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Comment on the Paper by Patrick Széll

Ronald B. Mitchell

Patrick Széll's paper describing the new non-compliance regimes of the Montreal Protocol and the Convention on Long-Range Transboundary Air Pollution provides invaluable insight into innovative mechanisms for inducing greater compliance with these conventions.[1] These regimes fill the gap between reporting requirements, which by themselves cannot produce compliance, and dispute settlement procedures, which are so rarely invoked. His paper provides a window onto the content of these non-compliance mechanisms and how they were negotiated, and provides an important analysis of why they were designed as they were.

The following discussion places his views in a broader framework that is currently being developed among international relations scholars concerned with improving cooperation in order to solve international environmental problems. Széll's paper points out that the all-but-ubiquitous provisions for reporting and dispute settlement in most treaties are frequently ineffective and also are often inappropriate to environmental agreements. Given this, how can the international community succeed at eliciting compliance? The paper explains the efforts being made to design systems that provide secretariats and implementation committees with the tools needed to respond in "supportive, constructive" ways to identified cases of non-compliance. The paper uses the terminology of a deterrence-based model of addressing non-compliance, but none the less clearly supports and fits into an argument for designing compliance systems focused on inducing compliance by increasing initial incentives for compliance.

Rather than designing tougher and stricter compliance mechanisms, we need to design better provisions. To accomplish the difficult task of eliciting compliance, analysts must understand (a) the various reasons for non-compliance, and (b) the linkages between a treaty's monitoring system, the framing of its proscriptions and the processes for responding to non-compliance.

Much current research shows that there are a variety of reasons for non-compliance with international environmental treaties.[2] Non-compliance stems from the lack of capacity to comply and from inadvertence as often as from intentional

[1]Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 18 *ILM* 1442 (1979) and associated protocols; Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 26 *ILM* 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 *ILM* 1541 (1987); and London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990, 30 *ILM* 539 (1991).

[2]See, for example, R.B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (MIT Press, Cambridge, MA, 1994); A. Chayes and A. Handler Chayes, "On Compliance", 47 (2) *International Organization* (1993); and H. Jacobson and E. Brown Weiss, "Implementing and Complying with International Environmental Accords: A Framework for Research", paper presented at the annual meeting of the American Political Science Association, San Francisco, CA, September, 1990.

violation. Since most cases involve the former two reasons for non-compliance, sanctions and the confrontational atmosphere associated with dispute settlement are not only inappropriate but also ineffective. Treaties will most probably continue to include mechanisms for addressing the rare cases that involve wilful violations. However, the need to develop, evaluate and refine less confrontational mechanisms along the lines of the "friendly" non-compliance regimes described by Széll is crucial. Although systems that facilitate compliance rather than punish violation are a political necessity because of the jealousy with which treaty parties guard their national sovereignty, such systems also prove more effective at inducing compliance.

New research shows that treaties often do not elicit compliance through the traditional, deterrence-based strategy of increasing the costs of non-compliance. Two other strategies exist: incentive-based systems that increase the benefits of compliance, and coerced-compliance systems that reduce the opportunities for non-compliance.[3] Sanctions against treaty violations are generally unlikely and too weak to deter;[4] incentive-based and coerced-compliance strategies skirt this problem by making actors view compliance as an easier and more attractive alternative even if their non-compliance were never detected. Most treaties rely on a mix of all three strategies.

Incentive-based and coerced-compliance systems ease the demands placed on the monitoring system. Incentive-based strategies assume that most instances of non-compliance arise from an inability by the party to comply and they respond to this inability with financial or technical assistance. Such a system makes monitoring easier by creating incentives for parties to reveal, rather than conceal, their non-compliance. In an adversarial, deterrence-based setting, accurate self-reporting involves self-incrimination. In an incentive-based context, self-reporting becomes a precondition for assistance. The Montreal Protocol's Financial Mechanism and those in the Framework Convention on Climate Change provide good examples of this approach.[5]

Coerced-compliance systems prevent violations from occurring – rather than imposing sanctions on those that do occur by defining prohibited activities in terms that reduce the number of opportunities for violation and that ensure that the actions that precede violation can be readily and cheaply monitored. Treaties regulating oil pollution have increased compliance by shifting their focus from regulation of the discharges that tanker captains make on each voyage to regulation of the equipment that the tanker builders installed during construction.[6] This shift has greatly improved monitoring because the act of building a tanker is both less frequent and more transparent than the act of discharging waste.

