1

A Theory of Compliance

In an increasingly complex and interdependent world, the negotiation, adoption, and implementation of international agreements are major elements of the foreign policy activity of every state. In earlier times, the principal function of treaties was to record bilateral (or sometimes regional) political settlements and arrangements. But in recent decades, the main focus of treaty practice has moved to multilateral regulatory agreements addressing complex economic, political, and social problems that require cooperative action among states over time. Chief among the areas of concern are trade, monetary policy, resource management, security, environmental degradation, and human rights.

Scholarship on international regimes teaches that these cooperative efforts take place within a dense and complex web of norms, rules, and practices. What is less clear from the work on regimes is that at the center there is almost always a formal treaty—sometimes more than one—that gives the regime its basic architecture. These treaties are the concern of this book.[1]

The agreements vary widely in scope, number of parties, and degree of specificity, as well as in subject matter. Some are little more than statements of principle or agreements to agree. Others contain detailed prescriptions for behavior in a defined field. Still others may be umbrella agreements for consensus building in preparation for more specific regulation later. Often they create international organizations to oversee the enterprise.

The focus on treaties does not imply that they are the only source of international legal or normative obligation. International lawyers have long recognized an unwritten "customary" or "general" international law comprising, indeed, some of the most fundamental principles of the system. The

International Court of Justice has held that a state is bound by its unilateral statement intended to convey that it was accepting a firm obligation.[2] A wide variety of instruments, declarations, joint statements, and expressions, loosely categorized as "soft law," are accepted and enforced as constraints by processes that differ little from those applicable to formal legal undertakings. And, as regime theorists constantly point out, the formal pronouncements are enshrouded in a maze of informal and tacit customs and practices that orient behavior and flesh out the scope of the obligations. But what they are less willing to acknowledge is that, in complex regulatory regimes, the armature on which the whole is constructed is commonly an act of formal lawmaking—a treaty.[3]

If treaties are at the center of the cooperative regimes by which states and their citizens seek to regulate major common problems, there must be some means of assuring that the parties perform their obligations at an acceptable level. To provide this assurance, political leaders, academics, journalists, and ordinary citizens frequently seek treaties with "teeth"—that is, coercive enforcement measures. In part this reflects an easy but incorrect analogy to domestic legal systems, where the application of the coercive power of the state is thought to play an essential role in enforcing legal rules. Our first proposition is that, as a practical matter, coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future. The effort to devise and incorporate such sanctions in treaties is largely a waste of time.

The deficiencies of sanctions for treaty enforcement are related to their costs and legitimacy. The costs of military sanctions are measured in lives, a price contemporary publics seem disinclined to pay except for the most urgent objectives, clearly related to primary national interests. The costs of economic sanctions are also high, not only for the state against which they are directed, where sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning states. When economic sanctions are used, they tend to be leaky. Results are slow and not particularly conducive to changing behavior. The most important cost, however, is less obvious. It is the serious political investment required to mobilize and maintain a concerted military or economic effort over time in a system without any recognized or acknowledged hierarchically superior authority.

Because the political cost is high, efforts to impose sanctions will be intermittent and ad hoc, responding not to the need for reliable enforcement of treaty obligations, but to political exigencies in the sanctioning states. There

is nothing inherently wrong with these characteristics. But an effort that is necessarily ad hoc cannot be systematic and evenhanded. Like cases are not treated alike. Such an effort to ensure compliance with treaty obligations is fatally deficient in legitimacy. Moreover, to have a chance of being effective, military and, especially, economic sanctions must have the support and participation of the most powerful states. In practice, active support if not direction by the United States is decisive for the success of any important sanctioning action. It is evident that the United States neither could nor would nor should play such a universal policing role for ordinary treaty obligations. In any event, a system in which only the weak can be made to comply with their undertakings will not achieve the legitimacy needed for reliable enforcement of treaty obligations. We return to the question of legitimacy in Chapter 5.

As against this "enforcement model" of compliance, this book presents an alternative "managerial model," relying primarily on a cooperative, problem-solving approach instead of a coercive one.[4] It is less easy to give a succinct and satisfying description of this alternative to sanctions, and much of this book is devoted to the attempt.

The Propensity to Comply

We start with a somewhat novel conception of compliance and the compliance problem. The position of mainstream realist international-relations theory goes back to Machiavelli: "[A] prudent ruler cannot keep his word, nor should he, where such fidelity would damage him, and when the reasons that made him promise are no longer relevant."[5] This rational-actor conception of compliance may be useful for theory or model building, but no calculus can supply rigorous, nontautological support for the proposition that states observe treaty obligations—or any particular treaty obligation—only when it is in their interest to do so.

By contrast, foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations. Foreign ministers, diplomats, and government leaders devote enormous time and energy to preparing, drafting, negotiating, and monitoring treaty obligations. It is not conceivable that they could do so except on the assumption that entering into a treaty commitment ought to and does limit their own freedom of action, and in the expectation that the other parties to the agreement will feel similarly constrained. The meticulous attention devoted to fashioning treaty provisions no doubt reflects the desire to limit the state's own com-

mitment as well as to secure the performance of others. But either way, the enterprise makes sense only if the participants accept (presumably on the basis of experience) that as a general rule, states acknowledge an obligation to comply with the agreements they have signed. For these officials, dealing with the occasional egregious violator is a distinct problem, but it is not the central issue of treaty compliance.

We identify three sorts of considerations that lend plausibility to the assumption of a propensity to comply: efficiency, interests, and norms. Of course these factors, singly or in combination, will not lead to compliance in every case or even in any particular case. But they support the assumption of a general propensity for states to comply with their treaty obligations, and they will lead to a better understanding of the real problems of noncompliance and how they can be addressed.

Efficiency

Decisions are not a free good. Governmental resources for policy analysis and decision making are costly and in short supply. Individuals and organizations seek to conserve these resources for the most urgent and pressing matters.[6] In these circumstances, standard economic analysis argues against the continuous recalculation of costs and benefits in the absence of convincing evidence that circumstances have changed since the original decision. The alternative to recalculation is to follow the established treaty rule. Compliance saves transaction costs. In a different formulation, students of bureaucracy tell us that bureaucratic organizations operate according to routines and standard operating procedures, often specified by authoritative rules and regulations.[7] The adoption of a treaty, like the enactment of any other law, establishes an authoritative rule system. Compliance is the normal organizational presumption. A heavy burden of persuasion rests on the proponent of deviation.

