policy makers that might craft other instruments of law like legislation with some degree of flexibility for interpretation and implementation.

The manner in which contract lawyers reduce uncertainty in contracts and their negotiation is through contract tools like detailed provisions describing metrics of performance and circumstances of breach. Treaties are merely contracts among states, pursuant to the Vienna Convention on the Law of Treaties. Treaties are also recognized as contracts in decisions taken under the Supreme Court of the United States.²³ It is therefore not surprising that so many diplomats who negotiate treaties seem to default to contract

²² Dari-Mattiacci and Deffains, “Uncertainty of Law and the Legal Process.”

²³ See *Ware v Hylton*, 3 U.S. 199 holds that treaties adopted under Article II of the Constitution are contracts between sovereign nations, and not a form of legislation.

law best practice.²⁴ But should they? One of the questions at the heart of this research that reflects on this question is whether there is a relationship between the design of treaty provisions and compliance with those provisions.

Summary of Compliance-Related Theories

International relations and legal scholarship approach the topic of compliance in different but complementary ways. Taken together, the panoply of theories from both disciplines provide a comprehensive perspective of the compliance phenomenon and a useful foundation for this project. The purpose of this section is to summarize a subset of available compliance theories in order to provide context regarding what is already understood about compliance with international law.²⁵ These theories inform the empirical research undertaken in this study, including the questions presented to compliance experts in the survey and subsequent semi-structured interviews.

One of the earliest and most famous pieces of international relations and compliance literature is *How Nations Behave*, in which Louis Henkin

²⁴ “Yale Law Journal | Vol 116 | Issue 4,” 827.; See also Interviews 2 and 3

²⁵ Compliance theories summarized represent the range of views and are the most cited in the relevant academic literature. Less mainstream theories are not directly referenced either because they are unknown to the author or redundant to theories summarized in this chapter.

remarks, “Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.”²⁶ Henkin presents his descriptive *consent-based theory* of international law in which he observes that a precondition of any obligation is the consent to be bound. While this may seem tautological, recognition that an obligation exists only after a state consents is important. States bind themselves voluntarily through public measures like ratification following a domestic process that integrates, *inter alia*, a domestic cost-benefit analysis.²⁷ Implicit in a state’s ratification is that it has made a determination that compliance is in its national interest so that it may enjoy rights and responsibilities under the agreement. An obvious criticism of Henkin’s theory is that ratification or other means of signaling intent may be necessary to establish an obligation, but it is not sufficient to ensure compliance. Even with the best of intentions, a state may find it is not able to deliver on obligations due to a variety of reasons. States may lack the technical capacity or the institutions necessary. In other cases, the power to take action may not rest solely with the state and may instead be distributed to private sector entities.

²⁶ Henkin, *How Nations Behave*, 47.

²⁷ Ratification here is used as a catchall to include acceptance, etc., and without prejudice to domestic consent procedures that may be established under relevant law. Not all treaties are joined voluntarily, such as those obligations that may be forced upon contracting parties in peace agreements post surrender.

Henkin also asserts that international law influences the behavior of states, and states consequently have an incentive to both establish new, and comply with existing, international norms and law to sustain this arrangement. The concept of an international society in which states are drawn to developing, practicing, and observing international law is not isolated to Henkin, and is a continuous theme throughout much of the compliance and international relations literature. Hedley Bull recognized and described this international political arrangement as a “society of states” in 1977. Perhaps Henkin’s most significant contribution of relevance to this particular research is that he recognizes a *web of complex and potentially interrelated variables* influence compliance, to include reputational concerns, domestic political cycles, and reciprocity.

Notably absent from Henkin’s seminal work is a theory of *why* states comply. In the late 1980s, Thomas Franck was among the first to fill this gap in the literature with his *legitimacy theory*. Answering the question, “why do powerful states observe powerless rules,” Franck argues that a state’s perception that a rule is legitimate is the *crucial causal factor* that generates a compliance-pull. The degree to which states are *pulled* to comply is on a spectrum, and there is a direct relationship between the

perceived legitimacy of the rule and the strength of the compliance-pull.²⁸

Franck's theory is each international rule exerts a greater or lesser compliance pull commensurate with the perceived legitimacy of that rule. Powerless rules are those viewed as illegitimate. Franck defines legitimacy as, *inter alia*, the quality and clarity of the rule, and how widely the process in which it was developed is recognized.

As with Henkin's theory, one could argue that Franck has also identified a necessary but insufficient condition for compliance. Recognition that an international rule or norm is legitimate would precede a state accepting that rule and taking the necessary measures to observe and implement it. However, as with ratification, states are merely signaling their intent to observe and comply, and there may be a gap between commitment and practice for any number of reasons.

Subsequent literature on international law has continued to be concerned with the question: *why* are states motivated to comply? These theories can be placed into one of two categories: 1) self-interest, as in states comply when they decide the benefits from complying outweigh costs; or 2) states comply to avoid coercion or punitive measures – specifically reputational or economic sanctions.

²⁸ Franck, Franck, and Franck, *The Power of Legitimacy Among Nations*, 3.

In the 1980s and 1990s, a collection of theories regarding the relationship between treaty compliance and enforcement mechanisms followed, and taken together, I will refer to this collection of related conceptual ideas that punitive mechanisms strengthen compliance as *enforcement theories*. What enforcement theories have in common is the assertion that compliance is ensured – if not triggered – by the threat of sanction. In this collection of scholarship there is compliance-design literature available on *macro* structural questions such as whether there is a relationship between compliance and the presence of a punitive dispute resolution mechanism or facilitative financial mechanism.²⁹ There is also literature related to the role of flexibility in helping states overcome some compliance challenges, namely uncertainty about the future costs and benefits of compliance. For example, to reduce the risk from uncertainty, states may seek flexible treaty design measures such as exit provisions or an “escape clause.”³⁰ Outside of the above-referenced *macro* structural issues, I was unable to locate literature on the specific *micro* structural question of interest to this study: the relationship between compliance and the design of treaty provisions.³¹

²⁹ See Angelova; Guzman; Jensen and Malesky; Teichman and Zamir

³⁰ von Stein, “International Law: Understanding Compliance and Enforcement.”

In the mid-1990s, Chayes and Chayes argued that compliance with international law is best achieved through a *managerial model* of cooperative problem-solving. "The fundamental instrument for maintaining compliance with treaties at an acceptable level," they offer, "is an iterative process of discourse among the parties, the treaty organization, and the wider public."³²

Managerial model advocates argue that compliance is generally motivated by two factors. First, as Henkin posited, a fundamental principle of international law is states are bound only to treaties to which they consent. Because treaties are consent based, one can reasonably conclude that countries that opt-in are predisposed to comply because they have made a determination that implementation serves their national interest. Second, evoking Franck, a general climate of states cooperating and complying with obligations begets further compliance (the so-called 'compliance pull'). In other words, managerial model advocates argue that states comply not out of fear of punitive measures, but because compliance by other states

³¹ First-order indicates compliance with treaty provisions (and amendments, if applicable). Second-order compliance is related to decisions subsequently taken by treaty parties, memorialized outside of treaty text.

³² Chayes and Chayes, *The New Sovereignty*, 25.

incentivizes all states to comply, and that this culture of compliance and cooperation is reinforced through iterative discourse.

Realists who advocate in favor of the enforcement theory approach argue that the managerial model identifies necessary but insufficient conditions. In other words, maybe a state that opts-in to a treaty has determined national benefits of compliance outweigh the costs, or perhaps the state was already taking those same measures in the absence of treaty commitments and so opting in incurs no additional cost.³³ The fact that other states are implementing those measures may generate some level of compliance pull, but what happens when a state decides compliance with treaty measures are no longer in its interest? Realists argue those measures immediately become insufficient to maintain compliance, and enforcement model advocates would argue that punitive measures become necessary to compel compliance. What appears to be less a focus of the managerial model, but perhaps would bolster it as a descriptive theory, is the value that comes from state cooperation as a process. Harold Koh's transnational legal theory specifically looks at the relationship between process and compliance.

³³ Mitchell, "Compliance Theory," 895.

The role of process in facilitating compliance is central to Harold Koh's *Transnational Legal Process Theory* (or Transnational Legal Theory), in which he argues that norm internalization is the primary reason states obey international law. Transnational Legal Theory is somewhat unique in that it is not state-centric but rather recognizes the important role of external actors on state compliance. Norm internalization is the result of a vertical process that accompanies international cooperation. As part of that process, public and private actors interact in a variety of international forums to interpret, enforce, and internalize rules of international law. The act of public and private actors engaging on the margins of international cooperation also influences their participation in shaping a state's domestic legal framework, which in turn makes states predisposed to comply with obligations they accept. Others have similarly recognized state governments are not unitary actors and that groups, both internal and external "pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups."³⁴

Koh's work is particularly useful in that it moves beyond recognizing state intent to examining the possible mechanisms that help support and sustain state action, facilitating compliance. Transnational legal theory is

³⁴ Putnam, "Diplomacy and Domestic Politics," 434.

largely descriptive in that it was initially intended to describe a process that influences state behavior; it was not intended to directly explain compliance.

Christopher Hill's *capability-expectation gap* is explanatory. Hill's capability-expectation gap explains what he described as the gap between the European Union's (EU) public commitments and what the EU was ultimately able to deliver.³⁵ Hill's theory is primarily concerned with implementation – specifically the gap between rhetoric and delivery. It serves as a useful theory in the context of noncompliance because of Hill's focus on the importance of domestic mechanisms and the ability to follow-through on commitments. Hill argues the capability-expectation gap is a product of three primary and interrelated components: the ability to agree, the availability of resources, and the availability of bureaucratic instruments.

The lessons of the capability-expectation gap are transferable beyond Hill's case study of the European Union. The capability-expectation gap theory applies broadly to states that find themselves unable to comply with obligations for a variety of reasons that will be addressed in later chapters. Hill specifically points to circumstances in which states negotiate and accept obligations in good faith, but later find they miscalculated their ability to

³⁵ Hill, "The Capability-Expectations Gap, or Conceptualizing Europe's International Role."

comply largely because they overestimated the availability of resources and domestic institutions to implement necessary measures.

Taken together, the academic literature presents a number of potential factors associated with compliance. They include reputational concerns, stakeholder engagement in domestic political cycles and related decision-making, perceived legitimacy of a rule or norm, reciprocity nurtured by a culture of compliance among states, fear of sanction, and self-interest. These theories offer a useful starting point from which to analyze the various factors that may be associated with compliance and multilateral environmental agreements. However rich, these theories remain of limited utility because they are not generalizable to MEAs for reasons enumerated in Chapter Three.

Contracts: An Imperfect Analog to Treaties?

Conflicting or inconsistent expectations regarding contract performance can lead to costly efforts to remedy them. A basic principle of contract law is that terms must be certain, “*id certum est quod certum reddi potest.*”³⁶ Ambiguity is to be avoided for obvious reasons, among them is counterparties want to clearly understand their rights, privileges, and obligations. Another is that courts may be consulted to interpret and enforce

³⁶ *A Selection of Legal Maxims*, 397.

ambiguous provisions, which removes the power from the hands of counterparties. Such an arrangement is generally not the case for treaties and international relations where, unless explicitly and rarely otherwise agreed, the state parties remain the final arbiters of their own disputes.

Treaties are intended to memorialize an agreement among counterparties, specifically states. However, treaties also vary in several important ways. First, treaty contract periods of performance are often indefinite, unlike most contracts. Second, states are far more complex than the individuals and firms typically party to contracts. States operate under elaborate and continuously evolving legislative and regulatory frameworks, for example. They balance countless additional and dynamic variables that individuals and firms do not. Evolving legislative and regulatory frameworks as well as other variables can become constraints that make it difficult for states to comply with highly prescriptive obligations over time, even when a state's interests and objectives remain broadly aligned with the enumerated treaty objective. Third, treaties are sticky. Counterparties might agree to amend a contract to accommodate unanticipated changes not directly material to the outcome. But amending treaties between multiple state parties is far more complicated and costly, particularly in multilateral treaties with as many as 196 contracting parties.

For these and other reasons, the best practice applicable to contract law may be inappropriate for treaties. There is evidence that the international community may be recognizing these material differences between contracts and treaties, and accordingly designing international agreements in a manner that recognizes a need to capture flexibility in implementation while not sacrificing an agreement's objective. Examples of such agreements include the 2015 Paris Agreement negotiated under the auspices of the United Nations Framework on Climate Change, and the trend extends to nonbinding cooperative mechanisms like the Sustainable Development Goals negotiated under United Nations auspices. More will be said on design in chapter seven.

Chapter Conclusions

This chapter presents broad perspectives on compliance, which is a topic of interdisciplinary academic interest. Scholars from distinct schools of thought approach compliance in distinct ways. International relations scholarship considers compliance from a macro perspective, examining the relationship between regimes and state behavior. These scholars are primarily interested in understanding whether and under what circumstances regimes constrain or otherwise influence state behavior. There is no consensus among international relations scholars on the answers to these

questions, and they continue to be litigated in the academic literature.

Unlike international relations scholars, international law scholars largely take for granted the relevance and influence of international law on state behavior. Whereas international relations scholarship looks for directional relationships between regimes and state behavior, legal scholarship focuses on describing, examining, and prescribing the application of rules, or proposing new rules altogether.

Practitioners, conversely, are far more uniform in their approach to compliance and the design of legal instruments – more specifically the design of multilateral environmental agreements. Practitioners take for granted the premise that international law and its mechanisms affect state behavior. From this baseline, they approach the legal drafting and design of MEAs in a manner consistent with a contract law best practice – avoiding ambiguity in drafting whenever practical. However, as this chapter establishes, contract law best practice may not apply to the negotiation of MEAs for several reasons. Among them is the challenge of balancing the interests of many more counterparties – up to 196 states in some cases.

Contract lawyers strive for certainty and detail in domestic contracts³⁷

³⁷ The adjective “domestic” is used to more clearly contrast *contracts* from *treaties*. The use of this adjective throughout this study is not intended to exclude contracts executed between counterparties across state lines.

because counterparties may pursue remedies through an independent court system. Relinquishing control to a third party is uncommon in the case of treaties, where states more often remain the final arbiters of their disputes. For these and other reasons enumerated in this chapter, contract law best practice may not be an appropriate analog for multilateral environmental agreements.

Finally, this chapter presents the most prominent compliance theories that purport to explain when and why states follow international law. These explanations can be – for the sake of simplicity – codified into five categories: to avoid sanctions or coercion; a desire to establish credibility and remain in good standing with the international community; for reasons of political identity and to respect rules deemed as legitimate; for reasons of self-interest; and for reasons of legal process.

Chapter 3: Methodology

This chapter identifies four scope conditions, introduces and provides a rationale for the selected research methodology, and speaks to data collection methods and challenges. This study was scoped by four conditions in order to increase the likelihood of drawing and defending observations that are generalizable to multilateral environmental agreements writ large. Scope conditions are intended to define the specific circumstances in which a theory is applicable.³⁸ Scope conditions are explicitly stated so that the qualifications or constraints of a particular theory or project are known; there is an inverse relationship between the number of scope conditions and the broad applicability of a theory.³⁹

Scope Condition 1: Multilateral Instruments

First, I have specifically excluded bilateral treaties, focusing instead on multilateral agreements. The rationale behind this scope condition is self-explanatory, and no further will be said about this beyond noting that multilateral treaties involve myriad more variables than bilateral ones by virtue of the reality there are more state actors. The second scope condition is the character or *nature of the instrument* against which compliance is

³⁸ Harris, "On 'Scope Conditions' in Sociological Theories," 123.

³⁹ Cohen, *Developing Sociological Knowledge*.

being judged. This research is concerned with legally binding instruments, and more specifically their obligations. The third scope condition is the *category of obligations* against which compliance is being judged; this research is concerned with first-order compliance. The final scope condition is the *nature of the activities* subject to compliance; this research is concerned with cooperative activities, specifically those related to environmental cooperation.

Because of the nature of the proposed methodology for this study as well as gaps identified in available data, I intentionally did not narrow the study to subcategories of multilateral environmental agreements or even a specific agreement.⁴⁰ Another scope condition common to qualitative projects of this nature is time. A specific time period of analysis is not necessary for this project, and there is a real concern that scoping the study temporally would further restrict available data. While this project is not directly scoped by time, there is a temporal constraint indirectly built into the research. The second scope condition limits analysis to first-order compliance with treaty text, and does not include decisions subsequently taken by parties.

⁴⁰ Many of the participants in this study have MEA experience specific to pollution-prevention, but this is purely coincidental.

Scope Condition 2: Nature of the Instrument

The second scope condition is the nature of the instrument against which compliance is being judged. Academics and practitioners speak about compliance in the context of a variety of different types of instruments – some binding and some not. Guzman applies his concept of compliance to a range of both hard and soft law instruments because he asserts that any of these instruments can have a substantial impact on the behavior of states regardless of their form.⁴¹ Likeminded scholars assert the legal nature of the instrument should be less interesting than the question of whether the instrument brings about the desired change in a state's behavior. While this logic has some merit in an academic sense, it is a bridge too far to assert the format of an agreement is irrelevant. And it is very clear that states treat these instruments very differently.

States formally take steps to acknowledge and accept treaties and their obligations; soft law political declarations contain *lesser* non-binding commitments. One can measure compliance with both, but the nature of an obligation is different from that of a non-binding commitment. Before one can conclude a state is noncompliant, one must first ask whether there is an obligation to comply. If the state doesn't recognize an obligation exists,

⁴¹ Guzman, "A Compliance-Based Theory of International Law" by Andrew T. Guzman."

then asserting state noncompliance opens the door to legitimate challenges of that conclusion. Scholars must have reason to believe a state accepts they have made a commitment to comply before a true assessment of their compliance can be made.⁴² For these reasons, this study will consider compliance with legally binding obligations and not non-binding provisions.

Scope Condition 3: Category of Obligations

The third scope condition is the type or category of obligations against which compliance is being judged. This study is concerned with first-order compliance with multilateral environmental agreements. First-order compliance is compliance with the specific obligations contained in a treaty or its amendments. Second-order compliance, conversely, is compliance with rules and decisions that are agreed by the parties to the treaty after it enters into force. The rationale for a focus on first-order compliance is doing so should improve the likelihood that observations from this study can be an analog for other multilateral environmental treaties because the focus of compliance is on the treaty obligations and not subsequent binding (second-order) decisions.

⁴² D'Amato, "Is International Law Really 'Law'?"

Scope Condition 4: Nature of the Activities

The fourth scope condition is the nature of the activities relevant to the obligation. Compliance literature draws a distinction between the two broad categories of activities international agreements seek to influence: those of coordination or collaboration.⁴³ Environmental treaties are predominantly coordination activities. The interests of parties to environment treaties are assumed to largely align, there is less incentive to defect, and on balance all parties benefit in some manner from collectively advancing the shared environmental outcome even if the costs of implementation are not equitably distributed across parties. Another example categorized as coordination activities would be agreements governing airline traffic.

Conversely, nonproliferation treaties are collaborative. The interests of parties to a nonproliferation agreement do not necessarily align, and there is often a high incentive for some parties to defect from collaborative obligations while others comply. The variables that correlate with noncompliance under treaties that seek to influence coordination activities may be different from those variables that correlate with noncompliance under collaborative arrangements.

⁴³ Stein, "Coordination and Collaboration"; Snidal, "Coordination versus Prisoners' Dilemma."

Selected Methodology: Grounded Theory

Two qualitative methodologies were considered for this project: grounded theory and case study analysis with process tracing. Initially, the preference was to proceed via tracing compliance with provisions within a single multilateral environmental agreement. However, it quickly became clear that insufficient data was available for a robust case study analysis with process tracing. While reporting information and meeting minutes regarding compliance with select international agreements is available, this information is often a compilation of conclusions for which the underlying data is not available. Consequently, the method and approach to the research questions was modified accordingly.

Grounded theory methodology is appropriate for discovering emerging patterns in data, which can reveal new insight into the underlying causes or circumstances leading to poor MEA compliance. In the Discovery of Grounded Theory, Glaser and Strauss introduce a qualitative method that moves away from the traditional scientific method of hypothesis testing to generating new data through “systematic methodological procedures” with a view to later developing theories grounded in that data.⁴⁴ Grounded theory

⁴⁴ Glaser, Strauss, and Strutzel, “The Discovery of Grounded Theory; Strategies for Qualitative Research.”

is well suited for investigating and making sense of complex social processes like the one central to this project. The complexity of the compliance phenomenon is well established in the literature; Henkin famously observed that myriad of *complex and potentially interrelated variables* influence compliance.

Grounded theory is also an appropriate methodology where there is a new perspective on a well-traveled topic.⁴⁵ While much has been written about compliance, there is very little on the relationship between the design of treaty provisions and compliance and more can be said about the relationship between compliance variables addressed in this study and multilateral environmental agreements. Finally, grounded theory is appropriate for this project because the researcher enjoys access to a range of relevant experts in the field after years spent working in multilateral environmental cooperation. Practitioners interviewed or surveyed in this project would likely be reluctant to speak candidly with researchers completely unknown to the community.⁴⁶ Grounded theory methodology is the most promising for generating new compliance-related data by mining

⁴⁵ Milliken and Schreiber, “Examining the Nexus between Grounded Theory and Symbolic Interactionism.”

⁴⁶ A number of practitioners who participated in this project explicitly stated so, requesting that their candid contributions to this research be confidential and without attribution.

experts through an evolving, iterative process, and for arriving at a new theory to explain the phenomenon observed.

Data Collection Method

Data was gathered from primary and secondary sources, including but not limited to semi-structured surveys and interviews, archived environmental treaty meeting reports, newspaper articles, and existing data sets. The bulk of data analyzed in this project is newly collected through surveys and semi-structured interviews of compliance professionals with extensive MEA implementation and compliance experience.

I purchased an internet domain name and built a web platform to facilitate data collection and also to present research participants with increased assurances of their ability to remain confidential. Surveys were administered through the website domain www.treatycompliance.com in nearly all cases. Two exceptions were made to facilitate responses from respondents; those two practitioners were given Microsoft Word copies of the survey and they provided their responses to the survey by email. An image of the domain on which the online survey was available is in Appendix A.

Once participants submitted their survey responses through the web domain, all of their responses were immediately and automatically time-

stamped and catalogued in a database for analysis using the online survey tool *Google Forms*. Analytic and electronic tools used in this research made no modifications to participant responses. The survey is semi-structured; some questions were presented as multiple choice, and others short answer. For example, question eight is, “do you agree with the following definition of compliance: to comply means to fully conform to a rule, standard, or law?” Participants were presented with a choice between *yes* or *no*. Subsequently, question nine is, “if you do not agree with the compliance definition offered, please offer your preferred definition.” In several cases, even when selecting “yes” to question eight, survey respondents offered some rationale for their response. The full survey is available in Appendix B.

Concomitant with surveys, semi-structured interviews were conducted with select practitioners to better understand their perspectives on compliance. Practitioners were interviewed on the margins of unrelated multilateral events in Washington D.C. and New York City. Where meeting in person was not feasible, interviews were conducted via Skype and telephone. Skype and telephone interviews were limited to experts residing outside of Europe and the United States who had no immediate plans to travel to Washington, D.C. or New York City.