[3]For a more extended version of this distinction, see A. Reiss Jr, "Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion", 47 (4) *Law and Contemporary Problems* (1984); and Mitchell, *op. cit.*, note 2.

[4]See A. Handler Chayes, A. Chayes and R. Mitchell, "Active Compliance Management in Environmental Treaties", this volume.

[5]Montreal Protocol, *op. cit.*, note 1; and Framework Convention on Climate Change, 15 May 1992, 31 *ILM* 851 (1992).

[6]International Convention for the Prevention of Pollution from Ships, 2 November 1973, 12 *ILM* 1319 (1973); and Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, 17 *ILM* 1546 (1978). See R. Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance", 48 (3) *International Organization* (1994), for a comparative analysis of the efforts to use both these methods in international regulation of oil pollution.

Self-reporting itself can be improved when a secretariat creates a reporting system under which those responsible for reporting find it both easy and worthwhile to report accurately. This involves keeping the information requested to the minimum necessary to accurately monitor the relevant behaviour, and ensuring that the Secretariat analyses and disseminates the collected information in ways that further, rather than harm, the interests of those providing the reports. Crucial methods for achieving this include coordinating treaty reporting with existing monitoring infrastructures, computerizing the reporting process, and integrating reporting with positive responses to, rather than imposing sanctions in cases of non-compliance.

An effective non-compliance regime must strive: (a) to establish primary rules that make compliance more attractive in most instances and minimize the resources needed for effective monitoring; (b) to create a system of self-reporting and independent verification that coincides with the interests of those doing the monitoring but effectively identifies non-compliance and the reasons for it; and (c) to ensure that most cases of non-compliance are responded to, by helping parties come into compliance where appropriate, but reserving the option of taking a more confrontational approach when necessary. The effectiveness of any treaty monitoring system depends crucially on the nature of the rules being monitored and the system of responses to detected cases of non-compliance. Treaties are likely to be most effective in changing the behaviour of targeted actors when treaty design commences with a comprehensive approach that integrates the design of the monitoring system with the design of the treaty's primary rules and the non-compliance response systems. A realistic goal cannot be the elimination of non-compliance; rather, negotiators should strive to increase the likelihood that actors will choose compliance, while also improving the ability of treaties to successfully manage any non-compliance that does occur.

Széll's paper highlights the need for increased research into questions of how to improve mechanisms for monitoring in particular, and for inducing compliance in general. As Széll notes, each treaty must "feel its way" and tailor its compliance system to fit its particular circumstances "in light of experience". However, this does not preclude the negotiators of one treaty from learning from the successes and failures of other treaties. Indeed, given that it will be many years before we are able to draw useful lessons from the experiences of the non-compliance regimes that Széll helped develop and describes, identifying the successes and failures of other treaties is a crucial enterprise. Analysis of older treaties can provide the empirical evidence needed to avoid conjectures about the effects of various mechanisms; conjectures that are necessary when discussing more recent non-compliance regimes. Various efforts to do just that will allow future negotiators to have greater confidence that their choices between alternative strategies will help to increase compliance and ultimately to improve the earth's environment.[7]

[7]Projects in this area include those at, or with funding from, Dartmouth College (Oran Young and Marc Levy); the European Science Foundation (Kenneth Hanf); the Foundation for International Environmental Law and Development (James Cameron); the Fridtjof Nansen Institute (Steinar Andresen); Harvard University (Abram Chayes and Antonia Chayes); Harvard University (William Clark, Robert Keohane, and Marc Levy); the International Institute for Applied Systems Analysis (David Victor and Eugene Skolnikoff); the Social Science Research Council (Edith Brown Weiss and Harold Jacobson); and the University of Tübingen (Volker Rittberger). One published analysis is that by P. Haas, R. Keohane and M. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, Cambridge, MA, 1993).