Interests

A treaty is a consensual instrument. It has no force unless the state has agreed to it. It is therefore a fair assumption that the parties' interests were served by entering into the treaty in the first place. Accordingly, the process by which international agreements are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.[8] Modern treaty making, like legislation in a democratic polity, can be seen as a creative enterprise through which the parties not only weigh the benefits and burdens of commitment

but also explore, redefine, and sometimes discover their interests. It is at its best a learning process in which not only national positions but also conceptions of national interest evolve and change.[9]

This process goes on within each state and at the international level. In a state with a well-developed bureaucracy, the elaboration of national positions in preparation for treaty negotiations requires extensive interagency vetting in what amounts to a sustained internal negotiation. For example, Philip Trimble's roll of the groups normally involved in arms control negotiations includes the National Security staff, the Departments of State and Defense, the Arms Control and Disarmament Agency, the Joint Chiefs of Staff, the Central Intelligence Agency, and sometimes the Department of Energy or the National Aeronautic and Space Administration (NASA).[10] These organizations themselves are not unitary actors. Numerous subordinate units of the major departments have quasi-independent positions at the table. Much of the extensive literature on U.S.-Soviet arms control negotiations is devoted to analysis of the Byzantine complexity of these internal interactions.[11]

The same process may be seen in every major U.S. international negotiation. For example, at the end of what Ambassador Richard Benedick calls "the interagency minuet" in preparation for the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, the final U.S. position "was drafted by the State Department and was formally cleared by the Departments of Commerce and Energy, The Council on Environmental Quality, EPA, NASA, NOAA, OMB, USTR, and the Domestic Policy Council (representing all other interested agencies)."[12] In addition to this formidable alphabet soup, White House units, like the Office of Science and Technology Policy, the Office of Policy Development, and the Council of Economic Advisors, also got into the act.

In the United States in recent years, the increasing involvement of Congress and, with it, nongovernmental organizations and the broader public has introduced a new range of interests that must ultimately be reflected in the national position.[13] Similar developments seem to be occurring in other democratic countries. Robert Putnam has described the process as a two-level game, in which the negotiations with the foreign parties must eventuate in a treaty that is acceptable to interested domestic constituencies.[14]

For contemporary regulatory treaties, the internal analysis, negotiation, and calculation of benefits, burdens, and impacts are repeated at the international level. In anticipation of negotiations, the issues are reviewed in international forums long before formal negotiation begins. The negotiating process itself characteristically involves an intergovernmental debate that

often lasts years, not only among national governments but also among international bureaucracies and nongovernmental organizations as well. The most notable case is the United Nations Conference on the Law of the Sea (UNCLOS III), which lasted for more than ten years and spawned innumerable committees, subcommittees, and working groups, only to be torpedoed by the United States, which, having sponsored the negotiations in the first place, refused to sign the agreement.[15] Bilateral arms control negotiations between the United States and the Soviet Union were similarly extended, although only the two superpowers were directly involved. Environmental negotiations on ozone and global warming have followed very much the UNCLOS III pattern. The first conference on stratospheric ozone was convoked by the United Nations Environment Program (UNEP) in 1977, eight years before the adoption of the Vienna Convention.[16] The formal beginning of the climate-change negotiations in February 1991 was preceded by two years of work in the Intergovernmental Panel on Climate Change, convened by the World Meteorological Organization (WMO) and UNEP to consider scientific, technological, and policy response questions.[17]

Especially in democracies, but to a certain extent elsewhere as well, this negotiating activity is open to some form of public scrutiny, triggering repeated rounds of national bureaucratic and political review and revision of tentative accommodations among affected interests. The two-level game gives some assurance that the treaty as finally signed and presented for ratification is based on considered and well-developed conceptions of national interest that have themselves been informed and shaped to some extent by the preparatory and negotiating process.

Yet treaty making is not purely consensual. Negotiations are heavily affected by the structure of an international system in which some states are much more powerful than others. It is no secret that the United States got its way most of the time in the negotiations over the post–World War II economic structure.[18] In the case of the law of the sea, after holding out for more than a decade, the United States was able to secure substantial revisions of the convention even after it had entered into force, on the basis of which, in 1994, it announced its intention to adhere.[19] And almost single-handedly, the United States was able to keep a firm commitment to reduction of carbon dioxide emissions out of the Framework Convention on Climate Change in Rio in 1992.

At the same time, a multilateral negotiating forum provides opportunities for weaker states to form coalitions and organize blocking positions. In

UNCLOS III, the caucus of "land-locked and geographically disadvantaged states," which included such unlikely colleagues as Hungary, Switzerland, Austria, Uganda, Nepal, and Bolivia, had a crucial strategic position. The Association of Small Island States, chaired by the republic of Vanuatu, played a similar role in the global climate negotiations.

Thus, like domestic legislation, the international treaty-making process leaves a good deal of room for accommodating divergent interests. In such a setting, not even the strongest state will be able to achieve all of its objectives, and some participants may have to settle for much less. The treaty is necessarily in some measure a compromise, "a bargain that [has] been made."[20] From the point of view of the particular interests of any state, the outcome may fall short of the ideal. But if the agreement is well designed—sensible, comprehensible, and with a practical eye to probable patterns of conduct and interaction—compliance problems and enforcement issues are likely to be manageable. If issues of noncompliance and enforcement are endemic, the real problem is likely to be that the negotiating process did not succeed in incorporating a broad enough range of the parties' interests, rather than willful disobedience.[21]

It is true that a state's incentives at the treaty negotiating stage may be different from those it faces at the stage of performance.[22] Parties on the giving end of the compromise, especially, might have reason to seek to escape the obligations they have undertaken. But the very act of making commitments entrenched in an international agreement changes the calculus at the compliance stage, if only because it generates expectations of compliance in others that must enter into the equation. Although states may know they can violate their treaty obligations if circumstances or their calculations go radically awry, they do not negotiate agreements with the idea that they can break them whenever the commitment becomes "inconvenient."