Semi-structured interviews are “well suited for the exploration of the perceptions and opinions of respondents regarding complex and sometimes sensitive issues,” and they, “enable probing for more information and clarification of answers.”⁴⁷ Semi-structured interviews allowed for the more in depth data mining necessary for this project. Given gaps in available data, and the complex and sensitive nature of this topic, the use of semi-structured interviews – augmented by surveys – was the superior option for better understanding the relationship between the variables of interest, and to identify potentially multiple and unknown causal mechanisms.

A credible research process must be both valid and reliable, which can be a challenge when a study relies heavily on data gathered in semi-structured interviews.⁴⁸ Ensuring that the sample size of professionals interviewed adequately reflects the range of perspectives of those involved in compliance with multilateral environmental agreements was a challenge. To ensure a representative sample size, participation was sought from practitioners in developed and developing countries with roles in treaty implementation; practitioners hailed from governments, civil society,

⁴⁷ Barriball and While, “Collecting Data Using a Semi-Structured Interview.”

⁴⁸ Ibid.

industry, and international organizations. Every effort was made to ensure a broad, representative sample to improve the validity of project findings.⁴⁹

Sampling and Subject Identification

I used a two-method approach to identifying potential participants. First, I mined UN-authored MEA expert lists and lists of nationally identified MEA compliance focal points released from 2007 to 2019. Individuals on these lists are, by definition, recognized international experts or otherwise have deep and relevant experience in compliance or environmental treaty implementation. All persons interviewed and surveyed have a strong working proficiency in English, as well as technical or academic expertise relevant to this project. A sample survey is available in Appendix B.

Prospective participants were initially approached by email, provided general information regarding the project, and invited to participate in surveys. Each was asked to refer additional experts from industry, government, international organizations, or civil society that should be invited to participate in the project. In total, 206 professionals were invited to participate in the survey. The response rate was approximately 17

⁴⁹ Barriball and While, 329.

percent, with 35 professionals elected to participate by survey ($n=33$) and/or interview ($n=8$).

There was no specific goal with respect to the size of the population to be sampled from the outset of this project; consistent with grounded theory, sampling and data collection continued to the point of saturation or where interviews and surveys yielded no new information or leads. In several cases, respondents were interviewed multiple times.

Participation in this project was robust given the nature of the topic, notwithstanding the response rate of 17%. Nearly 70% of survey respondents elected to participate confidentially. All eight interview participants likewise elected to participate confidentially.

Treaty compliance is a diplomatically and politically sensitive matter. Sovereign states generally resist efforts by others to judge their performance, viewing resistance as a matter of asserting sovereignty. Evidence of this is widespread. For example, states generally prefer to be the arbiters of their own disputes, as evidenced by the dearth of formal dispute resolution mechanisms. Each prospective participant was given the opportunity to participate confidentially to encourage robust participation and candid responses. Participants were informed that their electing to participate confidentially meant that any information shared would not be publicly

attributed to them or their organization in any subsequent publication or presentation. Even those participating confidentially were asked to share information about their organizational affiliation so that data could be appropriately coded. Those participants were also informed that their responses would be codified by the category of the organization with which they are affiliated (e.g., government, intergovernmental organization).

Individuals with varied organizational affiliations were asked to participate to ensure a comprehensive perspective on the compliance phenomenon. Each organization has a unique role in MEA negotiation, implementation, and compliance, and so the perspectives of professionals working in each of those organizations could vary. Of the total survey sample size of 33, 20 responses are from government practitioners (including one representative from a regional economic integration organization), eight are from intergovernmental organizations, two are from industry (including an industry umbrella organization), two from academia, and one is from civil society.⁵⁰ The total interview sample size is eight, and the composition of interview participants is four from government, three from IGOs, and one from an industry umbrella organization. (A profile of

⁵⁰ Academics surveyed or interviewed in this project have participated in international compliance-related processes as experts or members of government delegations and consequently are considered to also have a practitioner's perspective.

interviewees is available in Appendix C.) Over 90% of subjects participating in this research project reported having experience participating in MEA treaty negotiations or serving on a related compliance committee. Over 97% of subjects participating in this research project reported experience with national MEA implementation, either directly as a government official or indirectly by providing advice and technical assistance to government officials.

Participation by Category



Figure B

Participation of government officials and regional economic integration organizations was emphasized in the sample size given the central role of these officials in treaty compliance. A balance was sought between developed and developing country representatives. A breakdown of the affiliation of government representatives consulted in this project is

available in Figure B.⁵¹ Few individuals reported affiliations with multiple categories of organizations, and were subsequently asked to classify themselves into a single category. All participants without exception chose the category from which they had the greatest perspective and experience as measured by time.

Data Analysis

Grounded theory requires the systematic, iterative collection, management, and comparative analysis of data.⁵² Analysis is accomplished through extensive review and coding of data into similar categories. Subsequently, those categories are further refined until clear themes or patterns emerge. This iterative collection and analysis continues until *saturation* or the point at which additional data collection contributes no new information.

To illustrate, participants in this research consistently identified *insufficient political will* as being associated with MEA noncompliance. However, *insufficient political will* is too abstract a term to arrive at any meaningful conclusions about the noncompliance phenomenon.

⁵¹ In the case of the United States and Australia, two different government representatives were interviewed for each country. The European Commission is a member of the OECD, and is not a state but a regional economic integration organization that operates much like a government. Many EC members are OECD countries.

⁵² Corbin and Strauss, *Basics of Qualitative Research*.

Consequently, additional data was collected and analyzed until a general theme emerged in practitioners responses. Continuing on the basis of this specific example, practitioners described a pattern of state engagement in the MEA negotiating process when illustrating insufficient political will using words such as: disinterested; hand-off; lone wolf; fragmented; disaggregated; no instructions; unknowledgeable about national framework; homogenous delegation; and appropriate parties not involved. All of these data points led to a new line of inquiry, focusing in particular on the negotiating phase of the MEA. Empirical analysis led to a clear convergence among practitioners that an insufficient domestic interagency consultative process early in the lifecycle of a multilateral agreement is a significant factor associated with noncompliance.

Methodological Challenges

There are three relevant challenges with the selected methodology. First, the researcher played a central role in data collection and analysis, which can “obscure the researcher's considerable agency in data construction and interpretation.” Rigid procedures and enhanced transparency, specifically transparency between the researcher and research participants from whom data was collected, were used to manage the considerable agency of the researcher in collection and analysis. For example, survey

participants directly entered their responses into a website and without any direct engagement with the researcher. The direct, web-enabled collection process allowed participants to use their own language, and afforded them the opportunity to review their responses prior to submitting them for analysis. The use of a website and giving participants the opportunity to submit their views in their own language without immediate feedback from the researcher also ensured the researcher's experience with MEAs did not taint or otherwise influence participant responses. Transparency measures were also used in interviews; interview participants were given two opportunities to review and confirm their responses and perspectives, as recorded by the researcher. The first opportunity was at the immediate conclusion of the interview when the researcher read through notes summarizing my understanding of participant responses. Second, interview participants were subsequently given the opportunity to review memos summarizing their responses to ensure accurate representation.

Second, grounded theory involves the coding and management of large amounts of data. The challenges associated with managing volumes of data in this project were managed with the use of technologies, including qualitative collection software and web-enabled data collection methods. Google survey facilitated collection of online responses through an

independent web platform, and integrated responses into a database for subsequent analysis.

The final challenge with the selected methodology, and indeed with many other methodologies, was ensuring adequate representation in the population sampled. I identified MEA professionals with varied perspective and experience throughout the negotiation, implementation, and compliance lifecycle to ensure adequate representation. In total, 206 practitioners were invited to participate, including representatives from developed and developing country governments (as defined by OECD membership), representatives from industry, academia, civil society, and international organizations. All participants are known and recognized experts in their field; their recognition is verified by their participation in relevant multilateral environmental meetings and/or their encumbrance of a position with related job responsibilities. More information on participant selection is contained in the section on subject identification.

Chapter Summary

Treaty compliance is a diplomatically and politically sensitive matter. Participants were offered two options for participating in this study: survey and/or interview. The survey was administered from a publicly accessible website, and participants were free to take the survey at a time and place of

their choosing. Interviews were administered one-on-one and either in-person, telephone, or Skype. Both methods of data collection were offered to encourage robust participation from a range of recognized professionals with expertise in MEA negotiation, implementation, and compliance.

Thirty-five professionals elected to participate by survey (n=33) and/or interview (n=8), and the total unique sample is 35. Data collected were then analyzed using grounded theory methodology, which led to new emerging patterns in the data and associated lines of inquiry.

This study is carefully designed to increase the likelihood that its findings may be generalizable to compliance with multilateral environmental agreements writ large. This is accomplished in one of several ways. First, the project is scoped so that assessments are limited to first-order compliance with provisions under legally binding multilateral environmental agreements. Second, data analyzed comes from a range of primary and secondary sources, including newly collected data generated through surveys and semi-structured interviews of compliance professionals with extensive MEA implementation and compliance experience. Third, significant efforts were made to ensure that professionals engaged reflect a balance of views from both developed and developing countries, as well as expertise in the negotiation, implementation, and assessment of compliance with MEAs.

Finally, several measures were implemented to mitigate the risks associated with the grounded theory methodology, particularly the considerable agency of the primary researcher.

Chapter 4: Overview of Findings and Empirical Data Collected

This chapter presents empirical data gathered in the course of this study together with a preliminary analysis of how findings supported by that data compare to academic literature. The literature identifies reciprocity, reputational concerns, stakeholder engagement in domestic political cycles and related decision-making, legitimacy of the rule or norm, the threat of sanction, and a favorable cost-benefit analysis supporting compliance as significant factors associated with compliance. However, empirical results collected in this project reinforce only a subset of these factors as being associated with MEA compliance – even when practitioners were prompted with the additional factors identified in the academic literature. Questions presented to practitioners are available in Appendix B.

Practitioners overwhelmingly identified a lack of political will on the part of the implementing state as the single greatest factor associated with noncompliance with MEAs, followed closely by two of its symptoms—insufficient financial resources and insufficient technical capacity. Additional analysis on insufficient political will and noncompliance are addressed in greater detail in Chapter 5.

Finding 1: Practitioners share a narrower understanding of compliance than reflected in the academic literature.

The international relations and law literature on compliance contains inconsistent and even conflicting definitions of compliance as a concept, sometimes conflating effectiveness and implementation, or approaching compliance as either a binary state or spectrum with varying degrees. The empirical data gathered in this study suggest this inconsistent approach to understanding compliance appears to be limited to the academic literature.

Practitioners surveyed were far more uniform in their approach to and understanding of the concept of compliance. Over 78% of survey respondents agreed with the binary definition of compliance presented to them, which was pulled directly from legal scholarship.⁵³ The compliance definition presented was to “fully conform” to a rule standard, rule, or law. The 21.2% of survey respondents who did not agree with the presented definition offered one of three amendments to improve it: three respondents noted that the ability to comply must be a prerequisite to judging compliance. The definition was otherwise deemed accurate assuming a state meets this unstated prerequisite. These same respondents suggested the prerequisite that a state must have the ability to comply should be more explicit in the definition. Second, some questioned the use of the adjective

⁵³ Actual percent is 78.8%

fully in the survey. Those respondents that took issue with *fully* did so for one of two reasons. Some noted compliance is conforming to a minimum standard and so the adjective *fully* could therefore be misleading; in other words, one cannot be more compliant with the minimum standard in a specific provision at one time, and less in another. For many practitioners, the word compliance itself suggests a binary state. One respondent took the opposing view that states should be able to receive partial credit for compliance noting, “developing countries may only be capable of partial compliance because of severe domestic resource and capacity constraints.”⁵⁴ This practitioner further explained that recognizing efforts to comply, even when unsuccessful, generates good will and encourages noncompliant states to remain engaged and continue to make concerted efforts.

In-depth interviews followed surveys. Like practitioners surveyed, those interviewed were also reasonably uniform in their approach to defining compliance. Of eight interviewees, seven endorsed the binary definition offered without modification. One interviewee accepted the presented definition on the understanding that an ability to comply is a prerequisite to judging compliance, similar to some of the minority views expressed by

⁵⁴ Survey respondent #13

survey respondents.⁵⁵ All interviewees framed compliance as a temporal issue to be judged at fixed moments in time.

Interestingly, while half of the interviewees accepted compliance as a binary state initially, they later partially undermined this view by asserting states could be granted partial credit for compliance under certain circumstances. The most common example on the difficulty of assessing compliance and the merits of granting partial credit for compliance was treaty reporting. “It is easy to assess a party’s compliance if it fails to submit a report when there is a treaty obligation to do so,” but judging compliance becomes less straightforward when the state has submitted a partially completed report that answers some but not all treaty reporting obligations.⁵⁶ Under both circumstances a party would be noncompliant, though in practice parties may be treated differently, with a party receiving partial credit in the form of more latitude from other parties in the latter case.

One practitioner shared the frustration that treaties with structural or formal mechanisms for judging compliance can encourage efforts to produce, “an absolute assessment . . . either the country is fully compliant

⁵⁵ Interview of Practitioner Three.

⁵⁶ Interview of Practitioner Four, session One.

[with the treaty] or not.” Compliance is better assessed on an, “individual per unit [provision] basis.”⁵⁷

Practitioners broadly share the view that compliance is a concept appropriately applied to legally binding obligations found in legally binding agreements, and inappropriately applied to soft political commitments for which there is no legal obligation. Against the backdrop of the view that assessments of compliance should be limited to legally binding provisions, two experts also acknowledged that the term compliance is sometimes colloquially but incorrectly used to refer to nonbinding commitments like political declarations. This misuse of the term can be politically motivated and, “willful when a particular interest group” wants to hold a state accountable for implementing nonbinding commitments that are important to that particular group.⁵⁸

Finding 2: Unlike academics, practitioners are highly concerned with legal character of MEA provisions when considering compliance.

The academic literature does not limit assessments of state compliance to legally binding instruments; however, the empirical results of this study support a conclusion that MEA practitioners do. Survey participants were asked for their views on the character of commitments,

⁵⁷ Interview of Practitioner Two.

⁵⁸ Interview of Practitioner One.

including the use of the colloquial adjectives “hard” and “soft” to modify terms like commitment or law. Both adjectives are common parlance in diplomatic circles to distinguish between more and less legalized arrangements. Survey language was carefully selected to avoid preemptively characterizing commitments as binding or nonbinding in order to leave respondents with the latitude to offer additional information beyond legal character, such as information about level of priority or hierarchy. Subsequently, survey participants were asked whether states treat hard and soft commitments the same in their domestic implementation processes.

Empirical evidence gathered in this study overwhelmingly supports the conclusion that MEA practitioners understand *hard* commitments are binding obligations, while *soft* are lesser “exhortatory” commitments.⁵⁹ Against the background that multilateral environment agreements often contain both binding and nonbinding provisions, practitioners sometimes illustrated the dichotomy in drafting between the two legal classes of commitments by referring to them as “shalls” and “shoulds.” Binding provisions are often but not always denoted by the verb *shall*. Nonbinding provisions in treaties are often denoted by the verb *should*. What is

⁵⁹ This sentiment is reflected across numerous survey responses in various ways, and practitioners clearly indicate the use of *hard* and *soft*, or *shall* and *should* are colloquial euphemisms among experts used to refer to binding and nonbinding provisions respectively.

exceedingly evident in this study is practitioners draw a clear and incontrovertible bright line between the treatment of legally binding and nonbinding provisions when it comes to compliance.

Practitioners share the view that compliance assessments should only be made in the context of binding provisions. Put another way: a prerequisite to assessing compliance should be establishing a state's acceptance or legitimacy of the obligation in the first place. The acceptance and consent to be bound is clear with treaties, which require states to formally opt-in to accept and acknowledge commitments.⁶⁰ This is such a sacred principle that three MEA practitioners interviewed expressed surprise there would even be any confusion on this point, with one government expert sincerely asking, "Is that a rhetorical question?"⁶¹

State concern for an agreement's legal character is evident in practice. Simply consulting the historical record of processes that led to MEA negotiating mandates will reveal an exhaustive back and forth over the character of the agreement to be concluded. MEA negotiation meeting summaries also reveal parties quibbling over the character of individual provisions within a binding agreement throughout the course of MEA

⁶⁰ Consistent with the Vienna Convention on the Law of Treaties.

⁶¹ Interview with Participant Five.

negotiations. Even when an agreement is legally binding, not every provision therein creates legal obligations on its parties.

Take the negotiation of the 2015 Paris Agreement on Climate for example. The legal character of the 2015 Paris Agreement was a central point of contention from the initial negotiations to adopt a negotiating mandate that punted the question of legal character right up until the Agreement's adoption.⁶² In the years since its adoption, much has been written about the Paris Agreement and negotiating states' concern over the Agreement's legal character.

Practitioners were also consistent in their view that states do not make commitments lightly *regardless of their legal character*, but nevertheless legal character is important because obligations can only come from binding agreements by their nature. State parties must meet obligations once they agree to be bound, pursuant to Article 26 of the Vienna Convention. This is in contrast to lesser commitments for which there is no obligation to comply. Academic compliance literature, however, does not always draw this distinction. Some academics examine the compliance phenomenon in the

⁶² UNFCCC, Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (UN Document FCCC/CP/2011/9/Add.1, 15 March 2012). See paragraph 2

context of international law writ large, inclusive of its both binding and nonbinding elements.⁶³

What explains the divergence between the literature and the practitioner's approach to assessing compliance with binding? In a word: perspective. Academics are likely more interested in understanding the relationship between an instrument and state behavior – regardless of the legal character of the provision or instrument. However, practitioners approach the question of compliance from a far more practical and defensive perspective – sovereignty. Sovereign states jealously guard their ability to manage their own affairs and resist efforts to be judged by other entities, and care deeply about the legal character of the agreements they negotiate. So what does it matter whether a norm is binding or not? Bodansky refers to “bindingness” as a state of mind – a sense that a rule constitutes a legal obligation and that compliance is therefore required rather than merely optional.⁶⁴

Notwithstanding the clear consensus that obligations enjoy a different status from nonbinding commitments, practitioners also observed a divergence between theory and practice. Practitioners with experience

⁶³ Hopkins, *inter alia*, argues for an even more expansive approach beyond international law - to include soft-law instruments like political declarations.

⁶⁴ Bodansky, “The Legal Character of the Paris Agreement.”

assisting countries with implementation observed that while states understand obligations enjoy a greater legal status than nonbinding commitments, they may behave differently in terms assigning implementation priority in practice.⁶⁵ For example:

- One government practitioner from a European country observed that a great deal of time and attention is spent negotiating the legal character of individual provisions in MEAs, but in practice many countries are “less sensitive” to legal character in implementation.⁶⁶
- Another government practitioner from a developing country observed that developing countries eligible for financial assistance under a multilateral environmental agreement seek to include a limited national need into MEA obligations with a view to generating outside financing support that can help advance those national needs. If they are unable to secure those needs as obligations, they seek to secure them as nonbinding commitments in the MEA. These nonbinding commitments might then in practice be prioritized over obligations during implementation.⁶⁷
- A practitioner from an international organization explained that developing countries often look at multilateral environmental provisions as a menu of options, prioritizing those in line with

⁶⁵ These practitioners typically participate in state implementation efforts in their capacity as project or program managers, and some work for IGOs or other World Bank-recognized implementing agencies.

⁶⁶ Interview with Practitioner Six.

⁶⁷ Interview with Practitioner Five.

“domestic needs first” regardless of legal character and then give second order preference to remaining obligations.⁶⁸

Finding 3: Practitioners find insufficient political will, and its symptoms insufficient financial and technical capacity, as the factors most strongly associated with MEA noncompliance.

Practitioners overwhelmingly identified political will on the part of the contracting state as the most significant factor associated with noncompliance, followed closely by two of its symptoms: insufficient financial resources and insufficient technical capacity. Prior to identifying these factors, practitioners were invited to share a case of publicly known or unknown noncompliance, describe the circumstances of that case, and then identify *one or more* factors that led to that case of noncompliance. Only 27 of the 33 survey respondents answered the relevant questions with sufficient detail for analysis. Twenty-six of the noncompliance cases reported were directly associated with an obligation; one was not.⁶⁹

Practitioners identified the following factors as being associated with noncompliance:

⁶⁸ Interview with Practitioner Four. This menu approach to treaty obligations was framed in the context of an exercise all countries face, but particularly developing countries where resources for environmental protection may be a lower priority than needs considered to be more immediate.

⁶⁹ It was later determined through follow-up that the one “noncompliance” case not directly associated with an obligation was related to a reporting obligation under a nonbinding Chemicals framework. The practitioner offered the example as the country received outside financing to prepare a chemical inventory to satisfy some of its reporting commitments under the nonbinding Framework and a separate legally binding obligation under the Stockholm Convention.

- 82% identified insufficient political will at the national level as the most significant factor associated with noncompliance. Political will is a term often used to simplify a complex phenomenon of interrelated variables. Significant follow up was devoted to exploring and more clearly defining this term in subsequent interviews with practitioners; those findings are presented in greater detail in chapter five.
- 77% identified insufficient financial resources at the national level as a factor associated with noncompliance, which indicates the noncompliant state has not allocated sufficient national resources to ensure the necessary measures for compliance.
- 73% identified insufficient technical resources at the national level as a factor associated with noncompliance, which indicates the noncompliant state has not allocated sufficient technical resources to take the measures necessary to ensure compliance.
- 41% identified insufficient willingness to enforce compliance as a factor associated with noncompliance – either on the part of the noncompliant state or the international community.
- 36% identified a conflict of laws, which indicates the view that a conflict between the noncompliant state’s domestic legal framework and the obligations it has accepted under an international agreement might preclude it from taking the necessary measures to comply.
- 23% identified insufficient political will at the international level as a factor associated with noncompliance, which indicates the view that the international community – specifically states other than the noncompliant state – have not taken sufficient action to support the noncompliant state’s efforts to implement its obligations, including through facilitative measures like providing capacity building and/or financial assistance.

- 18% identified a lack of clarity of the relevant provision as a factor associated with noncompliance, which can indicate that a state is not compliant with a provision because its interpretation of that provision is in conflict with others' or that the provision is sufficiently ambiguous such many interpretations exist.
- 18% identified the perception that the relevant law lacks legitimacy as a factor associated with noncompliance, indicating that the noncompliant state (and possibly others) does not view the relevant provision, agreement, or negotiating process by which it was negotiated as having legitimate authority and are therefore not required to comply.
- 1% identified inconsistent interpretation of the provisions as a factor associated with noncompliance, indicating that the noncompliant state's interpretation of the obligations may be in conflict with other parties' interpretation.

Less than 1% identified "other" factors associated with noncompliance not listed above. One factor in particular merits mentioning as it does not appear in the academic literature. An industry practitioner raised government corruption as a factor contributing to noncompliance; that practitioner provided a specific example of a developing country in which a single, well-placed individual was able to personally grant permission for the import and improper disposal of hazardous waste in a manner inconsistent with that country's Basel Convention obligations. I was able to find public reference to the incident but otherwise unable to verify through other sources the incident occurred as described. Consequently, the details are not

presented in greater detail, though the underlying message is that small bureaucracies with centralized authority may inadvertently empower solitary individuals to take decisions contrary to state obligations and interests.