In any case, the treaty that comes into force does not remain static and unchanging. Treaties that last must be able to adapt to inevitable changes in the economic, technological, social, and political setting. Adjustment may be accomplished by formal amendment, or by the less cumbersome "non-amendment amendment" devices devised by modern treaty lawyers. The simplest method is to vest the power to "interpret" the agreement in some organ established by the treaty. The U.S. Constitution, after all, has kept up with the times not primarily by the amending process but through the Supreme Court's interpretation of its broad clauses. These adaptation processes are more fully discussed in Chapter 9.

Norms

Treaties are acknowledged to be legally binding on the states that ratify them.[23] In common experience, people—whether as a result of socialization or otherwise—accept that they are obligated to obey the law.[24] The existence of legal obligation, for most actors in most situations, translates into a presumption of compliance, in the absence of strong countervailing circumstances. So it is with states. It is often said that the fundamental norm[25] of international law is *pacta sunt servanda*—treaties are to be obeyed.[26] In the United States and many other countries, they become a part of the law of the land.[27] Thus, a provision contained in an agreement to which a state has formally assented entails a legal obligation to obey and is presumptively a guide to action.

It seems almost superfluous to adduce evidence or authority for a proposition that is so deeply ingrained in common understanding and so often reflected in the speech of national leaders. Yet the realist argument that national actions are governed entirely by a calculation of interests is essentially a denial of the operation of normative obligation in international affairs. This position has held the field for some time in mainstream international relations theory (as have closely related postulates in other positivist social science disciplines).[28] Nevertheless, it is increasingly being challenged by a growing body of empirical study and academic analysis.

Such scholars as Elinor Ostrom[29] and Robert Ellickson[30] show how relatively small communities in contained circumstances generate and secure compliance with norms, even without the intervention of a supervening sovereign authority. Others, like Frederick Schauer[31] and Friedrich Kratochwil,[32] analyze how norms operate in decision-making processes: The norm is itself a "reason for action" and thus becomes an independent basis for conforming behavior. Norms help define the methods and terms of the continuing international discourse in which states seek to justify their actions.

Jon Elster, often regarded as one of the most powerful scholars of the "rational actor" school, says, "I have come to believe that social norms provide an important kind of motivation for action that is irreducible to rationality or indeed to any other form of optimizing mechanism."[33] As applied to treaty obligations, this proposition seems almost self-evident. An example: in the absence of the Anti–Ballistic Missile (ABM) Treaty, the Soviets would have been legally free to build an ABM system. If they had exercised this freedom, it would surely have posed serious military and political issues for U.S. analysts, diplomats, and intelligence officers. In due course the United States would have responded, either with its own ABM system or some

other suitable military or political move. The same act, the construction of a Soviet ABM system, would be qualitatively different, however, if it were done in violation of the specific undertaking of the ABM Treaty. Transgression of such a fundamental engagement would trigger not a limited response but an anxious and hostile reaction across the board, jeopardizing the possibility of cooperative relations between the parties for a long time to come. Outrage when solemn commitments are treated as "scraps of paper" is rooted in U.S. history.[34] It is unlikely that this kind of reaction is unique to the United States.

Even in the stark, high politics of the Cuban missile crisis, State Department lawyers argued that the United States could not lawfully react unilaterally, since the Soviet emplacement of missiles in Cuba did not amount to an "armed attack" sufficient to trigger the right of self-defense under Article 51 of the UN Charter. It followed that use of force in response to the missiles would be lawful only if approved by the Organization of American States (OAS). Though it would be foolish to contend that this legal position determined President Kennedy's decision, there is little doubt that the asserted need for advance OAS authorization for any use of force contributed to the mosaic of argumentation that led to the decision to respond initially by means of the quarantine rather than with an air strike. Robert Kennedy said later, "It was the vote of the Organization of American States that gave a legal basis for the quarantine . . . and changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position."[35]

The Sources of Noncompliance

If a state's decision whether or not to conform to a treaty is the result of a calculation of costs and benefits, as the realists assert, the implication is that noncompliance is a premeditated and deliberate violation of a treaty obligation. Clearly some of the most worrisome cases of noncompliance take that form: Iraq's invasion of Kuwait, and North Korea's refusal to permit International Atomic Energy Agency (IAEA) inspection in accordance with its obligation under the Nuclear Non-Proliferation Treaty (NPT), for example. On occasion a state may enter into a treaty to appease a domestic or international constituency, with little intention of carrying it out. This may have been the case when the Soviet Union and some other totalitarian states signed the international human rights covenants—although in the event, the undertakings did not prove to have been as empty as had been supposed (see

Chapter 11). A passing familiarity with foreign affairs, however, suggests that such cases are the exception rather than the rule. Only infrequently does a treaty violation fall into the category of a willful flouting of legal obligation.[36]

Yet enough questions remain about noncompliance and incomplete compliance with significant treaty obligations to warrant analysis of the methods by which international systems can bring deviant behavior into conformity with treaty norms. The analysis must begin with a diagnosis of the reasons for observed noncompliance. If the violations are not deliberate, what explains this behavior? We identify three circumstances, infrequently recognized in discussions of compliance, that in our view often lie at the root of much of the behavior that may seem to violate treaty requirements: (1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of parties to carry out their undertakings, and (3) the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.

In one sense, these factors might be considered "causes" of noncompliance. But from a lawyer's perspective, they might be thought of as defenses—matters put forth to excuse, justify, or extenuate a prima facie case of breach (subject, like all other issues of compliance, to the overriding obligation of good faith in the performance of treaty obligations).[37] If the plea is accepted, the conduct is not a violation, strictly speaking. Of course, in the international sphere, these charges and defenses are rarely made or determined in a judicial tribunal, but diplomatic practice in other forums can be understood in terms of the same basic structure. Still a third perspective—the one that animates this book—is that of regime management. Where and how can resources and energy be most effectively committed to improve compliance with treaty obligations?

Ambiguity

Treaties, like other formal statements of legal rules, frequently do not provide determinate answers to specific disputed questions.[38] Language is unable to capture meaning with precision. Drafters do not foresee many of the possible applications, let alone their contextual settings. Issues actually foreseen often cannot be resolved at the time of treaty negotiation and are swept under the rug with a formula that can mean what each party wants it to. Economic, technological, and scientific conditions change, to say nothing of political circumstances. All these inescapable incidents of the effort to formulate rules to govern future conduct can produce a zone of ambiguity within which it is difficult to say with precision what is permitted and what forbidden.

Of course treaty language, like other legal language, comes in varying

degrees of specificity.[39] The broader and more general the language, the wider the ambit of permissible interpretations to which it gives rise. Yet precision is not always a virtue, and frequently there are reasons for choosing a more general formulation of the obligation. The political consensus may not support more precision. Or, as with certain provisions of the U.S. Constitution, it may be wiser to indicate a general direction, to try to inform a process, rather than seeking to foresee in detail the circumstances in which the words will be brought to bear. If there is a degree of trust in those who are to apply the rules, a broader standard may be more effective in realizing the general policy behind the law than a series of detailed regulations. The North Atlantic Treaty has proved remarkably durable, though its language is remarkably general: "In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."[40] In the arms control field, the United States has opted for increasingly detailed agreements, on the ground that they reduce interpretative leeway. The 1963 Limited Test Ban Treaty (LTBT), the first bilateral arms control agreement between the United States and the Soviet Union, consisted of five articles covering two or three pages. The Strategic Arms Reduction Treaty (START) signed in 1989 is the size of a telephone book.[41] Nor is increasing detail confined to the security area. The original General Agreement on Tariffs and Trade (GATT) was made up of thirty-five sections in as many pages. In 1994, the Uruguay Round produced a new agreement for world trade that is three or four times as long, with numerous subsidiary agreements and annexes.

Yet detail also has its difficulties. It invites the maxim, *expressio unius est exclusio alterius* (to express one thing is to exclude the other). As in the U.S. Internal Revenue Code, precision generates loopholes, necessitating a procedure for continuous revision and authoritative interpretation. The corpus of the law may become so complex and unwieldy as to be understandable to (and manipulable by) only a small coterie of experts. The complexities of the rule system may give rise to shortcuts in practice that reduce inefficiencies when things are going well but may lead to friction when the political atmosphere darkens.

In short, more often than not there will be a considerable range within which parties may reasonably adopt differing positions as to the meaning of the relevant treaty language. In domestic legal systems, courts or other authoritative institutions are empowered to resolve such disputes about meaning as between parties in a particular case. The international legal

system can provide tribunals to settle such questions if the parties consent, but compulsory means of authoritative dispute resolution—by adjudication or otherwise—are not highly regarded at the international level.[42] Moreover, the issue of interpretation may not arise in the context of an adversary two-party dispute but as a more general question of debate among the parties. In 1965, the parties to the International Coffee Agreement disagreed sharply about whether the organization had power to set quotas selectively for different types of coffee or was limited to establishing a global quota to be divided among the exporters according to a preestablished formula. The issue was put to an advisory legal panel, which decided against the selective quota authority, but ultimately the Coffee Council voted to interpret the treaty as authorizing the action.[43] In all such cases, it remains open to a party, in the absence of bad faith, to maintain its position and try to convince the others. In fact this kind of discourse among the parties, often in the hearing of a wider audience, is an important way of clarifying the meaning of the rules, much like the discourse of courts in common law countries.

In many such controversies, a consensus may exist or emerge among knowledgeable professionals about the legal rights and wrongs.[44] In many others, however, the issue will remain contestable. Although one party may charge another with violation and deploy legions of international lawyers in its support, a detached observer cannot readily conclude that there is noncompliance, at least in the absence of "bad faith." The long list of alleged violations of arms control treaties with which the Soviets were annually charged were, with the exception of the Krasnoyarsk radar, contestable in this sense.[45]

It is, of course, by no means unheard of that states, like other legal actors, take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action. Indeed a state may consciously seek to discover the limits of its obligation by testing its treaty partners' responses. There was speculation that the pattern of Soviet deployment of Pechora-type radars prior to the construction of their phased-array radar at Krasnoyarsk was an attempt to test the limits of the deployment prohibitions in the ABM Treaty. The Pechora sites were located up to 400 kilometers from the border, arguably "on the periphery of the national territory," as required by the treaty—but also arguably not.[46] The failure of the United States to react was thought by some to have contributed to the decision to site Krasnoyarsk even further from the nearest border—some 700 kilometers.

Justice Oliver Wendell Holmes said, "The very meaning of a line in the law is that you intentionally may come as close to it as you can if you do not pass

it."[47] Nevertheless, deliberate testing of the kind just described might in ordinary circumstances be thought to be inconsistent with good faith observation of the treaty obligation. On the other hand, in the early years of SALT I, the United States played a similar game by erecting opaque environmental shelters over missile silos during modification work, despite the treaty undertaking "not to use deliberate concealment measures which impede verification by national technical means."[48] In the context of the long cold-war confrontation between the United States and the Soviet Union, a certain amount of such probing, despite the dangers, was inherent in the relationship and seems to have been within the expectations of the parties.[49]

Another way to operate in the zone of ambiguity is to design the desired activity to comply with the letter of the obligation, leaving questions about the spirit for another day. The GATT prohibits parties from imposing quotas on imports. When Japanese exports of steel to the United States generated pressure from domestic producers that the Nixon administration could no longer withstand, U.S. trade lawyers invented the "voluntary restraint agreement" (VRA), under which private Japanese producers agreed to limit their U.S. sales.[50] The United States imposed no official quota, but the Japanese producers might well have anticipated some such action had they not "volunteered." Did the arrangement violate the GATT obligation?

Limitations on Capacity

According to classical international law, legal rights and obligations run between states. A treaty is an agreement among states[51] and an undertaking by them as to their future conduct. The object of the agreement is to affect state behavior. This simple relationship between agreement and relevant behavior continues to exist for many treaties. The Limited Test Ban Treaty prohibiting nuclear testing in the atmosphere, in outer space, and under water is such a treaty. Only states conduct nuclear weapons tests, so only state behavior is implicated in the undertaking. The state, simply by governing its own actions, determines whether it will comply with the undertaking or not. Moreover there is no doubt about the state's capacity to do what it has undertaken. Every state, no matter how primitive its structure or limited its resources, can refrain from conducting nuclear tests in the atmosphere.