Finding 4: Practitioners' views on the role of sanctions (reputational and economic) in MEA compliance are mixed, and in line with the literature. Sanctions can compel compliance, but they are not always appropriate.

Consistent with the collection of literature on enforcement theories, practitioners identified sanctions as a mechanism that can strengthen compliance. Sanctions are particularly useful as a tool to encourage states to correct noncompliance. At the same time, practitioners cautioned sanctions are not always appropriate and their use should be targeted to ensure that state-to-state cooperation that otherwise might be possible is not discouraged. Such cooperation can help facilitate compliance by states facing difficulty.

Sanctions have a direct and immediate impact on a state's reputation or economic interests. Sanctions are formal, either established by an MEA subsidiary body (e.g., a Compliance Committee) or memorialized by a decision of the Conference of the Parties. Reputational sanctions are often memorialized in a decision *noting with concern* a party's failure to meet a specific obligation. Generally, sanctions are uncommon with multilateral

environmental agreements. This is consistent with international instruments that primarily govern cooperative activities.

The risk of economic harm can compel compliance with MEA obligations when a state might otherwise be unconvinced about taking necessary measures. Economic sanctions can be a useful tool but their value can also be “overstated,” and in some cases economic sanctions may be inappropriate or unnecessary.⁷⁰ One practitioner noted that a reputational sanction in the form of a Conference of the Parties decision memorializing a state’s failure to meet its obligations can result in a public shaming that is even more effective than the risk of economic loss.⁷¹

The prevailing view among practitioners interviewed is sanctions may not be the most effective or appropriate tool to persuade a state to correct noncompliance, and determining the appropriate tool will depend on the reasons for noncompliance. For example, states experiencing difficulty because of a technical gap are better helped with targeted technical assistance to address that gap. In such a case, the threat of sanction might backfire, cause the state to retreat, and undermine international cooperative

⁷⁰ Interview with Practitioner Four.

⁷¹ Interview with Practitioner Seven.

efforts that might otherwise facilitate bringing the noncompliant state back into compliance.⁷²

In two noteworthy cases, practitioners used the word *sanction* in an informal sense, even describing civil society or interest group allegations of “noncompliance” with nonbinding provisions as an “informal sanction.” The notion of an informal sanction in this context is noteworthy because it extends the concept of noncompliance to *nonbinding aspirational commitments* – something sovereign states seem to consider a cardinal sin. For example, one United Nations intergovernmental organization expert offered a hypothetical example: a country like Kenya might be inclined to comply with *nonbinding aspirational commitments* under the Convention on International Trade in Endangered Species (CITES) to avoid *informal* reputational consequences from interest groups mischaracterizing the nature of aspirational commitments because those mischaracterizations might impact its lucrative wildlife tourism industry. In other words, a state may be compelled to act even when it has no obligation to do so if it has concern that it could experience reputational harm from inaction. Practitioners sharing views on informal sanctions were asked explicitly if formal and informal sanctions carry equal weight in compelling compliance; both said

⁷² Interview with Practitioner Seven.

no. Recognizing the intent behind the question, an international organization expert offered, “a formal sanction is a serious matter because it can be treated as an indictment [of a state...] and then future commitments [can become] questioned.”⁷³

Finding 5: Practitioners feel strongly that there is a relationship between the design of treaty obligations and the likelihood states will comply with those obligations. Most practitioners assert good design balances giving states flexibility in how they implement obligations while maintaining clarity regarding the expected outcomes.

Over 90% of practitioners believe the manner in which obligations are designed has a relationship with the extent to which states comply with them. Good design means crafting obligations in a manner that preserves some flexibility for states to determine how they are implemented at the national level when appropriate, and doing so in a manner that does not sacrifice certainty, efficacy, legal clarity, or outcomes. On its face, drafting with the objective of maintaining both flexibility and certainty can seem paradoxical. To an outsider, flexibility implies a level of discretion, while certainty implies the absence of it. Practitioners simply do not view it this way.

Striking a balance between flexibility and certainty is, practitioners assert, a logical and sound approach to crafting treaties that are relevant and

⁷³ Interview with Practitioner Four.

appropriate to 196 states. Certainty refers to a combination of the measures and outcomes each state agrees to undertake or produce. Flexibility refers to the discretion each state might retain in determining the specific measures it will implement for a subset of their obligations. Some practitioners also lauded flexibility in implementation as a measure for overcoming the static nature of treaties and increasing the overall level of ambition of state parties to do more over time. For example, a state might report on measures it takes to implement an obligation in 2018, and then feel compelled to do far more as technology improves when it reports again in 2025.

Practitioners also repeatedly referenced the value of practical and enforceable provisions. Practitioners used the adjective *practical* to convey one of three concerns: economically feasible, politically feasible, and technically appropriate to the environmental challenge. The need for flexibility was often linked to determining technically appropriate solutions.⁷⁴ *Enforceable* is intended to convey obligations that share two broad characteristics: they are clear and transparent. Clarity and transparency were often used to convey the need to answer the following

⁷⁴ Interview with Practitioner Eight. Note that in most cases, practitioners speaking to technically appropriate solutions were speaking to provisions related to pollution mitigation and chemicals.

illustrative questions, “how will we know when a state has taken the required measures?” and “what will success look like?”⁷⁵

Finding 6: When presented with two specific design options, practitioners overwhelmingly chose obligations of outcome as the most likely to result in good compliance.

Over 90% of practitioners believe the design of obligations can play a role in facilitating state compliance, and nearly 75% believe that obligations designed to provide states with flexibility to implement can help overcome a number of traditional factors leading to noncompliance. Those factors include higher priority domestic challenges, insufficient national technical capacity, insufficient political will, incompatible domestic legal frameworks, and other unrelated but distracting domestic issues that can inevitably complicate state efforts to meet the landscape of growing international commitments. On balance, the overwhelming majority of practitioners share the view that preserving the flexibility for states to maneuver domestically in order to implement treaty obligations *increases the likelihood* that states will act and make incremental progress towards compliance with their obligations should they find themselves in a situation of noncompliance.

Practitioners recognize that an exceptional challenge in multilateral treaty design is establishing, “universally applicable obligations” that also

⁷⁵ Interview with Practitioner Four.

“take into account differences among parties,” such as differences with respect to the magnitude of a particular environmental challenge, the feasibility of specific technical measures, as well as socioeconomic and political realities. Practitioners widely observed the need to maintain balance between flexibility and clarity on the specific outcomes and expectations. On the one hand, one expert from an international organization recognized the utility of obligations of action, specifically they are in some ways “easier to measure and test” and “countries may comply to the letter” with greater certainty they can demonstrate compliance.

On the other hand, obligations of action are not a silver bullet solution. For one, “sovereign nations do not like to be dictated to.”⁷⁶ Additionally, obligations that are overly prescriptive can be a challenge to implement for several reasons. They might “be impossible to implement [because of] conflicts with national systems.”⁷⁷ A reliance on overly prescriptive obligations increases the risk such obligations are either unnecessary or cost-prohibitive for some countries. For example, an obligation related to particulate matter mitigation from coal-fired power plants may be unnecessary for a country whose power primarily comes from

⁷⁶ Interview with Participant Eight.

⁷⁷ Interview with Participant Eight.

nuclear power facilities. Alternatively, requiring specific technical solutions to coal-fired power generation may be both cost prohibitive and unnecessary in cases where simply switching from one type of coal to another will do. Failure to capture “sufficient flexibility” that allows each implementing state to take into consideration “country context” risks noncompliance.

Chapter Conclusions: Empirical Findings Regarding Factors Associated with Noncompliance only Reinforce a Subset of Factors Identified in the Literature

Empirical data collected regarding factors associated with noncompliance only reinforce a subset of the factors identified in the academic literature, namely: insufficient financial resources, insufficient technical capacity, reputational concerns, and the threat of sanction. However, practitioners overwhelmingly identified a lack of political will on the part of the implementing state as the single greatest factor associated with noncompliance (82%). This statistic only offers limited insight into the noncompliance phenomenon; defining political will is critical to better understanding and analyzing the noncompliance phenomenon and this was an area of focus of empirical data collection in practitioner interviews. The following chapter is devoted to an analysis of political will.

With respect to design, over 90% of practitioners see a connection between the design of legal obligations and the extent to which states

comply with them. As a general matter, practitioners share the view that “good design” means crafting obligations in a manner that preserves some flexibility for states to determine how they implemented them, but doing so in a manner that does not sacrifice certainty, efficacy, legal clarity, or outcomes. Consistent with this view, practitioners overwhelmingly chose obligations of outcome as the design more likely to produce better compliance outcomes.

An interesting preliminary conclusion that can be drawn from these results is domestic contracts are not analogous to multilateral agreements. Consequently, contract law best practice should not guide the design of multilateral environmental agreements. Multilateral agreements and domestic contracts are intended to memorialize terms of agreement between counterparties, but this is largely where similarities end. Precision and thoroughness are a virtue in domestic contracts where periods of performance are clear, and amending contract terms can be as straightforward as seeking a new agreement between two parties. However, the circumstances of multilateral agreements tend to differ dramatically: contract periods of performance are often indefinite and there can be as many as 196 contracting parties. Amending multilateral agreements can be practically challenging, in part because they tend to be more costly and take

more time given the number of parties. More work is necessary to draw a definitive conclusion on the merits of one legal design over another with respect to compliance, and this is an area ripe for future work.

Chapter 5: An Analysis of Political Will

Section I: Establishing a Descriptive Framework on the Lifecycle of a Multilateral Environmental Agreement

Section I of this Chapter establishes a descriptive and temporal framework to provide important context for the Section II analysis of practitioners' views on insufficient political will. The framework in Figure C describes five distinct phases of the lifecycle of a multilateral environmental agreement. These phases will be referred to throughout subsequent chapters.

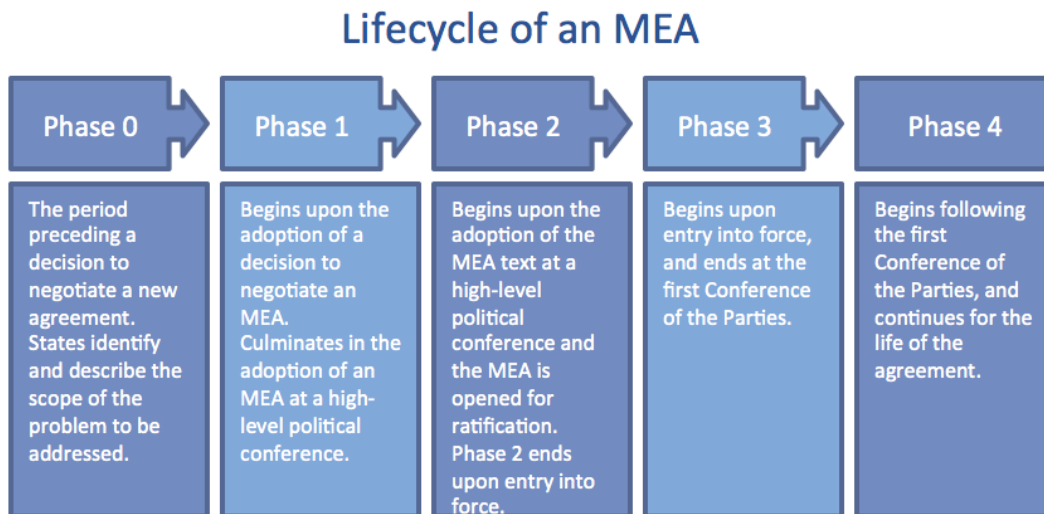


Figure C

Phase zero is the period preceding an international decision to negotiate the agreement and is typically marked by substantive and procedural international discussion. The purpose of the discussion in phase

zero is to gauge global interest and commitment to moving forward with global cooperation. In phase zero, states identify and describe the environmental problem on which cooperation is proposed, potential causes and solutions to address the problem, and the extent to which the problem will benefit from international cooperation.

Once consensus to move forward is achieved, a commitment to negotiate an agreement is typically memorialized in a decision. Such a decision will often contain information on the scope of a future agreement and rules of procedure under which the negotiation will take place, among other issues. Phase one begins upon adoption of the decision to negotiate and lasts throughout the negotiations, culminating in the adoption of the multilateral environmental agreement at a high-level political conference.

Phase two begins when the agreement is adopted and opened for signature, and lasts until entry into force of the agreement – the point at which the minimum number of states required consent to be bound. Phase three begins upon entry into force and lasts through the first official meeting of the Conference of the Parties (COP-1), and phase four begins following COP-1 and continues for the remaining life of the agreement – often in perpetuity or until the MEA is otherwise retired.

Section II: Political Will as a Euphemism for Insufficient Domestic Intragovernment Consultation and Preparation at Key Stages in the MEA Lifecycle

“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”

-Justice Potter Stewart,
Re-contextualized for political will.

The interdisciplinary academic literature identifies several factors associated with compliance with international law, but these factors only partially overlap with the empirical results specific to multilateral environmental agreements obtained in this study. For example, the literature identifies reciprocity, reputational concerns, stakeholder engagement in domestic political cycles and related decision-making, legitimacy of the rule or norm, and self-interest as factors associated with compliance. However, empirical results collected in the course of this project reinforce only a subset of these factors as being associated with MEA compliance.

Practitioners overwhelmingly identified insufficient political will at the national level (82%) as the most significant factor associated with noncompliance. Insufficient political will is followed closely by what I will argue are its symptoms, insufficient financial resources (77%) and insufficient technical resources (73%). These statistics only give limited insight into the noncompliance phenomenon. What exactly do practitioners

mean when they assert insufficient political will is associated with noncompliance, and how do we identify political will when we see it? This chapter presents answers to these questions.

Political will is a nondescript term

Like democracy, *political will* is a term that has stymied political scientists and researchers despite its ubiquitous use. It is the explanation for many policy failures, big and small. In spite of the term being pervasive in academic literature, it is not always clearly defined so that it can be uniformly quantified or otherwise measured. The term is often used to simplify a complex phenomenon of unstated and interrelated variables, reducing its utility to the point that it conveys little. Political will is "the slipperiest concept in the policy lexicon," and "the sine qua non of policy success which is never defined except by its absence."⁷⁸ Useful insight from this project requires looking beyond this abstract terminology and instead measuring and identifying specific characteristics of the phenomenon observed, such as government willingness or engagement.⁷⁹

⁷⁸ Hammergren, "Political Will, Constituency Building, and Public Support in Rule of Law Programs," 12.

⁷⁹ Odugbemi and Jacobson, *Governance Reform Under Real-World Conditions*, 114.

MEA practitioners overwhelmingly identified insufficient political will as the most significant variable associated with MEA noncompliance – with several characterizing it as the “primary driver” behind noncompliance. A practitioner with extensive experience gained from over twenty years in an international organization described the omnipresent blame ascribed to *insufficient political will* as a euphemism or “diplomatically acceptable explanation for noncompliance.”⁸⁰ The specific underlying factors that contribute to state noncompliance are well understood, but diplomatically sensitive to directly and publicly name.

Assessing a sovereign state’s compliance with international obligations can be an incredibly sensitive matter. Evidence supporting this statement is everywhere. For example, *for decades* parties to some multilateral environmental treaties have been unable to take the necessary measures to establish compliance mechanisms to evaluate compliance despite those their being called for in treaty text.⁸¹ Even when an MEA has an operating compliance committee, those committees restrict access to information about their deliberations. Not only can information be restricted

⁸⁰ Interview with Participant Four.

⁸¹ See Stockholm Convention and Rotterdam Convention.

from the public, but also from other Convention parties that do not have a formal compliance committee role.⁸²

Insufficient Political Will: A Euphemism for Insufficient Domestic Interagency Consultation resulting in Poor Preparation at Critical Stages in the MEA Lifecycle

What do practitioners really mean when pointing to *insufficient political will* as a factor strongly associated with MEA noncompliance? The phrase is used to describe the absence of a robust, organized government approach to domestic consultation and preparation early in the MEA lifecycle, specifically the phases described as zero and one described in Figure C (hereafter “insufficient domestic interagency consultation”). Insufficient domestic interagency consultation in the early phases of the MEA lifecycle raises the likelihood a state will be unprepared to undertake its obligations for any number of reasons including, *inter alia*:

- 1) Relevant domestic agencies with an implementation role were not consulted or otherwise made aware of future obligations, and so they are unprepared to implement them;
- 2) Relevant bureaucratic stakeholders with a budgetary role were not meaningfully integrated into domestic national preparations, and consequently budgetary needs for implementation are not reflected into domestic budget processes and decisions in a timely fashion;

⁸² See Basel Convention; more on this matter is available in Chapter 6.

- 3) Government representatives negotiating the agreement did not have a complete understanding of domestic environmental challenges and realistic measures available to address those challenges due to insufficient bureaucratic coordination. Consequently, these representatives unknowingly negotiate obligations that are impractical or otherwise inconsistent with domestic circumstances, which the state later accepts; and
- 4) Government representatives charged with negotiating on behalf of the state did not have a complete understanding of the relevant domestic legal framework, including domestic practice and relevant authorities, which can result in committing to undertaking measures that are not feasible or directly conflict with the domestic legal framework.

Robust Interagency Consultation as a Mechanism for Improving Compliance Outcomes

The international MEA negotiating process makes state preparation most critical in the earliest phases because it is in the early phases when the scope of the agreement and the general direction of its obligations are determined. State delegated representatives negotiate with one another to secure specific negotiating priorities and outcomes, which are typically contained in explicit delegate instructions. The quality of these instructions is inextricably linked to the quality of the domestic interagency consultation that informs them. Robust and thorough instructions are paramount to concluding obligations that are consistent with a state's interest and within its legal and technical capacity.

Practitioners overwhelmingly indicate that insufficient political support for a robust domestic interagency consultative process early in the MEA lifecycle is the point at which a state unknowingly sets itself on a trajectory of potential noncompliance. An interagency consultative process is the mechanism by which a state identifies its interests and establishes the scope of its legal and technical capacity. This process is crucial early in the MEA lifecycle because, among other things, national responsibility for implementing environment-related action is often delegated across multiple domestic agencies.⁸³ For example, management of a pesticide might fall within the remit of both an Environment and an Agriculture agency. In a federalist system, authority to manage pesticides might be further disaggregated between states and the federal government.

While responsibility for implementing MEAs may be disaggregated across institutions, the data show that responsibility for representing state interests in international conferences and meetings to negotiate environmental agreements is generally not. Practitioners confirmed that it is not unusual to for a single agency to lead state participation early in the MEA lifecycle, typically phases zero through two. In most cases that agency is typically the Ministry of Foreign Affairs, whose personnel

⁸³ For example, in the United States the Food and Drug Administration and the Environmental Protection Agency have responsibility for regulating mercury.

specialize in, among other things, negotiating process and procedure, and also have the benefit of being familiar with a state's larger geopolitical interests. However, Foreign Affairs is not typically the agency ultimately responsible for domestic implementation of a state's *environmental* obligations, and consequently foreign affairs delegates may not be sufficiently familiar with the intricacies of the relevant domestic environmental governance regime. This reality presents a risk that a delegate may unknowingly accept obligations that are incompatible with the state legal framework. A further potential complicating factor is these same officials may not have a deep background in the specific environmental issue central to the agreement. Interagency consultation that precedes international negotiations and informs delegate instructions must be sufficiently robust to contain all of this relevant information.

Mitigating the noncompliance risk may not be as simple as choosing a different agency to lead engagement in the relevant MEA negotiation process. Any single agency charged with representing state interests throughout the MEA lifecycle is unlikely have a role in all the relevant domestic budgetary processes that will ultimately fund implementation of treaty obligations. A domestic interagency consultation process can effectively manage this gap by ensuring all relevant agencies are made

aware of their respective implementation responsibilities and their corresponding resource needs upon ratification. However important, interagency consultative processes are also resource intensive, and often require the reallocation of already stretched human resources. Governments may not be willing to invest the resources necessary to undertake a robust process, especially when the consequences of a state's poor preparation are likely to be delayed and come year's later following entry into force – assuming the state ratifies the MEA at all.

One expert anecdotally observed, “delegations with representation from a single agency [often Foreign Affairs] can sometimes indicate poor domestic preparation - where [relevant other] agencies aren't consulted in time or consulted at all,” and “we see this [more often] in developing countries [that often have fewer resources to devote to robust preparation].”⁸⁴ Two practitioners with extensive experience facilitating negotiations and compliance committees offered a related observation and potential noncompliance indicator: the composition of state delegations throughout a negotiation process might offer an indication of the robustness of their domestic interagency consultation. The more homogenous a

⁸⁴ Interviews with Participant Four and Five.

delegation is in terms of agency representation, the more one should have concerns that domestic preparation may not be sufficiently robust.

The logic behind this is delegations with more heterogeneous agency representation are an indication that a country is taking a methodical, consultative interagency approach to investigating domestic environmental challenges, its capacity to address those challenges, and the potential compatibility of its domestic legal framework with international commitments under negotiation.

Insufficient empirical data was collected in this study to draw conclusions on this particular observation. However, Figure D contains a partially complete distribution of delegation composition across the Basel Convention negotiation, and suggests this hypothesis is worthy of further investigation in a subsequent study. Consistent with practitioners' hypothesis, state delegations in Figure D are more homogenous early in the negotiating process and become more diverse in terms of interagency representation as the convention matures.⁸⁵ Basel Convention compliance is investigated further in Chapter 6.

⁸⁵ Delegation composition prior to entry into force of the Basel Convention is from archived paper lists maintained and supplied by the Basel Convention Secretariat. Others are archived online. While the Figure D does not contain every delegation present beginning in 1987, it does contain a significant number of them. In some cases, delegate agency affiliations are not available in archived registrations and had to be pulled from complementary UN lists.

Another practitioner whose professional career includes nearly 20 years of facilitating MEA negotiations and working with states to address noncompliance described a potentially problematic domestic “hand off” between agencies of primary responsibility for coordinating state engagement in the MEA lifecycle.⁸⁶ She anecdotally observed that foreign affairs often leads phases zero, one, and two, and then hands off responsibility to another domestic agency with ultimate responsibility for implementation. This handoff, she asserts, is evidence that domestic planning may be compartmentalized, increasing the long-term risk of noncompliance for reasons previously articulated. Once again, insufficient information is available to draw a conclusion on the reliability of delegation composition as an indicator, but Figure D suggests this line of inquiry merits additional study.

⁸⁶ Interviews with Practitioner Four and Five.

Basel Convention Meetings, Delegation Composition of Subset of Countries

Country	<i>Before entry into force</i> 27-29 Oct 1987	<i>Before entry into force</i> 1-5 February, 1988	<i>Before entry into force</i> 7-16 November, 1988	<i>Before entry into force</i> 30 Jan - 3 Feb, 1989	No Info for this Period	COP-7 25-29 October, 2004	COP-8 23 January 2007
Algeria				-			
Australia	-						
Austria							
Argentina	-						
Belgium	-		-				
Bolivia	-			-			-
Brazil	-	-					
Bulgaria	-	-	-				-
Canada							
China		-					
Egypt							
Finland							
France							

Figure D




Key to Figure D	
	Foreign Affairs only
	Environment only
	Foreign Affairs & Environment, possibly others
-	No information or no participation

Figure D, cont'd

An Analysis of Two Factors: Interagency Consultation

A state is not a monolith. Practitioners observe that noncompliance is associated with insufficient preparation that results from the absence of political will to drive a robust, organized government approach to domestic interagency consultation early in the MEA lifecycle. The next logical

question that arises is whose political will is needed (i.e., participation) and when (i.e., timing)?

Factor 1: Source of Participation in Interagency Consultation

Various actors are engaged throughout the MEA lifecycle, and each of these can support MEA compliance in different ways. Primary actors with a direct role are government representatives, which includes politicians and administrative bureaucrats. Other actors with an indirect role include civil society, industry, academia, and individuals. These actors and their potential roles in a consultative process are further described in Figure E.

Participants Engaged in Domestic Interagency Consultative Process	
Government	<p>Government representatives <i>directly</i> participate in the domestic interagency consultative process.</p> <p>Representatives employed by state governments, including administrative bureaucrats and politicians. Representatives can be employed by various domestic agencies, including the Ministries of Foreign Affairs, Environment, and/or Agriculture.</p>
International Organizations	<p>International Organizations (IO) may <i>indirectly</i> participate in a state's domestic interagency consultative process by, among other things, providing state representatives information germane to issues under negotiation.</p> <p>IOs are membership organizations composed primarily of member states and/or other organizations. IOs are typically established by treaty, and created to undertake tasks in support of objectives set by member states. For MEAs, relevant IOs include the UN Environment Program, the World Health Organization, and the World Bank's Global Environment Facility.</p>
Civil Society	<p>Civil society typically <i>indirectly</i> participates in a state's domestic interagency consultative process by, among other things, lobbying</p>

	state representatives or providing them information germane to the MEA. Civil Society organizations are groups working in the interest of the citizens but operating outside of the government and for-profit sectors.
Industry	Industry typically <i>indirectly</i> participates in a state’s domestic interagency consultative process by, among other things, lobbying state representatives or providing them information germane to the MEA. Industry is a term used to describe for-profit institutions, often companies and industry umbrella organizations.
Academia	Academics may <i>indirectly</i> participate in a state’s domestic interagency consultative process by publishing information germane to the issues relevant to the MEA. Individuals and/or institutions involved in the pursuit of research, education, and scholarship.
Individuals	Individual citizens may <i>indirectly</i> inform interagency consultative process by providing information or otherwise registering their views. Individual citizens are persons participating outside of an organized group.

Figure E

While any of the above-referenced actors may participate in a domestic interagency consultative process, directly or indirectly, practitioners primarily shared their observations about government representatives as a critical source of support. Government participation will be characterized in terms of two characteristics: 1) the nature of a person’s position; and the 2) placement of that position.

Participation of Government Representatives: Nature of their Position

The *nature of a position* is divided into two categories: politicians and administrative bureaucrats. Politicians are understood to be persons that are

typically in high-level Ministerial positions, like heads of agencies, or that otherwise serve in similarly highly influential roles where they make policy and leadership decisions in their respective governments. Administrative bureaucrat is understood to mean long-term civil servants who are charged with informing policies and later implementing leadership decisions, including those taken by politicians. A distinguishing characteristic between these two is the tenure of politicians is typically shorter than the tenure of administrative bureaucrats.

Politicians and administrative bureaucrats work in complementary and mutually re-enforcing roles to support MEA compliance. Politicians provide an important political signal when they endorse a multilateral environmental agreement and its respective obligations at a Diplomatic Conference where the treaty text is adopted, and again when the state subsequently ratifies it. Political endorsement is an important early indication of support to both the international community and domestic constituency. Politicians' endorsements assure domestic bureaucrats and administrators that the MEA and the steps a state must subsequently take to implement it enjoy political support. Political endorsement is essential for the early mobilization of national resources to support implementation.

Practitioners were less inclined to draw bright lines regarding the hierarchical level at which political support must be established, with one noting that while “the level of political endorsement is quite important,” and a good compliance indicator, the “necessary level [of political support] for good compliance will depend on the country.”⁸⁷

The support and commitment of bureaucratic administrators is similarly important for ensuring compliance. Bureaucratic administrators are typically mid-level bureaucrats with a significant role in the year-to-year planning and related decisions on budget allocations and human resources. As political priorities shift over time, the endorsement and commitment of bureaucratic administrators is the necessary and enduring link between a state’s initial public commitment and the follow-through necessary to meet its obligations.

Participation of Government Representatives: Organizational Placement of their Position

The *placement of the participant’s position* is also relevant to determining whose participation is needed in interagency consultation. Placement refers to either where the position sits within the government organizational hierarchy, or in which agency the position sits. With respect to hierarchy, high-level positions refer to heads of domestic agencies (e.g.,

⁸⁷ Interviews with Participants Four and Eight.

ministers) or higher. On balance, high-level placement is typically consistent with politician-occupied roles. Mid and low-level positions are typically administrative bureaucrat occupied. Placement can also refer to the agency in which a position is found. Where a position is embedded may be relevant under circumstances where one agency holds more domestic power than others. Practitioners assert that some domestic agencies are inherently more powerful than others, with power measured as a function of budget, political influence, and size. Apathy from a powerful domestic agency with direct equities in the scope of an MEA negotiation can, “undermine a [state] negotiator’s ability to be effective,” and “can be the kiss of death.”⁸⁸

Practitioner Views: Necessary Sources of Participation for Success

As insufficient interagency consultation early in the MEA lifecycle is associated with noncompliance, facilitating interagency consultation should be a state goal. Practitioners observe that facilitating interagency consultation requires sustained support, which is most likely when 1) the MEA in question has received public support from politicians and administrative bureaucrats; and 2) those politicians and administrative bureaucrats represent the range of domestic agencies with equities on the issue governed under the MEA. Political support can be demonstrated in a

⁸⁸ Interviews with Participants One, Two, Three, and Seven.

number of ways, but practitioners broadly agree that high levels of commitment are apparent when politicians issue public statements of support for both the MEA and its objective, and do both domestically and internationally – with emphasis on the importance of domestic statements. Some also noted politicians’ willingness to participate in high-level MEA conferences at pivotal moments, such as adoption of a convention or on an anniversary of its adoption, is further evidence of sustained support. Administrative bureaucrats’ support was less easy to quantify, but most characterized it by consistent personnel engagement accompanied by meaningful participation.

Factor 2: Timing of Participation in Interagency Consultations

Timing of participation is also important. Practitioners correlate insufficient consultation in phases zero through two of the MEA lifecycle with state noncompliance, and they also offer insight into the nature of participation in that consultation. As a general matter, consistent attention and engagement from both politicians and administrative bureaucrats throughout the interagency consultative process is ideal. However, practitioners observe that in reality (and likely for very practical reasons) attention and engagement is sinusoidal.

Consistent high-level attention from politicians early in the MEA lifecycle is a good indication that states are taking the necessary measures to support compliance. High-level political attention is typically greatest in phases zero and two – times when heads of domestic agencies and other high-level officials are invited to participate in ministerial sessions where critical political decisions are made. The key political decision in phase zero is whether the international community agrees on the broad parameters of the environmental issue and that the issue merits cooperation at the international level. Establishing the scope of the negotiation involves considerable jockeying among state representatives. Failure to ensure that issues of greatest importance to a state fall within the agreed negotiating mandate will generally preclude them from being addressed.

Another key decision: financing international cooperation and the negotiation process. The decision to facilitate international cooperation of potentially 196 countries throughout the negotiating process and subsequent Conferences of the Parties is costly. States seek assurances that there is ‘critical mass’ to fund this cooperation – especially during the negotiating phase when countries typically share the costs on a voluntary basis. Costs can be staggering. The first Conference of the Parties of the Minamata Convention on Mercury in 2018 was held in Geneva, Switzerland for one

week and cost approximately 2.875 Million USD.⁸⁹ International agreement to pursue cooperation means an agreement to fund the costs associated with facilitating meetings, including space, interpretation, document production, *inter alia*.

High-level participation and attention at the international level falls somewhat in phase one, when administrative bureaucrats typically take the lead internationally in negotiating the operative text of the multilateral environmental agreement. Simultaneously, administrative bureaucrats at this stage are likely running the domestic interagency consultative process. Practitioners note that high-level participation often picks up again in phase two.⁹⁰ A logical explanation for this observation is there are frequently fewer ministerial-level events during this phase. Political participation in phase one is described as limited to “monitoring” of the negotiations from the most-interested countries. High-level participation sharply falls again in phases three and four. Domestic agency bureaucrats and administrators responsible for the day-to-day implementation take over state engagement almost exclusively in phases three and four.

⁸⁹ Budget and expenditures were accessed from the Minamata Convention in 2019, and are available here: http://www.mercuryconvention.org/Portals/11/documents/meetings/COP1/English/1_21_add1_e_costs.pdf

⁹⁰ The one noted exception was climate, specifically the Paris Agreement.

Three interview participants noted the “gold standard” is to seek political endorsement of an MEA on its adoption by holding a Diplomatic Conference.⁹¹ This modus operandi continues in the life of the convention for second-order compliance with efforts to secure minister-level endorsement of subsequent decisions taken during the lifetime of an MEA. For example, it is relatively common to hold ministerial-level meetings on the margins of Conferences of the Parties. Parties do so with a view to securing political commitments at the highest levels of state government and on the understanding that these officials will take an interested role in shepherding relevant domestic follow-up, thereby increasing the chances of follow-through and compliance.⁹²

Two government representatives interviewed presented an alternate view, and questioned the over-reliance on ministerial meetings for two reasons: first, routinely holding ministerial segments on the margins of MEA Conferences of the Parties will likely undermine their strategic and targeted use to broker politically sensitive agreements which require high-level attention to secure, and then subsequently ensure implementation and

⁹¹ Interview with Practitioners Two, Three, and Six. Diplomatic conferences are not limited to MEAs and are typically used when adopting and opening treaties for state signature.

⁹² A related interesting anecdote: One practitioner observed that when one Convention holds a ministerial-level meeting, others of related subject matter typically follow suit with a view to “not suggest [their] agenda is less important.”

compliance. Second, ministerial segments often distract from the routine business of the MEA. By doing so, they undermine the ability of mid-level bureaucrats to exchange important information about routine business of the convention necessary to facilitate implementation and ensure compliance.

Practitioner Views: Timing of Participation for Success

Good interagency consultation requires sustained support and participation by both politicians and administrative bureaucrats. While sustained participation by both throughout the lifecycle is ideal, the balance of other demands on a state and its actors make this difficult. Consequently, practitioners observe that states prioritizing participation during defining moments is a practical reality. For politicians, those moments are pivotal but intermittent: 1) adoption of the negotiating mandate; 2) adoption of the treaty text during the Diplomatic Conference; 3) state ratification of the MEA; and 4) at periodic intervals following entry into force. For administrative bureaucrats on the other hand, sustained and predictable participation is critical to ensuring continuity and implementation. Robust administrative bureaucratic participation is important in interagency consultations beginning at phase zero throughout the lifecycle of the MEA.

A Good Process: Interagency Consultation to Bolster Compliance

Practitioners also use political will as a euphemism for the likelihood of sustained national action to meet obligations, as evidenced by clear public statements of commitment, accompanied by widespread domestic bureaucratic engagement across all relevant domestic agencies that will be responsible for implementation. Having identified shortcomings in national processes as a potential vulnerability, practitioners were asked to identify the characteristics of good domestic process associated with positive compliance outcomes.

Practitioners described a robust domestic consultative process that meaningfully integrates all domestic agencies with equities in the environmental subject matter of the relevant MEA. Such a process bolsters the likelihood the state has taken the domestic steps necessary to understand their unique domestic challenges and options for addressing those challenges against financial and technical realities. Practitioners with government experience were asked to describe the elements of a robust interagency consultative process. They described the following:

- 1) An assessment of the environmental problem in the domestic context;
- 2) Identification of available technical or other solutions to address environmental problems, and if applicable, feasibility of acquiring

those solutions;

- 3) An assessment of the existing domestic legal framework and identification of relevant gaps;
- 4) An assessment of human and financial resources needed to address domestic challenges, and or potential future obligations; and
- 5) A plan of action to mobilize necessary resources, and disaggregate authority and responsibility across domestic agencies.

Plausible Alternate Explanations: Potential Confounding Factors

While practitioners overwhelmingly point to the absence of a robust, organized government approach to domestic interagency consultation and preparation early in the MEA lifecycle as strongly associated with noncompliance, effort was made to identify possible confounding variables. Practitioners also point to a correlation between noncompliance and what I have demonstrated are the symptoms of a poor interagency consultative process: insufficient financial and technical resources. There may be other possible alternative explanations that explain the noncompliance phenomenon equally as plausibly. This section is dedicated to considering them.

Before analyzing data, I first construct a number of alternative explanations for the noncompliance phenomenon, drawing from academic literature and empirical evidence collected, with a view to ruling each out.

Several potential confounding variables could provide an alternate explanation for noncompliance. For example:

- It is possible a noncompliant state is experiencing the *capability-expectation gap*, overestimating its ability to comply with obligations under the relevant treaty prior to ratification only to discover later it is unable to comply. The academic literature summarized in chapter two presents the capability-expectation gap as a stand-alone variable. However, I argue this is merely a symptom of insufficient interagency consultation because – as practitioners support- a gap in the state's ability to comply should have been caught in the interagency consultation and associated planning.
- A noncompliant state might have simply made a cost-benefit decision to not comply with the relevant obligations following ratification. While possible, here too one could argue that robust domestic planning through the interagency consultation mechanism should have resulted in the state making a determination ratification is not in its interest *prior* to ratification, when it could minimize reputational risk.
- It is possible a noncompliant state ratified the treaty knowing compliance is impossible at the time of ratification, but did so knowing repercussions are unlikely as the treaty in question has no formal sanctions mechanism. This is a variant of the preceding, but with the small distinction that a cost-benefit was undertaken prior to ratification, and the state presumably determined that the reputational risk of not ratifying outweighed the risk of being a noncompliant state given the absence of a formal sanctions mechanism. Testing for this variable would require extensive within-case process tracing, such as the examination of internal government preparatory documents that informed the ratification process.
- It is possible that a state has made the decision to deprioritize compliance because it observes a culture of noncompliance among

parties of the relevant treaty. This is in line with the theory that compliance begets compliance, and would be more likely in a case where other cases of state noncompliance are numerous and known. Testing for this variable would require extensive within-case process tracing, including interviews of known noncompliant states to better understand the factors contributing to their noncompliance.

Summary and Transition to Case Study

Practitioners use the euphemism *insufficient political will* to describe the absence of a robust, organized government approach to domestic interagency consultation and preparation early in the MEA lifecycle. They conclude the absence of a robust domestic interagency process may put states on an early path toward noncompliance. Bolstering confidence in the empirical results collected in this study requires triangulating that empirical data with independent compliance information from official MEA records, such as decisions from a Conference of the Parties and its subsidiary bodies.

The following case study on the Basel Convention on the Transboundary Movement of Hazardous Waste is consistent with practitioners' assertions. Both noncompliance incidents selected were examples referenced in surveys and interviews. In the following truncated case studies, I undertake a 'straw in the wind' process tracing causal test by tracing the dependent variable, noncompliance findings, to establish a

connection between the finding and evidence of a failed interagency consultative mechanism.

Chapter 6: Case Study on Basel Convention Noncompliance

Introduction

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was adopted in 1989 and entered into force on May 5, 1992. The Convention's objective is to protect human health and the environment from the uncontrolled global movement and dumping of hazardous waste, and waste mismanagement. The Convention introduced a consent-based system for controlling the export, import, and disposal of hazardous waste. During the first decade following the Convention's entry into force, parties focused their attention on establishing a framework for controlling the transboundary movements of hazardous waste and developing criteria for the environmentally sound management of waste. But in recent years Parties have focused on improving implementation of treaty commitments and reducing hazardous waste generation, which is considered to be a long-term solution to the stockpiling of hazardous waste.

This mature Convention also remains relevant to emerging global challenges, including the management of electronic waste – now the fastest

growing global waste stream.⁹³ When the Basel Convention was under negotiation, there was a divergence of views between some countries that wanted a ban on hazardous waste shipments (generally waste-importing countries), and those who wanted to allow hazardous waste trade with informed consent (generally waste-exporting countries). In the end, the first-order Convention text focused on informed consent. However, at the second meeting of the Conference of the Parties (March 1994), Parties agreed to an “immediate ban” on the export of hazardous wastes from OECD to non-OECD countries. This second-order change was memorialized in an amendment to the Convention known as the Ban Amendment. Decades later, the Ban Amendment has only just received the number of ratifications needed to enter into force in December 2019. Opponents of the Ban Amendment have asserted it will restrict the transboundary movement of materials for their environmentally sound management and recycling, leading instead to their disposal and exacerbating the global waste problem.

What makes the Basel Convention particularly suitable as a case study is it both fits the scope conditions of this project and has a long-standing and operational Mechanism for Promoting Implementation and Compliance with

⁹³ “E-Waste Rises 8% by Weight in 2 Years as Incomes Rise, Prices Fall - United Nations University.”

the Basel Convention (hereafter Basel Compliance Committee, Compliance Committee, or Committee).⁹⁴ The Basel Compliance Committee was established as a subsidiary body to the Conference of the Parties in 2002, consistent with Article 15, paragraph 5 (e) of the Convention. The Committee is comprised of 15 members who are nominated by their regions and elected by the Conference of the Parties. The Compliance Committee is largely facilitative, drawing on a small pool of resources to assist parties unable to fully implement and comply with their obligations.

The Committee operates under what is described as a dual mandate. Under its specific submission mandate, the Committee considers any “submission made to it...with a view to determining the facts and root causes of the matter of concern,” and to assist the party in taking measures to resolve that matter. The Conference of the Parties has, historically, instructed the Compliance Committee to prioritize work on submissions received. Submissions can come from parties who choose to self-trigger a compliance review, parties who submit concerns about another party’s compliance, or referrals from the Convention Secretariat.

⁹⁴ Additionally, practitioners surveyed and/or interviewed in this study offered Basel Convention noncompliance examples.

Some parties, typically developing country parties, are incentivized to self-trigger a noncompliance review because they could qualify for financial and/or technical assistance to implement a *plan of action* to address the reasons for their noncompliance. Under the general review mandate, the Committee reviews general issues of compliance and implementation as identified by the Conference of the Parties. These general issues and corresponding activities to address them are elaborated in a *work programme* that is adopted every two years by the Conference of the Parties.

Compliance with treaty obligations can be a highly sensitive and politically divisive topic. However, the Basel Convention is in stark contrast to two other treaties characterized as falling within the same “chemicals and waste cluster” of environmental conventions.⁹⁵ Firstly, the negotiations to establish the Basel Compliance Committee were relatively expeditious and noncontroversial, unlike negotiations to establish compliance mechanisms as called for under the Rotterdam and Stockholm Conventions on chemicals. Rotterdam and Stockholm negotiations have stalled since both treaties entered into force in 2004. The stall is remarkable, because Article 17 of

⁹⁵ Those two are: the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Stockholm Convention Persistent Organic Pollutants. A third new Convention falling within the chemicals and waste cluster - the Minamata Convention on Mercury - does have functional a Compliance Committee but insufficient data is available as the Convention and Committee itself is new.

both treaty texts call for the establishment of compliance mechanisms “as soon as practicable.” In other words, the question of *whether* Rotterdam and Stockholm should have compliance mechanisms was settled. Only the procedures and institutional mechanism by which noncompliance would be determined required discussion and adoption post entry into force, and these discussions have been highly inflammatory and divisive.⁹⁶

After 15 long years, Rotterdam Parties *triggered a vote* to adopt a compliance mechanism in May 2019 – a remarkable development and indicator of the politically sensitive nature of these discussions because the Rotterdam Convention generally operates by consensus. Stockholm Parties still have not adopted a compliance mechanism. Political objections have been the primary hurdle to establishing a committee under Stockholm, and the reason for the delay under Rotterdam. Some countries have stated that they do not want to finalize compliance procedures, in large part because of concerns that the international community has not made sufficient financial assistance available to developing countries to facilitate implementation, and also in part because of concerns that the mechanism will be used to formally

⁹⁶ Again, for both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Stockholm Convention Persistent Organic Pollutants.

find countries in non-compliance.⁹⁷ Stockholm has a financial mechanism; Rotterdam does not.

Remarkably, unlike the international diplomatic discourse at Basel Convention and many other MEA meetings, practitioners in this study did not cite insufficient financial assistance *from the international community* as an impediment to compliance. They did, however, note that insufficient national financial resources and technical capacity are. Practitioners also repeatedly noted the sensitivity regarding any public assessments of sovereign states' compliance, as well as related trepidation that compliance mechanisms could be used to make noncompliance findings given "persistent noncompliance" across MEAs.

Henkin famously quipped, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." But when one United Nations compliance expert was asked whether most Parties are in compliance with their MEA obligations, she chuckled "absolutely not."⁹⁸ Widespread noncompliance is evident and easily quantifiable in one of the most fundamental of MEA obligations:

⁹⁷ "Rotterdam Convention Signatories Adopt Compliance Mechanism."

⁹⁸ Interview with Practitioner Four. Practitioner clarified she could only speak for those MEAs negotiated under the auspices of the United Nations, which are the majority of MEAs.

reporting. MEA reporting rates are generally not publicized and but appear to be low where statistics are available – frequently under 50%.

Poor compliance with reporting obligations also holds true for the Basel Convention where in 2001 less than 50% of parties reported at all. Reports that were submitted were of variable quality and not always comparable.⁹⁹ In 2015, a legal officer with the Convention Executive Secretariat observed that approximately 60% Basel parties do not submit obligatory reports under the Convention.¹⁰⁰ This is a modest improvement over the 2001 figure, but still quite low. She adds,

Lack of reporting can mean that there is lack of implementation of the convention as a whole. Some of the countries that the committee is currently assisting do not have adequate legislation in place; they don't know how much hazardous wastes they generate and they do not have a system in place either to control their import or export or to ensure their environmentally sound management.¹⁰¹

⁹⁹ Raustiala, K. (2001). Reporting and Review Institutions in 10 Selected Multilateral Environmental Agreements UNEP, Nairobi Page 39, 63

¹⁰⁰ Interview with Juliette Kohler, BRS Secretariat Legal Officer, Accessed October 2019: <https://chemicalwatch.com/24151/international-treaties-monitoring-compliance>

¹⁰¹ Interview with Juliette Kohler, BRS Secretariat Legal Officer, Accessed October 2019: <https://chemicalwatch.com/24151/international-treaties-monitoring-compliance>

Restatement of Case Study Objective

The purpose of this truncated case study is to triangulate empirical data collected with publicly available compliance information, specifically noncompliance with the Basel Convention. Beginning from the dependent variable, noncompliance, I reviewed Basel Committee noncompliance findings for evidence that could possibly confirm or disconfirm a connection between those incidences and a failed interagency consultative mechanism.