Even if only state behavior is at stake, the issue of capacity may arise when the treaty involves an affirmative obligation. In the 1980s it may have been a fair assumption that the Soviet Union had the capacity to carry out its undertaking to destroy certain nuclear weapons as required by the Intermediate Nuclear Forces (INF) and START agreements. In the 1990s, that assump-

tion was threatened by the deterioration of the Russian political and military structure and the emergence of a congeries of successor states in place of the Soviet Union, many of which may not have the technical knowledge or material resources to do the job.[52]

The problem is even more acute in contemporary regulatory treaties. Such treaties are formally among states, and the obligations are cast as state obligations—for example, to reduce sulfur dioxide (SO_2) emissions by 30 percent against a certain baseline. The real object of the treaty, however, is not to affect state behavior but to regulate the activities of individuals and private entities that produce SO_2—generating power, smelting, and the like. The state may be "in compliance" when it has formally enacted implementing legislation, and despite the vagaries of legislative and domestic politics, it is appropriate to hold it accountable for its failure to do so. But the ultimate impact on private behavior depends on a complex series of further steps. It will normally require detailed administrative regulations and vigorous enforcement efforts. In essence, the state will have to establish and enforce a full-blown domestic regime designed to secure the necessary reduction in emissions. Quite apart from political will, the construction of such a regulatory apparatus is not a simple or mechanical task. It entails choices and requires scientific and technical judgment, bureaucratic capacity, and fiscal resources. Not the least of these limited resources are places on crowded government agendas and priority lists. Even developed Western states have not been able to construct such systems with the confidence that they will achieve the desired objective.[53]

The deficit in domestic regulatory capacity is not limited to environmental agreements. Much of the work of the International Labor Organization (ILO) has, from the beginning, been devoted to improving its members' domestic labor legislation and enforcement. The NPT is supported by a side agreement among nuclear-capable states not to export sensitive technology to non–nuclear weapons states, an agreement implemented by national export control regulations. However, the UN/IAEA inspections in Iraq revealed that the Iraqi nuclear weapons program was able to draw on suppliers in the United States and West Germany, among others, where the governmental will and ability to control such exports are presumably at their highest.

In developing countries, the characteristic situation is a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems. Four years after the Montreal Protocol was signed, only about half of the member states had fully complied with the requirement of the treaty that they report annual chlorofluoro-

carbon (CFC) consumption.[54] The Conference of the Parties established an Ad Hoc Group of Experts on Reporting, which quickly saw that the great majority of the nonreporting states were developing countries that for the most part were simply unable to comply without technical assistance from the treaty organization.[55]

The Montreal Protocol is the first treaty under which the parties have undertaken to provide significant financial assistance to defray the incremental costs of compliance for developing countries.[56] The same issue, on a much larger scale, figured in the negotiations on the biodiversity and global climate change conventions concluded at the 1992 United Nations Conference on Environment and Development (UNCED), and the final instruments contain provisions similar to those in the Montreal Protocol.[57] Indeed, in these instruments, the obligations of the developing countries are explicitly conditioned on provision of financial resources by developed countries. The last word has surely not been spoken in these forums, and the problem is not confined to environmental agreements.

The Temporal Dimension

The regulatory treaties that are our major concern are, characteristically, legal instruments of a regime for managing a major international problem area over time. Significant changes in social or economic systems mandated by regulatory treaties take time. Thus, a cross section at any particular moment may give a misleading picture of the state of compliance.

Treaty drafters often recognize at the negotiating stage that there will be a considerable time lag after the treaty is concluded before some or all of the parties can bring themselves into compliance. Thus modern treaties, from the International Monetary Fund Agreement in 1945[58] to the Montreal Protocol in 1987,[59] have provided for transitional arrangements and made allowances for special circumstances. But whether the treaty provides for it or not, a period of transition is always necessary.[60]

Similarly, if the regime is to persist over time, adaptation to changing conditions and underlying circumstances will require a shifting mix of regulatory instruments to which state and individual behavior cannot instantaneously respond. Often the original treaty is only the first in a series of agreements addressed to the issue area. For example, the START agreement to reduce nuclear arsenals contemplates a process extending over seven years, by which time it is expected that new and further reductions will have been mandated.[61]

Activists in all fields lament that treaty negotiation tends to settle on a least common denominator. But the drive for universality (or universal member-

ship in the particular geographical or issue area of concern) may necessitate accommodation to the response capability of states with limited financial, technical, or bureaucratic resources. A common solution is to start with a low obligational ante, and then to increase the level of regulation as experience with the regime grows. The convention-protocol strategy adopted in a number of contemporary environmental regimes—though it is unwieldy and may be sluggish in response—exemplifies this conception.[62]

The Vienna Convention for the Protection of the Ozone Layer, signed in 1985, contained no substantive obligations. It required only that the parties, "in accordance with the means at their disposal and their capabilities," cooperate in research and information exchange and in harmonizing domestic policies on activities likely to have an adverse effect on the ozone layer.[63] Two years later, as scientific consensus jelled on the destructive effect of CFCs on the ozone layer, the Montreal Protocol was negotiated, providing for a 50 percent reduction from 1986 levels of CFC consumption by the year 2000.[64] By June 1990, the parties agreed to a complete phaseout by 2000 and to regulate a number of other ozone-destroying chemical compounds.[65] At Copenhagen two years later, the phaseout date for most of the controlled substances was advanced to January 1, 1996.[66] A similar sequence marks the Convention on Long-Range Transboundary Air Pollution (LRTAP), beginning with a general agreement to cooperate signed in 1979, followed by a protocol imposing limits on SO_2 emissions in 1985, and by another in 1988 on nitrogen dioxide (NO_2).[67] The Framework Convention on Climate Change has started, like the others, with a general undertaking for cooperation and no quantitative obligations.

The pattern has a long pedigree, extending back to the ILO, the first of the modern international regulatory agencies, whose members agreed in 1921 only to "bring the recommendation[s] or draft convention[s] [prepared by the Organization] before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action."[68] The ILO then became the forum for drafting and propagating a series of specific conventions and recommendations on the rights of labor and conditions of employment, for adoption by the parties.

The effort to protect human rights by international agreement may be seen as an extreme case of the time lag between undertaking and performance. Human rights norms, despite their almost universal acceptance, are slow to establish themselves in places where they may clash with local customs, culture, and systems of government. Although the major human rights conventions have been widely ratified, compliance leaves much to be desired. It

is apparent that some states have adhered to the conventions without any serious intention of abiding by them. It is also true that even parties committed to the treaties had different expectations about compliance than they did with most other regulatory treaties. Indeed the Helsinki Final Act, which contained important human rights provisions applicable to the Soviet Union and Eastern Europe, is by its terms not legally binding.[69]

Yet it is a mistake to call these treaties merely "aspirational" or "hortatory." To be sure, they embody ideals of the international system but, like other regulatory treaties, they were designed to initiate a process that over time, perhaps a long time, would bring behavior into greater congruence with those ideals. These expectations have not been wholly disappointed. The vast amount of public and private effort devoted to enforcing these agreements—not always in vain—evinces their obligational content. Moreover, the legitimating authority of these instruments was an important catalyst of the revolutions of the 1980s against authoritarian regimes in Latin America and Eastern Europe, and it continues to spark demands for democratic politics elsewhere in the world. We return to this subject in Chapter 11.

Levels of Compliance

Compliance is not an on-off phenomenon. For a straightforward prohibitory norm like a highway speed limit, it is in principle a simple matter to determine whether any particular driver is in compliance. Yet there is a considerable zone within which behavior is accepted as adequately conforming. Most communities and law enforcement organizations in the United States, at least, seem to be perfectly comfortable with a situation in which the average speed on interstate highways is perhaps ten miles above the limit. The problem for the system is not how to induce all drivers to obey the speed limit, but how to contain deviance within acceptable levels.[70] And, so it is for international treaty obligations.

The Standard of Acceptable Compliance

An "acceptable level of compliance" is not an invariant standard. It changes over time with the capacities of the parties and the urgency of the problem. It may depend on the type of treaty, the context, the exact behavior involved. The matter is further complicated because, for many legal norms, as we have noted, questions of compliance are often contestable and call for complex, subtle, and frequently subjective evaluation.

It would seem, for example, that the acceptable level of compliance would

vary with the significance and cost of the reliance parties place on the others' performance.[71] Flouting a cease-fire under a peace agreement or refusing to allow inspection of nuclear reactors under the NPT would be expected to evoke very different responses from a failure to meet the reporting requirements of an environmental treaty. On this basis, treaties implicating national security would demand strict compliance, because the stakes are so high, and to some extent this prediction is borne out by experience. Yet even in this area, some departures seem to be tolerable.

The U.S. emphasis during the cold war on the importance of verification of arms control agreements seems to confirm the insistence on a strict compliance standard.[72] However, at least since the Reagan administration, annual presidential reports to Congress, mandated by the Arms Control and Disarmament Act, have listed a long series of alleged Soviet violations without igniting any serious move to withdraw from the applicable treaties.[73]

One of these violations, already mentioned, was the phased-array radar constructed at Krasnoyarsk in Siberia. It was widely regarded as a deliberate and egregious breach of the ABM Treaty. As we noted earlier, Article VI of the treaty requires that early-warning radars be sited "along the periphery of [the] national territory and oriented outward." Krasnoyarsk was 700 kilometers from the Mongolian border and pointed northeast over Siberia. The issue was repeatedly thrashed out between the two governments over a period of years, sometimes at the highest levels. The United States linked future arms control progress to the satisfactory resolution of the controversy. The Soviets at first maintained that the installation was a space-tracking radar and thus not subject to the prohibition, but ultimately they acknowledged the breach and agreed to eliminate the offending installation. Nevertheless, throughout this entire period the ABM Treaty regime continued in full force and effect. The basic treaty bargain—that neither side would deploy ABM systems—remained intact, and the U.S. administration never seriously pursued the option of withdrawal or abrogation.[74] Even in connection with its cherished Strategic Defense Initiative (SDI), the Reagan administration preferred to attempt to "reinterpret" the treaty rather than accept the more serious political costs of abrogation.

In the last analysis, the catalogue of asserted "violations" presented no threat to the U.S. security interests that the treaties were designed to safeguard, so the level of Soviet compliance was "acceptable." American political and military leaders remained willing to tolerate nonperformance at the margin as the price of continuing constraint on any meaningful Soviet attempts to shift the strategic balance.

In the case of the NPT, indications of deviant behavior by parties have been severely dealt with. In the 1970s, U.S. pressures resulted in the termination of programs to construct reprocessing facilities in South Korea and Taiwan.[75] In the 1990s, a menu of even more stringent pressures was mounted against North Korea. Ultimately North Korea signed an IAEA safeguards agreement and submitted to an initial inspection, but it balked at accepting a "special inspection" of two suspicious facilities, and later at permitting the IAEA to observe the refueling of its research reactor.[76] After public threats of economic sanctions (and even some calls for military action) by the United States, a visit to Pyongyang by former President Jimmy Carter resulted in the renewal of active negotiations. The two countries reached a comprehensive agreement, under which North Korea would give up its weapons program in return for two nuclear power reactors of a type less susceptible to plutonium diversion, plus other economic assistance and political gestures. The implementation of this agreement predictably ran into snags, but as of mid-1995, the process was still under way.[77] Moreover, although more than 130 states are parties to the NPT, the treaty is not universal,[78] and some nonparties have acquired or are seeking nuclear weapons capability. Despite these important deviations and holdouts, compliance with the NPT by the parties remains high. In fact in recent years, prominent nonparties—including France and China among the nuclear weapons states, and Brazil, Argentina, and South Africa among the non–nuclear weapon states—have either adhered to the treaty or announced that they will comply with its norms.[79] Even the recalcitrant nonparties, like Israel and India, have not openly tested or acknowledged the possession of nuclear weapons. The level of compliance has been acceptable enough to enable the NPT and the nonproliferation regime built around it to survive.