While practitioners associate a failed interagency consultative mechanism with noncompliance generally, there are specific types of noncompliance that would logically be more obvious indicators of such an association. Specifically, a promising indicator is noncompliance with any activity whose successful completion would likely require robust coordination across several domestic agencies, such as comprehensive reporting or establishing new intra-governmental institutional mechanisms like a national focal point and competent authority as required by Article 5. Noncompliance with these specific obligations accompanied by references to the need for 1) domestic coordination, or 2) domestic intergovernmental awareness raising measures as corrective measures is particularly promising. Such references are likely to be exceptional; a sovereign state is not typically in the habit of airing its noncompliance laundry, much less admitting or even

indirectly pointing to the reasons for their noncompliance.¹⁰² Nevertheless, this is what we find in this case study, together with action plans to rectify or mitigate shortcomings.

Triangulated sources of data under the Basel Convention lend credibility to support practitioners' assertion that poor preparation resulting from insufficient interagency consultation is associated with MEA noncompliance, and unlikely to be fully explained by confounding variables identified in chapter four. Those are:

- The nature of Basel Convention noncompliance broadly and corresponding Work Programme areas of focus; and
- Specific incidents of noncompliance, and the corresponding Compliance Committee decisions and work plans intended to address national gaps that result in that noncompliance.

Overview: Basel Convention Noncompliance Cases

The Basel Compliance Committee has considered a number of noncompliance cases since its inception. However, despite widespread noncompliance with select treaty provisions, relatively few cases have been brought before the Committee. Most of the cases publicly available are non-OECD member states, and many from Africa. Figure F contains a list of

¹⁰² Interview with Participants Two, Three, Five, Six, Seven, and Eight.

noncompliance cases brought before the Basel Compliance Committee,
several are closed cases but presented here for context.

Basel Compliance Committee Noncompliance Cases

	Open Cases	Closed cases
Self-Triggered	Central African Republic Togo	Central African Republic Oman
Secretariat-Triggered	Bahamas Bhutan Burkina Faso Chad Cook Islands Democratic People's Republic of Korea Equatorial Guinea Gabon Liberia Mauritania Mongolia Nauru Niger St Vincent and the Grenadines Sao Tome and Principe Sudan Syrian Arab Republic Turkmenistan	Afghanistan Cabo Verde Eritrea Guinea-Bissau Libya Nicaragua Palau Somalia Swaziland Togo Turkmenistan

Figure F

The lack of available OECD member cases from which to select is not ideal for the purpose of this experiment, and looking to noncompliance cases outside of the Basel Convention would present other challenges – including controlling for a number of variables across treaties with different obligations. One could argue the concentration of noncompliance cases among developing countries in Figure F indicates that noncompliance merely a byproduct of scarce national resources – consistent with the struggles of developing countries and small-island developing states. While it is not possible to rule out that argument as one factor associated with

noncompliance, the circumstances of each case offers greater insight into the specific factors associated with noncompliance. To better control for this, the list of noncompliant countries brought before the Compliance Committee were sorted by level of economic development, using data from the International Monetary Fund's (IMF) World Economic Outlook Database last updated in April 2019. That ranking is available in Figure G.

Basel Noncompliant Countries, Sorted by GDP

Country (IMF Global GDP Ranking)	
Highest GDP	Oman (70)
	Turkmenistan (87)
	Libya (92)
	Afghanistan (116)
	Gabon (120)
	Burkina Faso (125)
	Mongolia (128)
	Bahamas (130)
	Nicaragua (135)
	Equatorial Guinea (136)
	Chad (138)
	Niger (142)
	Somalia (145)
	Eritrea (146)
	Togo (150)
	Mauritania (151)
	Swaziland (155)
	Liberia (160)
	Bhutan (164)
	Central African Republic (167)
	Cabo Verde (168)
	Guinea Bissau (175)
	St Vincent and the Grenadines (181)
	Sao Tome and Principe (185)
	Palau (187)
	Nauru (190)
	Cook Islands (197)
	Sudan (209)
	Democratic People's Republic of Korea (200)
Lowest GDP	Syrian Arab Republic (210)

Figure G

Nature of Noncompliance with the Basel Convention

A review of Basel Compliance reports from 2005 to 2019 indicates that a significant number of noncompliance incidents before the Compliance Committee relate to foundational obligations, specifically those under Article 5 and Article 13. Article 5 requires parties to designate a competent

national authority and focal point. Article 13 covers the transmission of information, including annual reports on the measures parties have taken to implement the Convention.

The obligation to establish a national focal point and competent authority under Article 5 is arguably a foundational measure to meeting other Basel obligations. The reality that some parties have not met this obligation 25 years after the Convention's entry into force is astonishing. Annual reporting requirements under Article 13 are similarly straightforward; the information parties are obliged to report includes:

- Identifying competent authorities and focal points that have been designated pursuant to Article 5;
- Information regarding transboundary movements of hazardous wastes in which the party has been involved;
- Data on the hazardous waste exported; and
- Information on national measures adopted to implement the convention.

Submitting reports and identifying a national focal point and competent authority are presumably among the easiest obligations in the sense the obligations are clear. However, complying with them requires an established domestic process and dedicated national resource stream to both implement the underlying measures (e.g., managing waste exports) and to

collect the data from the various domestic agencies that have responsibility for regulating that activity domestically.¹⁰³

These two articles and the obligations they contain are suitable for this exercise because their nature allows for empirical measurement. Either a party has identified a national focal point, or it has not. Either a party has submitted a report, or it has not. Not only are these two articles and their obligations ideal in the sense they allow for straightforward measurement, but the very nature of the obligations suggest parties require an underlying domestic interagency consultative process that facilitates the robust coordination required for their successful implementation. And accordingly, any widespread failure to comply with these obligations may be consistent with practitioners' assertion that insufficient domestic interagency consultation is partly to blame.

State noncompliance with obligations under both of these articles is evident throughout Compliance Committee deliberations, as demonstrated in both Committee decisions and every Committee Work Programme throughout the Committee's existence. Committee Work Programmes identify a biennial agenda, along with corresponding activities intended to

¹⁰³ It is noteworthy that poor compliance with these foundational obligations so many years after the Convention's entry into force also suggests that compliance with other more complex or resource intensive obligations is also low.

mitigate noncompliance. Every Committee Work Programme references reporting as an area of compliance concern, and every Committee Work Programme since 2007 frames reporting as a “general issue[s] of compliance and implementation under the Convention.”¹⁰⁴ Additional identified issues of concern include the failure to take obligatory measures to control illegal traffic of wastes, or failure to enact appropriate national legislation.

Further, a number of Work Programme activities are consistent with those a Committee might undertake to assist parties’ efforts to overcome the consequences of an insufficient interagency consultative process.

Astonishingly, the 2020-2021 Committee Work Programme includes activities to, “better assist Parties to *enhance coordination between their competent authorities and enforcement entities*,” and to, “develop a better understanding of the reasons for: (i) any *shortcomings in establishing coordination mechanisms*; (ii) the limited amount of information on illegal traffic shared with the Secretariat; and (iii) what can be done to enhance coordination and increase the flow of information” (emphasis added). In the 2016-2017 Committee Work Programme, the Conference of the Parties ask the Basel Compliance Committee to identify measures that could improve

¹⁰⁴ Basel Convention reporting rates are very low. At the 13th Conference of the Parties the Executive Secretariat published annual reporting rates for 2009-2013 in information document 26. Reporting rates for 2009 were 53%, 2010 was 40%, 2011 was 49%, 2012 was 45%, and for 2013 was 47%.

compliance with national reporting, and specifically include “face-to-face meetings,” a clear, direct reference to a mechanism to facilitate interagency consultation.

The above-referenced activities are among many in the Committee Work Programme, but are remarkable in that they are explicitly linked to the very gap practitioners assert is most associated with noncompliance. More extraordinary, practitioners interviewed for this study noted it is highly unusual for multilateral documents to so explicitly point to a state’s domestic process-related shortcomings in implementation as a matter of custom and out of respect for sovereignty and diplomacy. One is more likely to see what are considered more diplomatically benign references to finance needs and technical assistance gaps.

Additionally, in 2018 the Executive Secretariat surveyed parties to the Basel, Rotterdam, and Stockholm Conventions about their “experience with the establishment of coordinating mechanisms at the national level and lessons learned.”¹⁰⁵ In that exercise, 95% of respondents approved of the broad involvement of stakeholders in national coordination mechanisms, and many (82%) reported having some national coordination mechanism but to

¹⁰⁵ Document referenced is available at the Secretariat website, and is codified as: UNEP/CHW.14/23–UNEP/FAO/RC/COP.9/19–UNEP/POPS/COP.9/26 (Accessed October 2019)

“different degrees of formality.”¹⁰⁶ However, when asked a variation of the same question – specifically to assess national coordination mechanisms more directly relevant to Basel obligations - only 36% of parties surveyed admitted having cooperative mechanisms for a basic institutional arrangement necessary to effectively implement the Convention. That specific mechanism is one to coordinate the work of domestic import and export authorities – a fundamental Basel obligation.¹⁰⁷

The results from the Executive Secretariat survey support practitioners’ assertion that insufficient interagency consultative mechanisms are associated with noncompliance. The Basel Conference of the Parties clearly agree; they instructed the Compliance Committee to assist parties with enhancing domestic coordination consistent with lessons learned from the Executive Secretariat’s survey – including the “importance of cooperating with national institutions” and “engaging customs and other

¹⁰⁶ Document referenced is available at the Secretariat website, and is codified as: UNEP/CHW.14/23–UNEP/FAO/RC/COP.9/19–UNEP/POPS/COP.9/26 (Accessed October 2019)

¹⁰⁷ Document referenced is available at the Secretariat website. See pages 3 and 4: UNEP/CHW.14/INF/42–UNEP/FAO/RC/COP.9/INF/33–UNEP/POPS/COP.9/INF/42 (Accessed October 2019)

enforcement authorities (e.g., police, military) in a variety of convention-related activities” with a view to improving compliance.¹⁰⁸

Examining Specific Noncompliance Incidents: Liberia, the Central African Republic, and Oman

The bulk of compliance-related information available to anyone not formally a member of the Basel Compliance Committee is limited by the committee’s terms of reference. Paragraph 26 of the Committee’s terms of reference provide, “[t]he Committee, any party or others involved in its deliberations shall protect the confidentiality of the information received in confidence.” The terms of reference clarify that all relevant information available to the Compliance Committee was not available for general research purposes. Nevertheless, I analyzed six years of Basel Compliance Committee reports, decisions, and related publicly available information related to specific noncompliance incidents, with a focus on those related to Liberia, the Central African Republic, and Oman. While all data for each of these cases may not be publicly available, there remains a solid trail of breadcrumbs available for analysis between decisions of the Conferences of

¹⁰⁸ Document referenced is available at the Secretariat website. See page 6: UNEP/CHW.14/INF/42–UNEP/FAO/RC/COP.9/INF/33–UNEP/POPS/COP.9/INF/42 (Accessed October 2019)

the Parties, Compliance Committee decisions, and media reporting on the margins of relevant Basel meetings.

Practitioners were asked in surveys and interviews to share specific incidents of MEA noncompliance that they directly observed, participated in, or otherwise have experience with, such as through serving on a compliance committee. Incidents shared range from entirely unverifiable to easily verifiable cases of noncompliance, such as failure to report as required under the relevant MEA or a failure to establish a national focal point. Among the incidents shared were two Basel Convention-specific noncompliance cases: Liberia and Central African Republic. These were the only two Basel-related cases to which practitioners referred for which independent, public information is available for triangulation. A third Basel Convention case, Oman, was added. As previously noted, noncompliance cases before the Basel Compliance Committee appear to be limited to non-OECD countries – largely developing countries. The absence of OECD member state noncompliance cases and more developed country cases in general presents a challenge. It would be premature, however, to dismiss noncompliance as purely a development issue. Notwithstanding the lack of Basel Convention OECD compliance cases, reporting data for the Basel Convention shows that OECD countries also have not consistently met

reporting obligations. In other words, data show noncompliance is an issue that touches countries at all levels of development, even if formal compliance cases filed are more limited. Consequently, all noncompliance cases were ranked according to the International Monetary Fund's GDP ranking, current as of April 2019. The noncompliant state with the highest GDP was added to this case study. Empirical data collected from practitioners, combined with the overall picture of Basel cases outlined in this chapter, and an analysis of the specific factors contributing to each of the three noncompliance cases selected provide a more comprehensive perspective on the noncompliance phenomenon.

Liberia and Noncompliance with Basel Convention Reporting Obligations

The Republic of Liberia is an English speaking country in West Africa, bordered by Sierra Leone, Guinea, the Ivory Coast, and the Atlantic Ocean. Liberia relies heavily on foreign assistance; its principal exports are iron ore, rubber, diamonds, and gold. Liberia became a party to the Basel Convention on December 21, 2004, and has struggled with compliance since.

In November 2010, the Basel Executive Secretariat submitted a referral to the Compliance Committee regarding Liberia's noncompliance with reporting obligations under Article 13, paragraph 3. The Secretariat

attempted to reconcile the matter directly with the Liberian government before triggering a compliance assessment, but received no response.¹⁰⁹ Liberia had failed to submit annual reports since it became a Party in 2004.¹¹⁰ The Compliance Committee concluded Liberia was “facing difficulties in complying with its reporting obligations” at its eighth meeting – a diplomatic finding of noncompliance. The Committee initiated a process to assist Liberia with becoming compliant.¹¹¹ The process included a dialogue to better understand the nature of Liberia’s difficulties, as well as providing Liberia general assistance and guidance.

At its ninth meeting, the Compliance Committee took a decision with more aggressive language, presumably made necessary by the fact that Liberia remained out of compliance with reporting and had made no public effort to rectify the matter since the previous finding of noncompliance in Decision 8/6. In addition, the Compliance Committee also found Liberia out of compliance with additional obligations, specifically its obligations to

¹⁰⁹ The Executive Secretariat can make referrals to the Compliance Committee pursuant to Paragraph 9(c) of the Basel Compliance Committee’s terms of reference.

¹¹⁰ Archived document accessed 10/1/2019 and available here: <http://www.basel.int/Portals/4/Basel%20Convention/docs/legalmatters/compcommittee/submissions/Submission-Liberia.pdf>

¹¹¹ Decision 8/6 from the Compliance Committee 8th meeting.

identify a competent national authority pursuant to Article 5 of the Convention. In Decision 9/6, the Committee,

1. Reiterates its commitment to assist Liberia in addressing the difficulties that it experiences in complying with its reporting obligations under paragraph 3 of Article 13 of the Convention;
2. Expresses its concern about the continued lack of transmission of national reports as well as the lack of designation of a competent authority and expresses its conviction that this failure may contribute to the matter of concern;
3. Requests the Secretariat to send a letter to the focal point reminding this party of its reporting obligations under Article 13, as well as its obligation under Article 5 to designate a competent authority, and to report to the Committee as appropriate.

Liberia began to cooperate with the Compliance Committee only at the tenth meeting, though it still remained noncompliant. The Compliance Committee, “expresses its appreciation for the cooperation of Liberia with the Committee during its tenth meeting,” and instructs the Executive Secretariat to provide additional information and opportunities for training on reporting.¹¹² Importantly, the Committee invited Liberia to submit before its eleventh meeting a, “compliance action plan to assist ... in identifying the matter of concern as well as ways to resolve it.”

Liberia missed the deadline to produce its action plan and submit a national report, but did fulfill its obligation to designate and communicate a

¹¹² See Basel Compliance Committee Decision 10/6.

competent authority prior to the eleventh meeting.¹¹³ At its twelfth meeting, the Compliance Committee worked closely with Liberia to permit progress and determine “the root causes of the matter of concern as well as measures to resolve the matter of concern.” Decision 12/7 adopts the Action Plan with corresponding activities to address Liberia’s “root causes” of noncompliance. Decision 12/7 also makes \$40,000 in financial assistance available to support implementation of the Action Plan. The details of the Action Plan and the activities it contains were driven almost entirely by Liberia and not the Compliance Committee.¹¹⁴ The logic behind deferring to the noncompliant state is that the state better understands its obstacles to compliance, and therefore should be charged as primary with elaborating a plan to address them.

Basel action plans routinely identify a domestic “responsible authority” for implementing each listed activity. Liberia identified a single domestic agency: the Environmental Protection Authority. Liberia’s Action Plan includes activities consistent with domestic measures one might expect when insufficient interagency consultation is associated with

¹¹³ See Compliance Committee Decision 11/7, see paragraphs 2 and 2.

¹¹⁴ For most countries, the Action Plan is almost entirely self-driven, but in this case the Compliance Committee and Executive Secretariat worked with Liberian delegates to elaborate the plan in response to the root causes Liberia identified. (See also interview with Participant Three.)

noncompliance. For example, one Action Plan activity is as foundational as identifying domestic “stakeholders involved in the management of hazardous wastes and other wastes,” and undertaking a baseline “assessment of the legal and institutional frameworks including possible gaps to implement the Basel Convention in order to enable compliance with the reporting obligations.” Both of these activities are ones practitioners identified as *core to interagency consultation* early in the lifecycle of an MEA – and are critical as early as phases zero and one. Likewise, a third activity that similarly points to poor interagency consultation early in the Basel lifecycle is awareness-raising activities, specifically conducting domestic, “awareness-raising and training activities on the Basel Convention, with a focus on development of legislation and the development of an inventory of hazardous wastes and other wastes.” As drafted, this activity is targeted to raising the awareness of the domestic interagency audience and is consistent with practitioners’ assertion that poor interagency consultation leaves key domestic agency actors in-the-dark about the Convention and forthcoming needs, and are associated with noncompliance.

Liberia took measures to improve its noncompliance in time for the 13th meeting of the Compliance Committee. Decision 13/6 notes Liberia’s progress: it met reporting obligations for 2016, and also submitted an

assessment of the suitability of its legal and institutional framework.

Liberia's noncompliance case remains under review today. The country continues to make progress and implement its Action Plan with support from the Executive Secretariat and Compliance Committee.

Central African Republic and Noncompliance with Basel Convention Reporting Requirements

The Central African Republic (CAR) is a landlocked country in central Africa and north of the Democratic Republic of the Congo; its exports are predominantly diamonds and timber, and its economy is largely dependent on agriculture, forestry, and mining.¹¹⁵ The Central African Republic joined the Basel Convention on May 25, 2006, and has struggled with compliance since.

The Central African Republic elected to alert the Basel Compliance Committee to its own noncompliance pursuant to paragraph 9 (a) of the Committee's terms of reference, unlike Liberia whose noncompliance review was initiated by the Secretariat. The Central African Republic self-triggered two separate compliance reviews after concluding it was unable to comply with its obligations under the Convention. The first submission was

¹¹⁵ CIA Factbook, accessed November 2019: <https://www.cia.gov/library/publications/the-world-factbook/geos/ct.html#field-anchor-economy-exports>

in 2014 for a failure to comply with reporting obligations under Article 13 paragraph 3; this matter has since been resolved. The second submission was in June 2017 for a failure to comply with enforcement-related obligations, including the requirement to adopt national legislation to prevent and punish illegal traffic; this matter remains under review.

As with Liberia, the Central African Republic's first noncompliance review culminated in a self-developed Action Plan to address the root causes of its noncompliance. Compliance Committee Decision 11/3 adopted that Action Plan and simultaneously approved \$50,000 of financial assistance to implement it. Also similar to Liberia, the Central African Republic's Action Plan contains activities one might expect when insufficient interagency consultation is associated with noncompliance. Some activities are in fact the same. The duplication is likely the case for one of two reasons. First, both countries were taking corrective action for noncompliance with the same treaty obligations, and it is not unusual to look to others' practice in addressing the same problem. Second, both action plans appear to have been discussed and developed around the same time, with some overlap; the Central African Republic's was adopted first. It is possible Liberia looked to the Central African Republic's Action Plan as an example when crafting its own.

The Central African Republic Action Plan's activities include identifying domestic "stakeholders involved in the management of hazardous wastes and other wastes," and undertaking an "assessment of the legal and institutional frameworks including possible gaps to implement the Basel Convention in order to enable compliance with the reporting obligations." In addition, the Action Plan identifies the need for domestic awareness-raising activities, specifically "awareness-raising and training activities ...with a focus on development of legislation and the development of an inventory of hazardous wastes and other wastes." All of these activities are consistent with the components of basic interagency consultation a government would undertake early in the lifecycle of an MEA, and their inclusion is very much consistent with practitioners' assertion that insufficient interagency consultation early in the MEA lifecycle is associated with noncompliance.

The Central African Republic resolved its noncompliance with reporting obligations, and the Compliance Committee declared the matter resolved in Decision 12/4/Add.1. However in that same decision, the Compliance Committee also invited the Central African Republic to make another submission to the Committee regarding the compliance difficulties it noted it was experiencing with Article 4, paragraph 4 and Article 9,

paragraph 5 of the Convention. The Central African Republic submitted a second Action Plan, which was adopted in Compliance Committee Decision 13/3 and approved \$20,000 to implement it. As with the previous Action Plan, the second plan also contains activities consistent with those one would expect when insufficient interagency consultation has posed an obstacle to compliance. For example, the Action Plan calls for organizing a “national endorsement meeting with key stakeholders” as well as “a national workshop.”

A Lesson Learned?

The Central African Republic is an interesting case because there are two separate noncompliance incidents before the compliance Committee, and both culminate in the Action Plans to address the underlying causes of CAR’s noncompliance. What is noteworthy is CAR’s first Action Plan identified a single domestic agency as the primary “responsible authority” for implementing all listed activities: the Ministry of Environment, Ecology and Sustainable Development. However, the Central African Republic’s second Action Plan does not limit the responsible authority for implementing the plan to a single agency, but *explicitly calls for*

*participation by multiple agencies.*¹¹⁶ This change is significant because it is made in CAR's second Action Plan, suggesting the change from assigning a single responsible authority in the first Action Plan to explicitly assigning authority across several domestic agencies is a lesson learned from implementation of the first Action Plan. While not conclusive, this again is consistent with empirical data collected from practitioners in this study. The Central African Republic's noncompliance case remains open.

Oman and Noncompliance with Basel Convention Reporting Obligations

The Sultanate of Oman is a country in the Middle East located off of the gulf of Oman between Yemen and the United Arab Emirates and south of the Kingdom of Saudi Arabia. Its official language is Arabic. Oman is a small but wealthy, resource rich country. Oil and gas generate between 68% and 85% of government revenues.¹¹⁷ Oman became a party to the Basel Convention on May 9, 1995.

The Omani noncompliance case is interesting because of Oman's wealth relative to other noncompliant Basel parties. Oman initiated its noncompliance review in 2008 in a letter to the Executive Secretariat,

¹¹⁶ See Basel Compliance Committee Decision 13/3, specifically activities to facilitate the review of draft legislation to implement the Basel Convention.

¹¹⁷ CIA Factbook, accessed October 2019. Available here: https://www.cia.gov/library/publications/the-world-factbook/geos/print_mu.html

pursuant to paragraph 9 (a) of the Committee’s terms of reference.

However, it appears from that correspondence that Oman elected to do so *after* several Executive Secretariat communications expressing concerns with Oman’s failure to comply with reporting obligations under Article 13 paragraph 3. At that time, Oman had not submitted a national report since 2001. In its communication, Oman acknowledges difficulty meeting reporting obligations and notes “details of difficulty and requirements” to meeting its obligations include, “the provision of staff and funding,” to undertake a domestic assessment of hazardous inventory, resources for “staff training programs,” and “education workshops.”¹¹⁸ Notably, Oman’s communication outlines a number of proposed solutions to overcoming domestic challenges, but not the actual challenges. The purpose of Oman’s communication to the Compliance Committee was to request assistance with the listed needs.