If national security regimes have not collapsed in the face of significant perceived violation, it should be no surprise that economic and environmental treaties can tolerate a good deal of noncompliance. Such regimes are in fact relatively forgiving of violations that can be plausibly justified by extenuating circumstances in the foreign or domestic life of the offending state, provided the action does not threaten the survival of the regime. As we have noted, a considerable amount of deviance from strict treaty norms may be anticipated and allowed for from the beginning, whether in the form of transitional periods, special exemptions, or limited substantive obligations, or by the informal expectations of the parties. The propensity to comply means that most states will continue to carry out their treaty obligations even in the face of such deviant behavior. In other words, the free rider problem

has been overestimated. Defections will not necessarily unravel the treaty if the level of compliance is acceptable.

Determining What Is Acceptable

How is the acceptable level of compliance to be determined in any particular instance? Economists have a straightforward answer: invest additional resources in enforcement (or other measures to induce compliance) up to the point where the value of the incremental benefit from an additional unit of compliance exactly equals the cost of the last unit of additional enforcement.[80] Unfortunately, the usefulness of this approach is limited by the impossibility of quantifying or even approximating, let alone monetizing, any of the relevant factors in the equation. There are no markets in international enforcement and compliance.

In such circumstances, as Charles Lindblom has said, the process by which preferences are aggregated is necessarily a political one.[81] It follows that the choice of whether to intensify (or slacken) the international enforcement effort is a political decision. It implicates all the same interests, pro and con, that were involved in the initial formulation of the treaty norm, as modified by intervening changes of circumstances. Although the balance will take account of the expectations of compliance that the parties entertained at that time, it is by no means rare, in international as in domestic politics, to find that what the lawmaker has given in the form of substantive regulation is taken away in the implementation. The problem referred to earlier, of changing interests over the life of the treaty, can be handled by changes in the acceptable level of compliance rather than by defection. What is acceptable in terms of compliance will reflect the perspectives and interests of the participants in an ongoing political process, rather than some external, scientifically or market-validated standard.

More commonly, the level of acceptable compliance rises over the life of the treaty. If the treaty establishes a formal organization, that body may serve as a focus for mobilizing the political impetus for a higher level of compliance. A strong secretariat itself can sometimes exert compliance pressure, as in the IMF or ILO (see Chapter 12). Within the organization, states committed to a level of compliance higher than that acceptable to the generality of the parties may seek to ratchet up the standard. The Netherlands seems often to play the role of leader in European environmental affairs, both in the North and Baltic Sea regimes and in LRTAP.[82] Similarly, the United States may be a leader for improving compliance with the NPT, where its position is far stronger than that of its allies.

Since the international system is flat rather than hierarchical, a state willing to commit enforcement resources may be able to short-circuit cumbersome organizational procedures and pursue improved levels of compliance on its own. Trade sanctions imposed by the United States under Section 301 of the Tariff Act or under the Marine Mammal Protection Act[83] can be thought of as reflecting a unilateral U.S. political decision that existing levels of compliance with the GATT or the whaling convention were not acceptable, and that it would pay the costs of additional enforcement.[84] In such cases, however, gains in compliance with substantive obligations must be weighed against the losses attendant on departure from the procedural norms mandating multilateral dispute settlement.[85]

Finally, a characteristic activity for nongovernmental organizations (NGOs), especially in the fields of the environment and human rights, is campaigning to improve a level of compliance that the states concerned regard as perfectly acceptable and would just as soon leave alone. Increasingly, these organizations have direct access to the political process both within the treaty organization and in the societies of which they are a part. Their technical, organizational, and lobbying skills are an independent resource for enhanced compliance at both levels of the two-level game (see Chapter 11).

It seems plausible that treaty regimes are subject to a kind of critical-mass phenomenon, so that once defection reaches a certain level, or in the face of a particularly egregious violation by a major player, the regime might collapse.[86] Either the character of a particular violation or the identity of the violator may pose a threat to the regime that evokes a higher demand for compliance. States committed to the regime may sense that a tipping point is close, and that an enhanced compliance effort will be necessary to preserve the regime.

The Convention on International Trade in Endangered Species (CITES), for example, ordinarily displays a good deal of tolerance for noncompliance. But the alarming and widely publicized decline in the elephant population in East African habitats in the 1980s galvanized the treaty regime. The parties first made the decision to list the elephant in Appendix I of the treaty, with the effect of banning all commercial trade in ivory. The treaty permits any party to enter a reservation to such an action, in which case the reserving party is not bound by it.[87] Nevertheless the United States and a group of European countries, strongly urged on by their domestic environmental constituencies, insisted on universal adherence to the ban. Washington hinted at trade sanctions. It was freely suggested that Japan's offer to host the next meeting of the Conference of Parties, which was accepted on the last day

of the 1989 conference, after Japan changed its position and announced that it would comply with the ivory ban, would have been rejected if Japan had entered a reservation.[88] The head of the Japanese Environment Agency explained that the Japanese move was made "to avoid isolation in the international community."[89] Although from the realist perspective only a relatively peripheral national interest was involved, a reservation—permitted under the treaty—threatened the collapse of the regime. A concerted and energetic defense resulted.

The New Sovereignty and the Management of Compliance

If we are correct that the principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly. A more sophisticated strategy directly addressing these deficiencies is needed to deal with the large bulk of compliance problems. Elements of such a strategy can be discerned in the characteristic activities of regulatory regimes, although they are not always employed with a full consciousness of their implications, and they are seldom integrated into a unified and coherent whole.

At the simplest level, participating in the regime, attending meetings, responding to requests, and meeting deadlines may lead to a realignment of domestic priorities and agendas, setting policies in motion that will operate to improve performance over time. But an array of more pointed activities can reinforce this general effect.

Ensuring Transparency

Transparency—the generation and dissemination of information about the requirements of the regime and the parties' performance under it—is an almost universal element of management strategy. Transparency influences strategic interaction among parties to the treaty in the direction of compliance:

- It facilitates coordination converging on the treaty norms among actors making independent decisions.
- It provides reassurance to actors, whose compliance with the norms is contingent on similar action by other participants, that they are not being taken advantage of.
- It exercises deterrence against actors contemplating noncompliance.