Compliance Committee Decision 8/1 references Oman’s self-trigger, and “expresses concern” with Oman’s inability to comply. Decision 8/1 also notes that, “to improve the effectiveness of its assistance to Oman in addressing the compliance difficulties, the Committee needs more precise

¹¹⁸ Letter from the Sultanate of Oman dated 25 October 2008 to the Katherina Kummer Piery, Executive Secretariat of the Basel Convention.

information about the causes of the compliance difficulties and how the Committee may best assist Oman.” By its ninth meeting, Oman had yet to submit the requested information or updated reports, and in Decision 9/1 the Committee memorializes Oman’s commitment to prepare a Voluntary Action Plan with the assistance of the Executive Secretariat. By the tenth meeting, Oman submitted “elements of an action plan” with assistance by the Executive Secretariat. Meeting minutes from the Compliance Committee’s Tenth meeting and the Tenth Conference of the Parties confirm an action plan exists, referring to it as document CC.10/3/Add.1.

Unfortunately, this document is not available outside of the Compliance Committee. However, paragraphs 4 and 8 of Decision 10/1 offer a glimpse into the Omani challenges that may be contained in that document.

Paragraph 4 notes the Oman delegation worked with the Compliance Committee to determine, “the root causes” of Oman’s compliance as well as “measures to resolve the matter of concern.”¹¹⁹ These “root causes” referred to in Paragraph 4 form the basis of the activities in Oman’s action plan.

Paragraph 8 of Decision 10/1 goes on to approve those specific “activities of the compliance action plan of Oman.” Those activities include:

- (a) Identification of the key stakeholders whose involvement is required for restoring compliance with the national reporting

¹¹⁹ See Compliance Committee Decision 10/1.

obligation;

(b) Assessment of Oman's legal framework, including possible gaps to fully implement the Basel Convention;

(c) Identification of steps already taken to develop an inventory of hazardous and other wastes and of their outcome, and preliminary assessment of gaps towards the development of a sustainable inventory for the purpose of national reporting;

(d) Additional elements proposed by Oman such as a mission by a Committee member and the Secretariat to Oman with a view to securing the support of the necessary governmental authorities towards restoring compliance with the national reporting obligation;

What is noteworthy is Decision 10/11 was taken in October of 2011, *sixteen years* after Oman joined the Convention. Notwithstanding, several of the activities listed that both the Oman delegation and the Compliance Committee agreed will help bring it back into compliance are very fundamental activities, such as identifying stakeholders and undertaking an assessment of the domestic legal framework. Recall that Oman's initial communication noted to overcome its noncompliance it requested "the provision of staff and funding" and "staff training programs." Hiring staff and related funding are the remit of the state, but training is an activity that the Compliance Committee can request the Executive Secretary provide by allocating Basel Implementation Fund resources. However, notably and despite Oman's request for technical assistance, the activities that ultimately

are publicly referenced in Oman's Action Plan are not activities aimed at enhancing Omani officials' technical capacity.

Most curious, however, is Paragraph 8(d) that refers to a possible mission by a Compliance Committee member to Oman in order to secure the support of "necessary governmental authorities towards restoring compliance." This item can be interpreted in several ways. First, one can understand that there is either a divergence of views with regard to the importance of complying with Basel obligations, or there are agencies that are simply unconvinced of the importance, and the Omani Environment Ministry is seeking outside assistance with underscoring the seriousness of their noncompliance with a view to generating domestic commitment from disenfranchised stakeholders. Perhaps concomitantly, there is simply no high-level political will to allocate the resources necessary for Oman to comply with its reporting (and other) obligations. The mission is an attempt to generate that support. Insufficient political will to allocate resources is consistent with Oman's initial identification of insufficient staff and funding as a core challenge to their Basel compliance.

What is also interesting about the Oman case is the evidence available shows a clear pattern of engagement and disengagement in Basel, consistent with sinusoidal domestic priorities. Compliance Committee Decisions 9/1

and 10/1 refer to an Oman government that is engaged in resolving the noncompliance problem. But subsequent decisions 11/9 and 12/9 note the Compliance Committees “regrets” Oman is disengaged. Ultimately, the *very narrow* noncompliance matter before the Committee was resolved per Decision 13/8/Add1. However, the Executive Secretariat also reports Oman continues to fail to submit several other required reports although there have been no additional noncompliance cases initiated.¹²⁰

Various Executive Secretariat documents and Compliance Committee decisions previously referenced above also informally indicate Oman has not been in compliance with several other Basel obligations at various times, including identifying a national focal point. In fact, taken together, Oman appears to have struggled complying with various obligations since it joined. Much of the data surrounding the Oman case is not available outside of the Compliance Committee. However, from what is available, Oman’s noncompliance case is consistent with practitioners’ assertions that noncompliance is associated with insufficient domestic interagency consultation and related planning. But Oman’s noncompliance also appears to be a matter of political will in the classic sense - an unwillingness to prioritize Basel compliance and allocate the requisite resources. A skeptic

¹²⁰ See reporting summary in document UNEP/CHW.11/INF/14.

could assert that the Oman case is also consistent with a skeptical realist's view that international agreements do not affect state behavior. A more definitive conclusion is not possible without more information that is not currently publicly available.

Chapter Conclusions: Poor Domestic Preparation at Critical Stages in the MEA Lifecycle Appears Associated with Noncompliance, but the Risk of Confounding Factors cannot be Disregarded

While the triangulated data and empirical evidence presented in this study do not conclusively support a finding that insufficient domestic interagency consultation early in the MEA lifecycle is causally linked to noncompliance, the data do support practitioners' assertion there is an association between the two. However, it remains difficult to fully disentangle or compellingly discount all other potential confounding variables with the evidence available.

One could still argue it is plausible, for example, that a party has simply not earmarked the sufficient financial resources to support the sustained interagency consultative process required to meet reporting obligations, or to identify a national focal point. However, this argument is not entirely compelling because a national decision to dedicate resources is

typically the result of either 1) interagency consultations, or 2) a political decision.

In the case of the Basel Convention noncompliance writ large, most noncompliance appears to be a persistent, longstanding matter for the noncompliant parties – including in the cases of Liberia, Central African Republic, and Oman. Many parties noncompliant with Basel reporting obligations have been noncompliant since their Convention obligations entered into force. In these cases, noncompliance is unlikely to purely be a matter of dedicating national financial resources. If so, one would expect these noncompliant countries would have started out in compliance following a political decision to ratify the Convention, and then later fall out of compliance when that political support waned. Instead, we see the opposite. Additionally, these cases in particular also fit Hill’s expectation-capability gap theory of noncompliance. In other words, perhaps some noncompliant countries simply overestimated their ability to comply.

Insufficient technical resources are another potential confounding variable that cannot be fully discounted. Noncompliance associated with insufficient technical resources remains plausible, and there are some references to technical assistance in the case studies presented here. For example, the Basel Compliance Committee’s 2020-2021 Work Program

references a request to explore “modalities for disseminating ... existing guidance and technical assistance tools developed under the Convention to assist Parties to prevent and combat illegal traffic.” While technical assistance will remain an important facilitative tool, it does not compellingly explain parties’ failure to comply with the most basic and straightforward of obligations – such as the Article 5 obligation to identify a national focal point. Identification of a national focal point is a matter as simple as forwarding to the Convention Secretariat the name and contact information for a primary government liaison for official communication.

Finally, while practitioners’ have used *insufficient political will* in this study to mean poor planning resulting from insufficient domestic interagency consultation early in the MEA lifecycle, there is the broader understanding of political will. This understanding is that a state is willing to sustain the resources needed to accomplish a particular objective. It is entirely possible that a premise taken for granted in this study that MEAs affect state behavior – is simply not true; in some cases noncompliance is as a direct result of insufficient political will in that broadest sense. States have made the calculation that the benefits of ratification even in the face of noncompliance outweigh being a nonparty to the Convention.

Chapter 7: Relationship between Design and Compliance

Design as a Noncompliance Mitigation Tool

The previous chapters addressed the first of two questions at the heart of this project, namely: what factors are associated with MEA noncompliance? Drawing on new empirical data collected from MEA practitioners, and by triangulating that data with case studies from the Basel Convention, I have established an association between noncompliance and poor domestic preparation because of insufficient interagency consultation early in the MEA lifecycle. This chapter will address the second question: is there a relationship between the design of MEA provisions and compliance with those provisions?

Poor domestic preparation, consultation, and socialization of issues within the scope of a treaty negotiation increases the likelihood a state accepts obligations it is unprepared or unable to meet, which can result in first-order noncompliance. In some cases, states are simply caught unprepared to implement on entry into force; they failed to allocate the necessary human, financial, or technical resources because all relevant domestic implementing agencies and stakeholders were not adequately consulted prior to ratification. Insufficient domestic coordination during the

negotiation phase can mean important budgetary milestones are missed, and requests to allocate national resources are simply never made.

In other cases, negotiators lack a complete understanding of the domestic legislative and regulatory framework, including laws relevant to the subject under negotiation. These negotiators may then accept obligations that are incompatible with domestic laws or are more ambitious than practical given the domestic framework, thereby increasing the likelihood the state cannot comply. Others accept ambitious obligations for which the state lacks technical capacity, but do so because they are either unaware or are under the misimpression the domestic technical gap can be closed in time for ratification. In short, what empirical evidence indicates in many cases is noncompliance may not be a willful or technical deficiency, but rather an inadvertent bureaucratic byproduct of poor interagency consultation and stove piping. Practitioners refer to this phenomenon with a vague, but diplomatic euphemism: *insufficient political will*.

Designing a better Provision: Balancing Flexibility with Ambition

Knowing practitioners consider the insufficient interagency consultation phenomenon widespread, is it possible to design obligations that increase the likelihood a state can recover? Or are states that fail to plan

early in the MEA lifecycle doomed to be more prone to noncompliance as a result?

Treaties are sticky, especially multilateral ones. Amending them requires significant time, resources, as well as the corresponding willingness of many states to do so. The Basel Convention Ban Amendment is just one of many examples illustrating how difficult treaty amendments can be; Ban took nearly 24 years to enter into force from its adoption. Simultaneously, domestic political cycles, interests, challenges, resource demands, and priorities also change over time- sometimes rapidly. It is impractical to expect that treaties can or will be amended in response to all future challenges given the significant time, expense, and political capital required to do so. Consequently, designing treaty obligations consistent with the dynamic nature of governance makes logical sense.

Over 90% of practitioners surveyed believe the manner in which treaty obligations are designed has a relationship with the extent to which states comply with them. They overwhelmingly assert that good design means balancing a degree of flexibility for states to determine how they implement their obligations while maintaining a level of legal certainty and clarity among the parties with respect to expected outcomes. On its face, drafting with the objective of maintaining both flexibility and certainty may

seem incompatible. But striking a balance between flexibility and certainty is a logical and practical approach to designing treaties that are relevant and appropriate to the dynamic realities of potentially 196 parties.

Practitioner preference for flexibility in implementation is consistent with their parallel observations on noncompliance. Failure to adequately prepare early in the MEA lifecycle need not doom states to noncompliance later provided the state is committed to taking measures consistent with the objectives of the agreement. MEA provisions can be designed in a manner that potentially mitigates noncompliance associated with insufficient preparation early in the MEA lifecycle by allowing states a degree of flexibility in their implementation. While this view is supported by empirical evidence, a more conclusive finding requires a more stringent analysis – such as a comparative analysis of states’ record of compliance with both obligation designs over time. Insufficient data was available for such a comprehensive study at the time of this writing, largely in part because of the sensitivities regarding treaty compliance writ large.

Practitioners Overwhelmingly prefer Obligations of Outcome

Practitioners recognize that an exceptional challenge in multilateral treaty design is establishing, “universally applicable obligations” that also “take into account differences among parties,” such as differences with

respect to the magnitude of a particular environmental challenge, the feasibility of specific technical measures, as well as socioeconomic and political realities. Practitioners widely observed the need to maintain balance between flexibility and clarity on the intended outcomes and expectations of a treaty provision. When presented with two specific design options (see Figure H), they overwhelmingly chose obligations of outcome as the most likely to result in good compliance. Explanations for this preference varied, but generally fit within three categories. First, obligations designed to provide states with flexibility to implement can help overcome a number of traditional factors leading to noncompliance. Those factors include higher priority domestic challenges, insufficient national technical capacity, insufficient political will, incompatible domestic legal frameworks, and other unrelated but constraining domestic issues that can inevitably complicate state efforts to meet the landscape of growing international commitments.

Obligation Design

Provision Designs	Description	Example Provision
1: Obligations of Action	In obligations of action, the provision elaborates a course of specific steps that a state is required to take.	Parties install "X" air quality technology to in all operating coal fired power plants built 2005 or earlier.
2: Obligations of Outcome	In obligations of outcome, the provision emphasizes the expected end result and gives states the responsibility and flexibility of deciding which actions to take in order to achieve that end result.	Parties shall reduce PM2.5 by 10% from an established 2000 baseline.

Figure H

Second, there is an emergent view that the international communities' approach to compliance with MEAs must shift so that the core consideration is no longer how to measure whether a state has complied but rather how does one design a compliance mechanism that simultaneously incentivizes compliance *and* the implementation of progressively more ambitious measures over time. The flexibility of an obligation of outcome is consistent with this approach. Practitioners offered several examples of MEAs that demonstrate movement in this direction, including the Paris Agreement under the UN Framework on Climate Change and the ongoing negotiation of new biodiversity targets under the Convention on Biological Diversity.

Third, obligations that are overly prescriptive can be a challenge to implement. They can unnecessarily confine states to implementing higher-

cost measures when lower-cost alternatives that are equally as suitable are available. For example, an obligation related to particulate matter mitigation from coal-fired power plants may be unnecessary for a country whose power primarily comes from nuclear power facilities. Alternatively, requiring specific technical solutions to coal-fired power generation may be both cost prohibitive and unnecessary in cases where simply switching from one type of coal to another will do. One practitioner observed that outcome-based provisions may, “produce more meaningful effects while allowing flexibility to use [other] relevant mechanisms.”¹²¹ In other words, outcome-based provisions allow parties to use other existing mechanisms, such as complementary mechanisms concluded under other MEAs.

Some Caution Against Automatically Favoring One Design over Another

While the preference for obligations of outcome is stark, several practitioners noted that either design option can be appropriate under different circumstances, and expressed caution against favoring one design over another for various reasons. First, obligations of outcome may require states to have some baseline knowledge of their domestic situation that may simply be impractical for certain states given socio-economic status or competing economic priorities. For example, if the hypothetical obligation

¹²¹ Survey Respondent 33.

of outcome is to reduce black carbon emissions by a certain percent, then a state must know three things prior to implementation: what is the current level of black carbon emissions; what are the sources of those emissions; and what are the possible interventions or policies to reduce emissions. This information may not be readily available for any number of reasons, and consequently resources may need to be invested to conduct an inventory to compile the information. Alternatively, if the obligation is to install a specific technology in all coal-fired power plants built or retro-fitted from the year 2000 and later, then the state only needs to know the number of power plants it has that fall within that category. In follow-up discussions, one practitioner suggested obligations of action almost serve a capacity-building function when a state has limited bandwidth to determine how best to implement an obligation.

Some practitioners cautioned that one should not assume treaty negotiators settled on a particular obligation design because it was determined to be the most appropriate. And others expressed reservations about any effort to categorically express preferences for one design over another because context is important. A persistent objective of MEA negotiators is to reduce uncertainty. One expert from an international organization recognized an important advantage with obligations of action is

they are in some ways “easier to measure and test,” and therefore easier to evaluate from a compliance perspective. A second advantage is “countries may comply to the letter to avoid being [found] in noncompliance.”¹²² In other words, obligations of action can offer assurances of certainty on both sides. The party implementing can be more certain that the measures it implements pursuant to the obligation are deemed compliant; other counterparties can feel more confident that all states both know what to expect of one another and are that they are taking measures of similar ambition and effect.

Chapter Conclusions: Design can Likely Mitigate some Factors Associated with Noncompliance, and Domestic Contracts are not Analogous to International Multilateral Agreements.

Practitioners overwhelmingly agree there is a relationship between the design of MEA provisions and compliance with those provisions. When presented with two different designs, practitioners overwhelmingly expressed a preference for obligations of outcome. This preference for a more flexible design is logical and follows from their assertion that noncompliance is associated with poor national preparation due to insufficient interagency consultation early in the MEA lifecycle. Empirical data in this study supports the preliminary conclusion that preserving state

¹²² Survey Respondent 33.

flexibility when implementing obligations *increases the likelihood* states will act to correct noncompliance. Design, in other words, can likely mitigate some factors associated with MEA noncompliance.

While empirical data gathered supports this preliminary finding, a conclusive finding requires more stringent analysis, such as a comparative analysis of states' record of compliance with both obligation designs over time. Insufficient data is available for such a comprehensive study at the time of writing, largely in part because of the sensitivities regarding treaty compliance writ large. This remains an area ripe for future study.

A preliminary conclusion consistent with the empirical findings of this research is domestic contracts are not analogous to multilateral agreements. A basic principle of contract law is that contract terms must be certain and ambiguity should be avoided. Contract lawyers pursue exhaustive detail in contracts in order to define and quantify expected outcomes, as well as the specific actions counterparties will take to achieve them. However in the case of MEAs, empirical data point to a clear preference and practical benefit to defining expected outcomes while retaining state flexibility to determine the specific actions to achieve them. This is a clear divergence that reinforces the view that contract law best

practice may be inappropriate for the design of multilateral environmental agreements.

Multilateral agreements and domestic contracts diverge in important ways. Domestic contract periods of performance are generally defined and short-term; multilateral agreements rarely have a defined period of performance; and state obligations often continue indefinitely or until amended. Domestic contracts are typically bilateral, and when they are multilateral they typically have few counterparties. Multilateral agreements often have many more counterparties, and potentially as many as 196 parties in the case of agreements concluded under the auspices of the United Nations. The number of counterparties makes amending multilateral agreements practically challenging and costly.

Finally, a maxim of international relations is state cooperation takes place in an anarchical system. States remain the final arbiters of their disputes, even when they explicitly agree to a third party arbitration mechanism. This is not so for domestic contracts, where disputes can quickly move to a third party judicial system whose decisions are final. This key difference incentivizes contract counterparties to include exhaustive detail in contracts; these details are guardrails to protect against arbitrary judicial decisions. More work is necessary to draw a definitive conclusion

on the merits of one legal design over another, but sufficient differences exist between domestic contracts and international agreements to suggest the practice of looking to contract law best practice may be ill advised.

Chapter 8: Conclusion and Areas for Future Work

Many environmental challenges are transboundary in nature and states continue to actively turn to multilateral environmental agreements to address them. Any measures to improve, incentivize, or otherwise facilitate compliance with MEAs are an important and relevant public policy objective because noncompliance undermines collective environmental policy goals. While there is a robust body of literature available on compliance, gaps remain. This research contributes to those gaps by asking and answering two questions: 1) what factors are associated with MEA noncompliance; and 2) is there a relationship between the design of MEA provisions and compliance with those provisions.

What Factors are Associated with MEA Noncompliance?

Traditional explanations for compliance with international law are numerous, but predominantly related to a state's desire to establish credibility and remain in good standing with the international community, avoid sanctions or coercion, reasons of political identity and to respect rules they deem as legitimate, out of self-interest, or for reasons of process – specifically as a result of a transnational legal process by which states internalize international rules through continued engagement with civil society and other parties. However, empirical data collected in this project

only reflects a subset of factors contained in the academic literature. These data reinforce an association between compliance and process but in a far narrower sense. MEA noncompliance is overwhelmingly attributed to a gap in the domestic process, specifically states' inadequate preparation early in the MEA lifecycle, particularly in preparation for and while actively negotiating the agreement.

When states fail to undertake robust domestic interagency consultation, they are inadequately prepared to represent their interests. They may consequently engage in negotiations without an adequate understanding of the nature of their domestic challenges, the relevant domestic legal framework, or whether they have the sufficient interagency support or national resources available to implement the obligations they plan to ratify, *inter alia*. Without this foundational knowledge and participation from the relevant bureaucratic actors, states can unknowingly accept obligations on which they are unprepared or unable to deliver. Basel Convention noncompliance case studies examined in Chapter Six are consistent with practitioners' assertion that there is an association between that noncompliance and insufficient interagency consultation early in the MEA lifecycle – though insufficient information is available for a conclusive finding.

Liberia, Central African Republic, and Oman each identified in their respective Action Plans a number of activities they determined would help them overcome their noncompliance. Several of these activities are ones practitioners identified as core to interagency consultation early in the lifecycle of an MEA – and are critical as early as phases zero and one. Liberia, for example, determined it needed to identify domestic stakeholders involved in complying with its core treaty obligations, specifically those involved in the management of hazardous wastes and other wastes. Additionally, Liberia reported the need to undertake a baseline “assessment of its legal and institutional frameworks including possible gaps to implement the Basel Convention in order to enable compliance with the reporting obligations.” Such an assessment would be expected immediately prior to ratification.

Is there a Relationship between the Design of MEA Provisions and Compliance?

Henkin quipped, “Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.”¹²³ But practitioners indicate that noncompliance associated with inadequate preparation is widespread in the multilateral environmental community. Knowing this, a logical and relevant policy question is whether it is possible

¹²³ Henkin, *How Nations Behave*, 47.

to mitigate MEA noncompliance associated with insufficient domestic preparation. Empirical data in this study supports the preliminary conclusion that preserving state flexibility to determine how to implement obligations increases the likelihood states can act to correct noncompliance. One manner in which preserving that flexibility can be achieved is in the drafting of treaty provisions.

Put simply: good design means balancing a degree of flexibility for states to determine how to best implement their obligations while maintaining a level of legal certainty and clarity among the parties with respect to expected outcomes. Practitioners overwhelmingly agree that obligations of outcome are superior to obligations of action in this regard, but additional study is needed before a more conclusive determination and recommendation can be made. However, an interesting preliminary conclusion that can be drawn from this research is domestic contracts are not very analogous to multilateral treaties, even though both are mechanisms for memorializing agreements between counterparties. From that conclusion, it follows that contract law best practice may not be appropriate to guide the design of multilateral environmental agreements. Precision and extensive detail are a virtue in domestic contracts where periods of performance are clear, and amending contract terms can be as simple as seeking an additional

agreement between two parties. However, multilateral agreements differ dramatically in several ways: contract periods of performance are often indefinite, there can be as many as 196 contracting parties, and amendments can be costly and practically challenging.

What is noteworthy about the empirical findings of this project is that they are additive to traditional academic explanations for noncompliance, and they also provide an alternate perspective to the international political discourse that distills noncompliance to the notion that states decide to not comply or they take an affirmative decision to reverse an earlier decision to comply for reasons of self-interest. While the specific findings of this research do not appear in academic literature, the role and function of process and its relationship to compliance do. The role of process in facilitating compliance is central to Koh's descriptive Transnational Legal Process theory, in which he argues that norm internalization is the primary reason states obey international law.

Norm internalization is the result of what Koh describes as 'a vertical process' that accompanies international cooperation and international law development. As part of a vertical process, public and private actors interact in a variety of international forums to interpret, enforce, and internalize rules of international law. The act of public and private actors engaging on the

margins of international cooperation also influences their participation in shaping a state's domestic legal framework, which in turn makes states predisposed to comply with obligations they accept. A transnational legal process positively correlates with compliance because domestic frameworks are continuously shaped by international dialogue, and therefore both predisposed and also well prepared to comply with international norms and obligations.

It is noteworthy that transnational theory asserts that the *international process* influences a sovereign states domestic process and subsequently its compliance through norm internalization. However, practitioners in this research believe the direction of the relationship is inverse; they point to the importance of the *domestic process* in empowering states and informing their international engagement early in the MEA lifecycle. Practitioners argue that it is the domestic process that sets states on a trajectory of compliance, or at least that the absence of a robust domestic process is associated with noncompliance.

One possible explanation for this divergence is a perspective bias. As previously noted, Harold Koh is a practicing U.S. lawyer and academic, trained in the common law tradition. In the United States, transparency and public participation are the norm, but this is not necessarily the case in other

countries. In those cases where public participation is not common, a vertical process that results in states internalizing norms is far less likely to exist. Original data collected in this research is from practitioners that have experience with a variety of legal systems, and is therefore likely to reflect a more balanced perspective. In sum, the Transnational Legal Theory may describe norm internalization in certain countries with characteristics associated with democratic states, but not others.

The findings of this research can and should shape the manner in which states engage with one another throughout the MEA lifecycle, but particularly in the earliest and arguably most crucial phases of cooperation when it comes to compliance. Practitioners argue these phases - defined in this study as phases zero and one - are crucial because these are the precise stages at which a state's failure to prepare may set them on a trajectory of noncompliance.

Areas for Future Work

Previous chapters have already identified two areas for future work. The first is examining the relationship between the composition of state delegations that participate in MEA meetings and those states long-term compliance with their MEA obligations. Practitioners identified delegation composition as a possible indicator of the degree to which states have

engaged a robust domestic interagency consultative process for reasons discussed in Chapter Five.

The second area for future work is on the relationship between provision design and compliance, specifically whether obligations of outcome are associated with better compliance than obligations of action. While design was a central area of inquiry to this project, insufficient compliance data is publicly available for the intra-treaty process tracing necessary for a reliable and generalizable conclusion. However, empirical data suggest obligations of outcome may be associated with better state compliance.

This chapter proposes a new third area for future work. A takeaway from this research is those engaged in multilateral rule development should undertake due diligence to ensure that the positions taken by any state delegated representatives with whom they are negotiating are informed by a robust domestic consultative process. Two logical questions follow: *how can one know? And can the answer to that question forecast the likelihood a state will comply?* Answers to these questions may lie in future work that builds on the results of this research and expands on negotiating game theories.

Negotiating game theories are primarily concerned with state actors' negotiating behavior and their motives *right up to* the point at which an agreement is adopted or ratified. These theories do not directly address compliance; their utility ends at describing how and whether states will arrive at an agreed outcome and subsequently ratify it, generally by describing the dynamics of a negotiating process leading up to the point of agreement. Two such theories are Putnam's Two-level Game Theory and Druckman's Dual Responsiveness Model.

Robert Putnam introduced a theory of negotiation and conflict resolution called *Two-Level Game Theory* in the late 1980s. His theory is the culmination of his research on the G7 process between 1976 and 1979. At the Bonn Summit in 1978 Putnam observed what he described as a shift in the behavior of state negotiating behavior in his Two-level Game Theory Model. Putnam asserts the, "need to move beyond the mere observation that domestic factors influence international affairs and vice versa," and to instead, "seek theories that integrate both spheres, accounting for the areas of entanglement between them."¹²⁴ His model frames multilateral international negotiations as consisting of two simultaneous and parallel negotiations: one at the international level between and among countries,

¹²⁴ Putnam, "Diplomacy and Domestic Politics," 434.

and the second at the national level, between each government and their respective domestic stakeholders. Two sets of actors are involved in each parallel negotiation, with the negotiator sitting at both tables simultaneously.¹²⁵

At the international level, the negotiator faces foreign counterparts alongside her international advisors. At the domestic level, she is surrounded by “party and parliamentary figures, spokespersons for domestic agencies, representatives of key interest groups,” and political advisors.¹²⁶ What makes these parallel negotiations complex is “that moves that are rational for a player at one... may be impolitic for that same player at the other.”¹²⁷ The end result is an iterative and complex two-level game in which state negotiators work to ensure outcomes of international negotiations reflect the objectives and concerns of domestic stakeholders with a view to securing their eventual support for joining and delivering on the commitments made.

Putnam’s model seeks to first and foremost explain the process by which the actors at both the international and domestic table inch closer

¹²⁵ Putnam uses the term “table” to illustrate a dynamic where the negotiator is undertaking with two simultaneous negotiations with two groups, each seated at a table.

¹²⁶ Putnam, “Diplomacy and Domestic Politics,” 434.

¹²⁷ Ibid.

towards an agreement – the landmark moment when all sides agree on a written way forward and a compromise is brokered. Putnam uses the term “win-sets” to describe what negotiating academics commonly refer to as the *zone of possible agreement*. Win-sets contain a set of options agreeable to both a state’s domestic constituency as well as other state delegations. International agreements are made, Putnam argues, when win-sets between states overlap. Putnam is less interested in what happens beyond the point at which states agree, although he does not ignore it entirely. Putnam addresses voluntary and involuntary defection, as well as the role of domestic constraints on an ability of a negotiator to deliver. The larger the win-set, the less likely a state will fail to deliver. His interest ends at the point that all parties are able to ratify their agreements – in other words, the point at which all parties are able to secure agreement from all interested domestic and international stakeholders.

Another academic who has noted the multiple-game nature of international relations is Daniel Druckman. In his *Dual Responsiveness Model*, Druckman observes negotiators as dual hatted: in the first, the negotiator is the bargainer working to secure an outcome with other nations. In the second, the negotiator is a representative of his/her internal bureaucracy, reconciling diverse and sometimes conflicting interagency

views. Druckman's model speaks to different "monitoring functions" of negotiators depending on which of the dual hats they're wearing. When acting as a negotiator-as-bargainer with other countries, negotiators look for either movement in response to concessions or a change in negotiating behavior in response to a complex "function of expectations and valuations." When wearing the hat of a bureaucratic representative, Druckman notes that each negotiator "attempts to build a package that will be acceptable both to the other side and his bureaucracy."¹²⁸

Druckman's Dual Responsiveness Model departs from the Two-Level Game Theory in that it presents the domestic and international process as complementary and not as a single simultaneous game – a departure Putnam criticizes directly. However, it also departs from Putnam's model in that it does look more closely at the role of the negotiator vis-à-vis interagency players. Inherent to this role is a conflicting aspect to the negotiator's obligations described as the *boundary role conflict* dilemma, which is the responsibility to balance, "the expectations of his own side that emerge from an internal consensus on the positions he is to take and the expectations of the opponent that must be taken into account if an agreement is to be

¹²⁸ Druckman, "Boundary Role Conflict," 652.

reached.”¹²⁹ Of direct interest to compliance is the degree to which a negotiator has engaged the domestic interagency to understand their preferences – and critically – their ability and commitment to implementing those preferences and to identify others that may be acceptable.

Druckman uses the word “accountability” to describe the negotiator’s degree of agency, or extent to which a negotiator is responsible and responsive to the domestic interagency:

“...highly accountable representatives were appointed and required to report regularly concerning their deliberations; low accountable representatives were elected as relatively free agents.”¹³⁰

Druckman notes the degree of agency is particularly relevant in a negotiation, particularly as the negotiator is acting as a representative. The degree to which the negotiator’s preferences depart in priority from domestic agencies can be problematic if those agencies for some reason feel their interests were not effectively represented. Domestic agencies could in that case withdraw their willingness to endorse the negotiated outcome. Under such a circumstance, a domestic agency may block consensus and impede a successful negotiation, which would have direct implications for how

¹²⁹ Druckman, “Boundary Role Conflict,” 660.

¹³⁰ Ibid

“successful” the negotiator is effort we must pick at this dynamic a bit more to understand the implications for compliance.

Future Work: Moving Beyond Negotiations and Forecasting the Likelihood of Compliance

Both Putnam’s and Druckman’s theories focus entirely on the process leading up to the moments an agreement is brokered and subsequently ratified by all relevant parties – domestic and international. The agreement in this process is sometimes called a negotiated or compromise package. To use Putnam’s term, win-sets contain many possible packages, each with varying degrees of acceptability to the domestic or international audiences depending on how closely they align with each groups favored outcome. But empirical evidence gathered in this study suggests that the level of acquiescence needed to get to the initial *yes* in a multilateral negotiation to accept a negotiated package is a relatively low bar. The commitment necessary to *undertake the measures necessary for compliance* appears to be a much higher bar, as evident by noncompliance in the Basel Convention.

Putnam’s and Druckman’s models explain negotiation behavior up until the point at which a negotiated package is adopted. It logically follows that to arrive at this point all relevant actors merely have to find the compromise package *acceptable enough to not object* to its adoption. With

respect to MEAs in particular, Putnam's and Druckman's interests are satisfied by the bare minimum level of support necessary to get to the adoption of the treaty text at the end of a protracted negotiation. However, not all of the potential outcomes that fall within the zone of possible agreement are equally as appealing to states. Particular outcomes reflect certain state interests more closely than others.

Interesting dynamics come into play at the point at which many states begin to converge around a potentially acceptable compromise. In the case a state that finds the compromise unacceptable, expressing dissatisfaction may mean a state representative is required to formally voice a state's objection and formally break consensus on the floor of a plenary meeting. Such an act would either result in the continuation of the negotiating process until a new and acceptable compromise can be reached or trigger a vote to move forward.

The diplomatic or political capital a state expends to object is reduced when a handful of other countries also object, but there is still a cost. The fewer the states objecting, the higher the political price the objecting state pays to delay agreement with a view to bettering the outcome from a national perspective. One practitioner described an unfortunate situation in which a state found itself isolated in objecting to compromise language in a

UN decision; the practitioner characterized the situation as being forced into “a game of chicken” by other delegates.¹³¹ In that specific case, that state was dissatisfied with the proposed compromise but not so dissatisfied that the state wished to expend the political capital necessary to derail adoption of a decision that every other United Nations Member States present were otherwise prepared to accept.

Once MEA text is adopted and open for state signature, states again have another opportunity to reevaluate their position and decide whether they will take the steps to formally become a party. Potentially at this stage there are principal agents within the government advocating for ratification, having staked their personal and professional reputations on the negotiated outcome. There may also be tremendous political pressure from domestic civil society to join, or even pressure from politicians within the state to ratify and showcase the MEA as a political deliverable.¹³² At this point the state will likely have joined consensus to adopt the text of the multilateral agreement, publicly signaling its acceptability. Importantly, it is *not enough* for a negotiated text to merely be acceptable at adoption when concerned with compliance. Widespread noncompliance is evidence of this.

¹³¹ Interview with Practitioner Three.

¹³² Interview with Practitioner Six.

The political capital necessary to not object to the adoption of outcome text a state finds mildly unsatisfying is far lower than the political capital necessary to commit the human, financial, and technical resources to implement its provisions. In short, the reality that a state joins consensus or otherwise does not object to the adoption of an MEA tells us little about that state's long-term commitment to implementing that outcome. Ratification is a much stronger signal, but still there may be domestic political calculations that are enough to tip the scales in favor of ratifying but not enough to sustain the long-term commitment to undertake the measures necessary to comply.

Two Possible Indicators that may Forecast Compliance

Empirical evidence gathered in this study offers a foundation for additional work on forecasting the likelihood of state compliance with MEAs. Widespread noncompliance with environmental agreements supports the logical conclusion that the level of political commitment required for a state to *ratify* an MEA is less than the level of political commitment to sustain the domestic measures necessary to *comply* with its obligations. Future work should analyze states with a record of long-term compliance to identify indicators that might forecast the likelihood of future state compliance.

Practitioners point to an association between noncompliance and poor preparation early in the MEA lifecycle due to insufficient domestic interagency consultation. A number of reasons this phenomenon may lead to noncompliance are established in Chapter Five and will not be repeated here. Chapter Five also outlines a consultative process practitioners describe as robust, and which sets a state up for success and compliance. Taken together, all of these factors may be reduced to possible indicators that may inform a new theory.

Empirical evidence collected in this study suggests two factors are required to increase the likelihood of a state's compliance with its MEA obligations. The first factor is that a state has a clear understanding of its ability to implement and comply with its MEA obligations. Such a clear understanding is established through a thorough interagency consultative process in which, *inter alia*, administrative bureaucrats assess the nature and extent of the relevant domestic environmental challenge, and examine the domestic legal framework to identify gaps to implementing anticipated future obligations under the MEA. The second factor that increases the likelihood a state will comply with its MEA obligations is that the state has earnestly committed to undertaking the measures necessary to implement and comply.

There are two indicators that suggest the above referenced factors may be met, and the strength of the indicators may consequently be used to forecast probability of compliance. They are *accountability* and the *degree of satisfaction* with a negotiated outcome:

- Indicator 1: The degree of accountability between the negotiator and domestic bureaucracy throughout the negotiating process, as well as the degree of accountability between the domestic bureaucracy and the negotiator; and
- Indicator 2: The bureaucracy's degree of satisfaction with the negotiated outcome.

Possible Indicator 1: Degree of Accountability

Accountability is an important indicator that should be measured in two directions: the accountability of the negotiator to the bureaucracy – both administrative bureaucrats in domestic agencies and politicians, and the accountability between the bureaucracy and the negotiator.¹³³

In the first direction, and consistent with Druckman's definition of accountability, is accountability as it pertains to a negotiator's responsibility to the bureaucracy. The more a negotiator is obligated to check in with the bureaucracy to keep them apprised and seek approval for proposed

¹³³ Druckman uses this accountability as it pertains to the accountability between the negotiator and his/her bureaucracy.

concessions, the more accountability Druckman asserts the negotiator has. In the second direction is the degree of accountability from the domestic bureaucracy to the negotiator, which can be measured by the extent to which agencies with equities in the specific negotiation participate in the domestic interagency consultative process.

Accountability in the negotiating process is a good indicator because a core element of accountability is sustained communication. Communication is two directional. Two directional communication early in the MEA process could prevent the very types of noncompliance cases that are persistent with the Basel Convention and – according to practitioners in this study – MEAs writ large. When it comes to compliance the *obligation* to check in or remain in communication with a bureaucracy is less relevant than the material benefit of doing so. The benefits accrue to both the negotiator and the bureaucracy. Continued communication throughout the negotiating process breeds trust and engenders commitment to both the process and eventual outcome - all necessary ingredients to sustaining the measures necessary to comply.

Possible Indicator 2: Degree of Satisfaction with Negotiated Outcome

A negotiator “attempts to build a package that will be acceptable both to the other side and his bureaucracy.”¹³⁴ A negotiator’s understanding of what is both acceptable and practical to implement will depend heavily upon the existence and quality of communication in a robust domestic interagency process early in the MEA lifecycle. However, for compliance, it is not enough to bring home a negotiated package that is merely *acceptable* to all sides. As established, concluding a proposal is *acceptable* is a low bar given the incredible public pressure a state may be under to accept a multilateral compromise. Merely finding an outcome acceptable does not indicate the degree to which it conforms to state interests, or otherwise confirm that a state and its domestic agencies are committed to taking the necessary measures and dedicating the necessary resources to comply. There are different degrees to which a bureaucracy may be satisfied with the outcome. The more satisfied domestic implementing agencies are with the outcome, the more likely those agencies will be willing to allocate and *sustain* resources to implementing it. For these reasons, the satisfaction of domestic agencies responsible for implementing the negotiated package is a possible indicator for compliance outcomes.

¹³⁴ Druckman, “Boundary Role Conflict,” 652.

Assessing a bureaucracy's degree of satisfaction with an outcome – in this case a multilateral environmental agreement – is a difficult but not impossible. More work is necessary to codify potential positive and negative metrics to measure a state's degree of satisfaction. Positive indicators could include explicit political statements of support for an outcome, affirming a commitment to implement the outcome, or evidence that the outcome reflects the objectives for which a state has publicly advocated throughout the negotiation. Negative indicators could include explicit political statements of concern regarding the outcome or elements of the outcome, a state's formal reservation deposited on ratification, or domestic constituencies' criticism of an outcome that rises to the level of threatening broad public support.

Rationale for Indicators

The rationale for investigating the above-referenced possible compliance indicators is straightforward. Practitioners associate poor domestic planning early in the MEA process with noncompliance. Logically, the antithesis - a robust domestic consultative process that integrates the views of all domestic agencies with equities in the relevant MEA early in the MEA lifecycle – would be positively associated with compliance. Such a process is associated with compliance because it

bolsters the likelihood the state has taken the domestic steps necessary to understand its unique domestic challenges as well as options for addressing those challenges. Taken together, the proposed indicators provide insight into the degree to which there is a robust domestic process, and also the degree to which a state is committed to implementing the outcome following the negotiation process. When both accountability and the degree of satisfaction with the outcome are high, there is a higher likelihood a state has the domestic foundation to be compliant with its obligations. If one of these indicators is low, there is a risk that a state does not have the requisite domestic foundation and is potentially in danger of experiencing noncompliance. If both are low, then there is a high risk. This relationship is illustrated in Figure I.

Relationship between proposed indicators and compliance

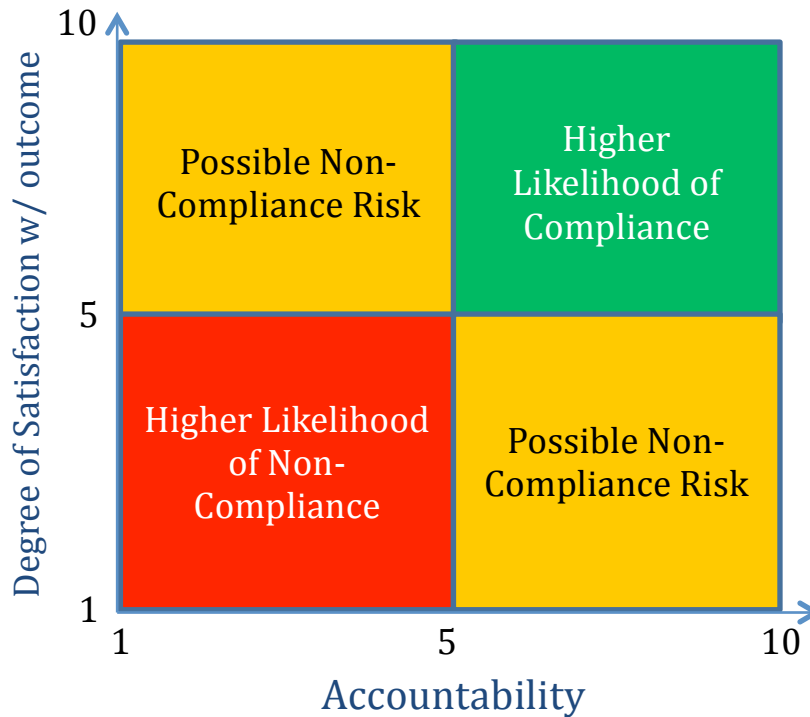


Figure I

An important caveat to note is that there are other variables that a state must take into consideration when deciding whether to ratify an MEA.

Those include whether ratification is in its broader interest and whether there is widespread domestic support for ratification (e.g., from civil society).

While these variables are also associated with compliance, they are more relevant to influencing a state's decision *whether* to comply, and accountability and degree of satisfaction with the negotiated outcome are more directly relevant to compliance over time.

Final Reflections

As states continue to look to multilateral cooperation and international legal instruments to address transboundary environmental challenges, more work is needed to better understand the factors that contribute to better compliance. Practitioners in this research assert that noncompliance with MEAs is widespread, and they associate this noncompliance with states' failure to undertake a robust domestic interagency consultative process at critical phases of the MEA lifecycle. The design of legal provisions may offer an opportunity to mitigate noncompliance, particularly by allowing states a certain degree of flexibility with regard to determining the measures they take to implement obligations in order to achieve the agreed outcome. The findings of this research would benefit from additional study, including work that looks past ratification and analyzes long-term compliance records to identify indicators that might forecast the likelihood a state will comply. Two indicators supported by the empirical data collected in this research are an excellent starting point: *accountability* and *the degree of satisfaction*.

Bibliography

- “9 out of 10 People Worldwide Breathe Polluted Air, but More Countries Are Taking Action.” Accessed September 23, 2019. <https://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action>.
- A Selection of Legal Maxims: Classified and Illustrated*. T. & J.W. Johnson, 1852.
- Abbott, Kenneth W., and Duncan Snidal. “Hard and Soft Law in International Governance.” *International Organization* 54, no. 3 (2000): 421–56.
- “After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars, New Edition - New Edition (Princeton Studies in International History and Politics): G. John Ikenberry: 9780691169217: Amazon.Com: Books.” Accessed September 25, 2019. https://www.amazon.com/After-Victory-Institutions-Rebuilding-International/dp/0691169217/ref=sr_1_1?keywords=after+victory&qid=1569439578&sr=8-1.
- Agger, Ben. “Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance.” *Annual Review of Sociology* 17, no. 1 (August 1, 1991): 105–31. <https://doi.org/10.1146/annurev.so.17.080191.000541>.
- Ahram, Ariel I. “Concepts and Measurement in Multimethod Research.” *Political Research Quarterly* 66, no. 2 (June 1, 2013): 280–91. <https://doi.org/10.1177/1065912911427453>.
- “An Estimated 12.6 Million Deaths Each Year Are Attributable to Unhealthy Environments.” Accessed November 6, 2019. <https://www.who.int/news-room/detail/15-03-2016-an-estimated-12-6-million-deaths-each-year-are-attributable-to-unhealthy-environments>.
- Angelova, Anastasia. “Compelling Compliance with International Regimes : China and the Missile Technology Control Regime Angelova, Anastasia A.” *Journal of Transatlantic Law* 38, no. 419 (1999). <http://catalogue.sciencespo.fr/ark:/46513/sc0000310209>.
- Ashford, Mary-Wynne. “The Responsibility to Protect: A New Notion of State Sovereignty.” *Medicine, Conflict and Survival* 19, no. 1 (January 1, 2003): 35–38. <https://doi.org/10.1080/13623690308409662>.
- Aust, Anthony. “Modern Treaty Law and Practice by Anthony Aust.” Cambridge Core, October 2013. <https://doi.org/10.1017/CBO9781139152341>.
- Barriball, K. Louise, and Alison While. “Collecting Data Using a Semi-Structured Interview: A Discussion Paper.” *Journal of Advanced Nursing* 19, no. 2 (1994): 328–35. <https://doi.org/10.1111/j.1365-2648.1994.tb01088.x>.

- Bodansky, Daniel. "The Legal Character of the Paris Agreement." *Review of European, Comparative & International Environmental Law* 25, no. 2 (July 1, 2016): 142–50. <https://doi.org/10.1111/reel.12154>.
- Buys, Cindy Galway. "Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon." *SSRN Electronic Journal*, 2015. <https://doi.org/10.2139/ssrn.2632333>.
- Chayes, Abram, and Antonia Handler Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge [u.a.: Harvard Univ. Press, 1998.
- Cohen, Bernard. *Developing Sociological Knowledge*. 2 edition. Chicago: Cengage Learning, 1988.
- Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford University Press, 2003. <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199270989.001.0001/acprof-9780199270989>.
- Corbin, Juliet, and Anselm Strauss. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. 3rd edition. Los Angeles, Calif: SAGE Publications, Inc, 2007.
- D'Amato, Anthony. "International Law and Rawls' Theory of Justice." *Faculty Working Papers*, January 1, 2010. <https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/119>.
- D'Amato, Anthony. "It's a Bird, It's a Plane, It's Jus Cogens Essay." *Connecticut Journal of International Law*, no. 1 (1991 1990): 1–6.
- D'Amato, Anthony. "Legal Uncertainty." *California Law Review* 71, no. 1 (January 1983): 1. <https://doi.org/10.2307/3480139>.
- Dari-Mattiacci, Giuseppe, and Bruno Deffains. "Uncertainty of Law and the Legal Process," 2007. <https://doi.org/10.1628/093245607783242990>.
- Denemark, Robert Allen. *The International Studies Encyclopedia*. Malden, MA: Wiley-Blackwell, 2010. http://www.isacompendium.com/subscriber/uid=1088/book?id=g9781444336597_9781444336597.
- Druckman, Daniel. "Boundary Role Conflict: Negotiation as Dual Responsiveness." *Journal of Conflict Resolution* 21, no. 4 (1977): 639–62. <https://doi.org/10.1177/002200277702100406>.

- Esty, Daniel C, and Maria H Ivanova. "Revitalizing Global Environmental Governance: A Function-Driven Approach," n.d., 24.
- Evera, Stephen Van. *Guide to Methods for Students of Political Science*. 1 edition. Ithaca: Cornell University Press, 1997.
- "E-Waste Rises 8% by Weight in 2 Years as Incomes Rise, Prices Fall - United Nations University." Accessed January 4, 2020. <https://unu.edu/media-relations/releases/ewaste-rises-8-percent-by-weight-in-2-years.html>.
- Fabbri, Marco, and Sven Hoeppe. "Compliance Externalities and the Role-Model Effect on Law Abidance: Field and Survey Experimental Evidence." *Journal of Empirical Legal Studies* 15, no. 3 (2018): 539–62. <https://doi.org/10.1111/jels.12185>.
- Foucault, Michel, and Colin Gordon. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. 1st American ed. New York: Pantheon Books, 1980.
- Galbraith, Jean. "Treaty Options: Towards a Behavioral Understanding of Treaty Design." *Virginia Journal of International Law*, Virginia Journal of International Law, 53, no. 309 (2013). https://scholarship.law.upenn.edu/faculty_scholarship/1455/.
- George, Alexander L. *Case Studies and Theory Development in the Social Sciences*. Fourth Printing edition. Cambridge, Mass: The MIT Press, 2005.
- Gilpin. *War and Change in World Politics*. Reprint edition. Cambridge: Cambridge University Press, 1983.
- Glaser, Barney G., Anselm L. Strauss, and Elizabeth Strutzel. "The Discovery of Grounded Theory; Strategies for Qualitative Research." *Nursing Research* 17, no. 4 (August 1968): 364.
- Goeteyn, N., and F. Maes. "Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?" *Chinese Journal of International Law* 10, no. 4 (December 1, 2011): 791–826. <https://doi.org/10.1093/chinesejil/jmr042>.
- Guzman, Andrew. "'A Compliance-Based Theory of International Law' by Andrew T. Guzman." *California Law Review* 90, no. 6 (December 2002): 1826–86.
- Hale, Thomas, David Held, and Kevin Young. *Gridlock: Why Global Cooperation Is Failing When We Need It Most*. 1 edition. Cambridge, UK: Polity, 2013.
- Harris, William A. "On 'Scope Conditions' in Sociological Theories." *Social and Economic Studies* 46, no. 4 (1997): 123–27.

- Hart, H. L. A., Leslie Green, Joseph Raz, and Penelope A. Bulloch. *The Concept of Law*. 3 edition. Oxford, United Kingdom: Oxford University Press, 2012.
- Henkin, Louis. *How Nations Behave*. 2 edition. New York: Columbia University Press, 1979.
- Hill, Christopher. "The Capability-Expectations Gap, or Conceptualizing Europe's International Role." *JCMS: Journal of Common Market Studies* 31, no. 3 (1993): 305–28. <https://doi.org/10.1111/j.1468-5965.1993.tb00466.x>.
- Hollis, Martin, and Steve Smith. *Explaining and Understanding International Relations*. 1 edition. Clarendon Press, 1991.
- Jensen, Nathan M., and Edmund J. Malesky. "Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention." *International Organization* 72, no. 1 (ed 2018): 33–69. <https://doi.org/10.1017/S0020818317000443>.
- Kagan, Robert. *The World America Made*. New York: Vintage, 2013.
- Kahneman, Daniel, and Amos Tversky. "Prospect Theory: An Analysis of Decision under Risk." *Econometrica* 47, no. 2 (1979): 263–91.
- Keohane, Robert, and Joseph S. Nye Jr, eds. *Transnational Relations and World Politics*. Cambridge, Mass.: Harvard University Press, 1972.
- Keohane, Robert O. *After Hegemony: Cooperation and Discord in the World Political Economy*. 1st Princeton Classic Ed edition. Princeton, N.J: Princeton University Press, 2005.
- Keohane, Robert O. "International Relations and International Law: Two Optics." *Harvard International Law Journal* 38 (1997): 487.
- King, Gary, Robert O. Keohane, and Sidney Verba. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton, N.J: Princeton University Press, 1994.
- Koh, Harold Hongju, Abram Chayes, Antonia Handler Chayes, and Thomas M. Franck. "Why Do Nations Obey International Law?" *The Yale Law Journal* 106, no. 8 (June 1997): 2599. <https://doi.org/10.2307/797228>.
- Lipson, Charles. "Why Are Some International Agreements Informal?" *International Organization* 45, no. 4 (ed 1991): 495–538. <https://doi.org/10.1017/S0020818300033191>.
- Lukes, Steven. *Power: A Radical View*. 2nd edition. Houndmills, Basingstoke, Hampshire : New York: Palgrave, 2005.

- Lutmar, Carmela, Cristiane L. Carneiro, and Sara McLaughlin Mitchell. "Formal Commitments and States' Interests: Compliance in International Relations." *International Interactions* 42, no. 4 (August 7, 2016): 559–64. <https://doi.org/10.1080/03050629.2016.1187144>.
- McAdams, Richard H., and Janice Nadler. "Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game." *Journal of Empirical Legal Studies* 2, no. 1 (March 2005): 87–123. <https://doi.org/10.1111/j.1740-1461.2005.00032.x>.
- Mearsheimer, John J. "The False Promise of International Institutions." *International Security* 19, no. 3 (95 1994): 5–49.
- Mearsheimer, John J. *The Tragedy of Great Power Politics*. 1 edition. New York: W. W. Norton & Company, 2014.
- Milliken, P. "Grounded Theory." *Encyclopedia of Research Design*, no. N. Salkind (Ed.) (2010): 549–54.
- Milliken, P. Jane, and Rita Schreiber. "Examining the Nexus between Grounded Theory and Symbolic Interactionism." *International Journal of Qualitative Methods* 11, no. 5 (December 1, 2012): 684–96. <https://doi.org/10.1177/160940691201100510>.
- Mitchell, Ronald B. "International Environmental Agreements: A Survey of Their Features, Formation, and Effects." *Annual Review of Environment and Resources* 28, no. 1 (2003): 429–61. <https://doi.org/10.1146/annurev.energy.28.050302.105603>.
- Morgenthau, H. J. *Politics among Nations; the Struggle for Power and Peace [by] Hans J. Morgenthau*. Fourth Edition edition. Alfred A. Knopf, 1968.
- Morgenthau, Hans J., Kenneth W. Thompson, and David Clinton. *Politics Among Nations*. 7 edition. Boston: McGraw-Hill Education, 2005.
- Morrow, James D. "When Do States Follow the Laws of War?" *The American Political Science Review* 101, no. 3 (2007): 559–72.
- Murphy, Sean D. *United States Practice in International Law: Volume 1, 1999–2001*. Cambridge University Press, 2003.
- Nye, Joseph S., and Robert O. Keohane. "Transnational Relations and World Politics: An Introduction." *International Organization* 25, no. 3 (1971): 329–49.
- Posner, Eric A. *Law and Social Norms*. Harvard University Press, 2009.
- Posner, Richard A. *Frontiers of Legal Theory*. New Ed edition. Cambridge, Mass.: Harvard University Press, 2004.

- Post, Lori Ann, Amber N. W. Raile, and Eric D. Raile. "Defining Political Will." *Politics & Policy* 38, no. 4 (2010): 653–76. <https://doi.org/10.1111/j.1747-1346.2010.00253.x>.
- "Primer of Contract Planning: Full Text Finder Results." Accessed July 13, 2019. [http://resolver.ebscohost.com.ezproxy.lib.vt.edu/openurl?genre=article&atitle=Primer+of+contract+planning.&title=Southern+California+Law+Review&issn=00383910&isbn=&volume=48&issue=&date=19750101&au=Macneil%2c+I.+R.&spage=627&pages=627-704&sid=EBSCO%3aIndex+to+Legal+Periodicals+Retrospective%3a+1908-1981+\(H.W.+Wilson\)%3a525271141&site=ftf-live](http://resolver.ebscohost.com.ezproxy.lib.vt.edu/openurl?genre=article&atitle=Primer+of+contract+planning.&title=Southern+California+Law+Review&issn=00383910&isbn=&volume=48&issue=&date=19750101&au=Macneil%2c+I.+R.&spage=627&pages=627-704&sid=EBSCO%3aIndex+to+Legal+Periodicals+Retrospective%3a+1908-1981+(H.W.+Wilson)%3a525271141&site=ftf-live).
- Putnam, Robert D. "Diplomacy and Domestic Politics: The Logic of Two-Level Games." *International Organization* 42, no. 3 (ed 1988): 427–60. <https://doi.org/10.1017/S0020818300027697>.
- Reimann, Mathias, and Reinhard Zimmermann, eds. *The Oxford Handbook of Comparative Law*. 1 edition. Oxford: Oxford University Press, 2008.
- Rosenau, James N. "Compliance and Public Authority: A Theory with International Applications. Oran R. Young." *The Journal of Politics* 43, no. 2 (May 1, 1981): 609–10. <https://doi.org/10.2307/2130408>.
- Rosenau, James N. "Governance in the Twenty-First Century." *Global Governance* 1, no. 1 (1995): 13–43.
- "Rotterdam Convention Signatories Adopt Compliance Mechanism." *Chemical Watch*, May 16, 2019. <https://chemicalwatch.com/77499/rotterdam-convention-signatories-adopt-compliance-mechanism>.
- Sartori, Giovanni. "Concept Misformation in Comparative Politics*." *American Political Science Review* 64, no. 4 (December 1970): 1033–53. <https://doi.org/10.2307/1958356>.
- Schachter, Oscar. "Towards a Theory of International Obligation." *Virginia Journal of International Law* 8 (1968 1967): 300.
- Simmons, Beth. "Compliance with International Agreements." *The Annual Review of Political Science* 1 (1998): 75–93.
- Simmons, Beth, and Daniel Hopkins. "The Constraining Power of International Treaties: Theory and Methods," 2005. <https://dash.harvard.edu/handle/1/3153315>.
- Snidal, Duncan. "Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes." *American Political Science Review* 79, no. 4 (1985): 923–42.
- Stein, Arthur A. "Coordination and Collaboration: Regimes in an Anarchic World." *International Organization* 36, no. 2 (1982): 299–324.

- Stein, Jana von. "Compliance with International Law." *Oxford Research Encyclopedia of International Studies*, November 2017. <https://doi.org/10.1093/acrefore/9780190846626.013.81>.
- Stein Jana von. "International Law: Understanding Compliance and Enforcement." *The International Studies Encyclopedia*, April 8, 2010.
- Opinio Juris. "Symposium: The Assumptions of Koh's Transnational Legal Process as Counter-Strategy," February 26, 2018. <http://opiniojuris.org/2018/02/26/symposium-the-assumptions-of-kohs-transnational-legal-process-as-counter-strategy/>.
- Teichman, Doron, and Eyal Zamir. "Behavioral Analysis of International Law: On Lawmaking and Nudging." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, January 26, 2018. <https://papers.ssrn.com/abstract=3110367>.
- Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions About Health, Wealth, and Happiness*. Revised & Expanded edition. New York: Penguin Books, 2009.
- SAGE Publications Ltd. "The SAGE Handbook of Grounded Theory," November 12, 2019. <https://uk.sagepub.com/en-gb/eur/the-sage-handbook-of-grounded-theory/book234413>.
- Walt, Stephen M. *The Hell of Good Intentions: America's Foreign Policy Elite and the Decline of U.S. Primacy*. New York: Farrar, Straus and Giroux, 2018.
- Waltz, Kenneth N. *Theory of International Politics*. 1 edition. Long Grove, Ill: Waveland Press, 2010.
- Wendt, Alexander. *Social Theory of International Politics*. Cambridge, UK ; New York: Cambridge University Press, 1999.
- Wendt, Alexander. *Social Theory of International Politics*. Cambridge, UK ; New York: Cambridge University Press, 1999.
- Whitman, J., ed. *Palgrave Advances in Global Governance*. 2009 edition. New York: Palgrave Macmillan, 2009.
- WHO. "WHO | Ambient and Household Air Pollution and Health." Accessed November 6, 2019. http://www.who.int/phe/health_topics/outdoorair/databases/en/.
- "Yale Law Journal | Vol 116 | Iss 4." Accessed January 4, 2020. <https://digitalcommons.law.yale.edu/yjl/vol116/iss4/>.
- Young, Oran R. *Compliance and Public Authority: A Theory with International Applications*. Baltimore: Published for Resources for the Future by the Johns Hopkins University Press, 1979.

Appendices

Appendix A Online Survey Platform

The following is a screenshot taken from www.treatycompliance.com, the website from which the electronic semi-structured survey contained Appendix B was administered.

This survey takes approximately 20 minutes. You can participate confidentially.

Compliance with Multilateral Environmental Agreements

Home Take Survey

Invited to Participate in our Survey?

Click Here

Compliance with Multilateral Environmental Agreements

Home Take Survey

This study is intended to better understand under what circumstances states become noncompliant with their multilateral environmental treaty obligations. The outcome of this research is expected to contribute to the body of literature on treaty compliance. You are invited to participate because you have been identified as a professional with extensive experience with multilateral environmental agreements (MEAs), treaty implementation, or relevant international law. Taking part in this research is completely up to you. We cannot offer compensation for your taking part in this research. You may participate confidentially. You will be presented with a number of questions about MEA implementation; in some cases these questions are open-ended, and in others we will offer you multiple choices from which to choose.

You must complete the survey in one session.

Begin Survey

Appendix B Semi-Structured Questionnaire

Semi-Structured Questionnaire (available at www.treatycompliance.com)

Pre-Questionnaire Introduction

Thank you for taking the time to share your thoughts. Only the research team will have access to responses you submit through this portal. The information you share may be used in an academic product, including a dissertation, published case study, or other peer-reviewed article. You have the opportunity to offer this information confidentially or in a manner that obscures its connection to you.

We are interested in understanding under what circumstances states fail to comply with multilateral environmental agreements (MEAs). You have been selected as a participant because you have experience with MEA implementation in one or more states. Your candid responses are much appreciated.

Please remember to hit "submit" at the end of the survey. Please do not use your browser back button. If you prefer to share your information another way, please email treatycompliance@vt.edu and we will send you a survey in Microsoft Word format.

Questionnaire Section 1

1. Do you consent to participate in this study?
Option: Yes/No
2. Do you wish to participate confidentially? If you answer yes, your name will not appear in any subsequent publication or presentation that uses this research.
Option: Yes/No
3. Do you wish to keep your specific organizational affiliation confidential? If yes, your organization's specific name (if you share it) will not appear in any subsequent publication or presentation that uses this research.
Option: Yes/No
4. Please share your name and organizational affiliation. (Note: these will not be shared beyond research team if you have elected to participate confidentially.)
5. With which type of organization are you currently professionally affiliated?
Options presented: government, international organization (e.g., UNEP, WHO, etc.), NGO, industry, Academia, Other
6. Have you participated in multilateral environmental treaty negotiations or served on an environment-related compliance committee?
Option: Yes/No/I don't know

7. Have you been involved in national treaty implementation, either directly as a government official or indirectly by providing advice and technical assistance to government officials? If yes, please share in what capacity and for which country or countries.

Open-ended answer block

Questionnaire Section 2

8. Do you agree with the following definition of compliance: to comply means to fully conform to a rule, standard, or law?

Options: Yes/No

9. If you do not agree with the compliance definition offered, please offer your preferred definition.

Open-ended answer block

10. The terminology “hard” and “soft” commitment are routinely used in the context of diplomatic commitments. What do these qualifiers mean to you?

Open-ended answer block

11. In your view, do countries treat hard and soft commitments the same in their domestic implementation process?

Open-ended answer block

12. Have you ever observed an incident of state noncompliance, and if so please briefly describe that incident, including the relevant countries and treaty if possible. (If you have observed more than one incident, please indicate so but choose one to describe. If you have not observed one, please answer "N/A")

13. Was the above-referenced incident of noncompliance related to a *binding* multilateral environmental commitment?

Option: Yes/No/I don't know/Not applicable

14. Who initially identified that incident?

Option: I don't know/the noncompliant country self-reported/another country/a treaty secretariat/an NGO/industry/not applicable

15. Was the incident ever brought to the attention of the international community?

Option: Yes/No/I don't know/Not Applicable

16. If the incident was brought to the attention of the international community, how was it brought to the attention of the community?

Options: Not Applicable/ the noncompliant country self-reported the incident/another country identified the incident/a secretariat reported the incident/an NGO reported the incident

17. To what factor(s) do you attribute that incident of noncompliance? More than one option may be selected.
Options: lack of political will to implement at the national level/ insufficient political will to implement at the international level/insufficient political will to enforce compliance/lack of clarity of the relevant provision/ inconsistent interpretation among parties of the relevant provision/ insufficient financial resources at the national level/ insufficient national technical capacity/conflict of laws between the national framework and international agreement/perception the relevant obligation lacks legitimacy/other (please clarify)
18. If you selected more than one factor in the previous question, to which factor do you give *greatest weight*?
Open-ended answer block
19. Do you think the incident of noncompliance you identify could have been avoided? If so, how?
Open-ended answer block
20. Would your reason for noncompliance change if the incident you describe were attributed to a country with a different level of economic development? (e.g., developed country versus developing country.) If so, please explain.
Open-ended answer block

Questionnaire Section 3

Section Introduction: There are different ways to design treaty obligations. We are interested in your views on two different types of design that we describe as a) obligations of action or b) obligations of outcome.

In obligations of action, the provision elaborates a course of specific steps that a state is required to take. For example: Parties install "X" air quality technology to in all operating coal fired power plants built 2005 or earlier.

In obligations of outcome, the provision emphasizes the expected end result and gives states the responsibility and flexibility of deciding which actions to take in order to achieve that end result. For example: Parties shall reduce PM2.5 by 10% from an established 2000 baseline.

21. Do you think there is a relationship between how treaty provisions are designed and the extent to which a state fully complies with those provisions?
Options: Yes/No/I don't know
22. If you answered yes to the previous question, please share more on your views.
Open-ended answer block
23. At the top of this page, we offer two "types" of obligation design. Do you believe either "obligations of outcome" or "obligations of action" as we describe above

will produce different compliance outcomes? Why or why not?

Open-ended answer block

24. Would your answer to the above-referenced question change depending on the development level of the country implementing the obligation? (OECD countries versus small-island developing states, for example?)

Option: Yes/No

25. Is there any additional information you'd like to offer?

Open-ended answer block

26. Is there anyone else you recommend we contact to speak to about compliance?

Open-ended answer block

Appendix C Profile of Confidential Interviewees

Eight interviewees elected to participate confidentially and in their personal capacities. Consequently, the views they shared are not attributed directly to them or their organization by name. However, important information about regarding professional affiliation and employment history is being made available about each confidential interview participant in a manner that is not personally identifiable. Where individuals are described as government officials, the views each offered were not and should not be officially attributed to the government of that country. All interviews were conducted in 2019.

Confidential Interviewee 1 – (Industry)

Interviewee one has over a decade of experience with industry, representing a range of industry organizations that are actively affected by multilateral cooperation on environmental issues, including legally binding treaties. In his capacity as an industry representative, he has experience working with various states and industry organizations taking measures consistent with international obligations. He also has over a decade of experience representing a state government in multilateral negotiations, including but not limited to MEA negotiations.

Confidential Interviewee 2 – (Government-Jordan)

Interviewee two has nearly 20 years of experience representing the Government of the Kingdom of Jordan in both international affairs and domestic environmental implementation. He has direct experience in implementing treaty obligations, as well as serving in positions in which he was charged with assessing other states' compliance with their MEA obligations.

Confidential Interviewee 3 – (IO)

Interviewee three has over twenty-five years of experience working in a large international environmental organization. In this capacity, she has overseen program management and facilitated multilateral state cooperation on the development and implementation of international law. Her experience also extends to working with various civil society and industry organizations on implementation and compliance issues. She is widely recognized as an international expert on MEA compliance.

Confidential Interviewee 4 – (IO)

Interviewee four has almost twenty years of MEA experience. Over five of those years were in the capacity of representing a developing county government in MEA negotiations and the implementation of related obligations. In addition, he has over fifteen years of experience developing and implementing environmental projects to assist developing countries with implementing their MEA obligations. In both roles, he developed a deep understanding of compliance challenges.

Confidential Interviewee 5 – (Government-USA)

Interviewee five has over fifteen years of experience working in the negotiation and implementation of MEAs, and over twenty years of experience working on international environmental issues – including assisting other governments with implementing their MEA obligations. She routinely represents the United States in international environmental meetings, during which she consults with other country representatives on their experiences and difficulties implementing environmental commitments.

Confidential Interviewee 6 – (Government-Sweden)

Interviewee six has over twenty years of experience representing the Government of Sweden in international MEA engagements, including in negotiation and implementation. She routinely engages both developed and developing countries to understand the challenges of implementing MEA commitments, and has experience consulting on the development and implementation of programs. She is widely recognized as an international expert on environment and MEA implementation.

Confidential Interviewee 7 – (Government-Brazil)

Interviewee seven has over twenty years of experience representing the Government of Brazil in international MEA negotiations, predominantly from the foreign affairs perspective. He has also served as an expert in international compliance panels tasked with developing and reviewing international environmental law.

Confidential Interviewee 8 – (Government-Nigeria)

Interviewee eight has over twenty years of combined academic and government experience in MEA compliance, including serving on domestic and international MEA compliance-related panels. He is widely recognized as an expert on Nigerian law, as well as environmental laws across the continent of Africa.