In pure coordination problems, the parties have a common interest in achieving a common objective, and the potential for relative gains is small.

The treaty, by establishing the rules, avoids the transaction costs of ad hoc coordination. Most international regulatory problems, however, are not pure coordination problems. The parties have incentives to compete as well as to cooperate. They need reassurance that the others are complying, if the cooperative incentives are to prevail. Elinor Ostrom's study, *Governing the Commons,* shows that in successfully managed common pool resources, the members pursue a "contingent strategy." They will follow the rules so long as most others similarly situated follow them also.[90] Transparency is the key to reassurance, and thus to compliance.[91]

For the principal cold war arms control agreements, unilateral verification with national technical means of verification (NTM), authorized and facilitated by the treaties themselves, provided the needed level of transparency. In contemporary regulatory agreements, the same function is fulfilled by a combination of reporting, monitoring, and verification under the aegis of the regime.

The first step toward transparency is the development of data on the performance of the parties as to the principal treaty norms and on the general situations of concern to the regime. Self-reporting is the method of choice in most regimes. In fact, the incidence of reporting requirements is so high that they seem to be included almost pro forma in many agreements, with little concern about whether they will be taken seriously. The record of compliance with reporting requirements varies. It is excellent in the ILO, fair to poor in many environmental treaties, and seriously deficient in human rights treaties. Here as elsewhere, the level of compliance depends on what the parties as a group are prepared to live with. Experience shows that performance can be substantially improved by technical and financial assistance to build capacity, by clarifying and simplifying the requirements, and by giving greater emphasis and attention to the reporting function (see Chapter 7).

Verification, both to check the reliability of reported baseline data and to ensure compliance, was the most hotly contested issue in cold war arms control agreements, and U.S. insistence on stringent verification standards was a major limitation on the scope and number of arms control agreements. Although some aspects of the cold war paradigm have continuing value, especially in nonproliferation regimes, much of its elaboration and thoroughness reflects the extreme caution and low financial constraints of an earlier era.

Short of formal and costly verification systems, external checks are often available against which the reliability of national reports can be tested. Other states and nongovernmental scientific and interest groups make their own

measurements of atmospheric conditions, ozone depletion, species populations, or, in the area of human rights, the condition of prisoners, minorities, and others who may face harsh treatment. National governments, business groups, and private organizations generate and publish a wide range of economic data for a variety of purposes. Nongovernmental organizations are playing an increasing role in providing information to treaty managers. These sources are generally sufficient to provide the necessary reassurance, if in fact the items or goals are measurable. Compliance problems that are exposed by verification and monitoring are then addressed in other phases of the process. These matters are discussed in Chapter 8.

Dispute Settlement

Where ambiguity or vagueness in treaty language creates compliance problems, the traditional prescription is dispute settlement machinery. Despite the fixation of international lawyers on the virtues of binding adjudication (preferably in the International Court of Justice, but if not, then by a specialized tribunal or arbitral panel), most treaty regimes turn to a variety of relatively informal mediative processes if the disputants are unable to resolve the issues among themselves. Authoritative interpretation of controverted provisions, either by the plenary body of the regime, the secretariat, or a designated interpretative organ, is common, perhaps surprisingly so. It is less contentious than conventional dispute resolution procedures, and in many cases it has a preventive or anticipatory value. On the whole, it has not seemed to matter whether the dispute settlement procedure is legally required or the decision is legally binding, so long as the outcome is treated as authoritative.

Although formal international adjudication, like its domestic counterpart, is costly, contentious, cumbersome, and slow, there is a recent disposition on the part of some regimes to revert to compulsory and more binding forms of dispute settlement. The most important instance is the GATT, which, after almost two decades of incremental tinkering, adopted a new procedure in the Uruguay Round that is to all intents and purposes binding adjudication.[92] Compulsory adjudication for some issues is also stipulated in the Canadian-U.S. Free Trade Agreement and in the North American Free Trade Agreement (NAFTA).[93] Likewise, although the dispute settlement chapter of the Law of the Sea Convention presents a menu of choices, if the parties fail to agree on an alternative, they must accept binding arbitration.[94]

A possible middle ground found in some recent agreements is compulsory conciliation resulting in a nonbinding recommendation from the concilia-

tors on the issues in dispute.[95] This ensures that the regime will be able to address the entire range of disputes. The reported views of the conciliators are likely to carry considerable weight both with the parties in general and with the disputants. Yet the niceties of sovereignty are observed, and the parties are not forced to accept the decision (see Chapter 9).

Capacity Building

Deficits of technical and bureaucratic capability and financial resources have received increasing attention in the context of the difficulties of domestic enforcement of measures adopted in compliance with recent international environmental obligations. The current jargon is "capacity building," but technical assistance has been a major function of many treaty organizations for many years. In practice this aid has inevitably carried a certain tacit conditionality, but the Montreal Protocol, for perhaps the first time, expressly provides for technical assistance as an affirmative device for enabling countries to comply with both the reporting and the control requirements of the treaty.[96] In establishing priorities for the use of financial resources contributed under the Framework Convention on Climate Change (FCCC), the Conference of the Parties decided that "in the initial period emphasis should be placed on enabling activities undertaken by the developing country Parties such as planning, endogenous capacity building including institutional strengthening, training, research and education, that will facilitate implementation, in accordance with the Convention, of effective response measures."[97]

The Uses of Persuasion

These disparate elements—transparency, dispute settlement, capacity building—all of which are to be found in some regimes, can be considered to be parts of a management strategy. They merge into a broader process of "jawboning"—the effort to *persuade* the miscreant to change its ways—that is the characteristic method by which international regimes seek to induce compliance. It is remarkable that lawyers and international relations scholars, whose everyday stock-in-trade is persuasion—including persuasion of decision makers—should pay so little attention and, by implication, attach so little significance to the role of argument, exposition, and persuasion in influencing state behavior. Our experience as well as our research indicates that, on the contrary, the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.

We propose that this process is usefully viewed as management, rather

than enforcement. As in other managerial situations, the dominant atmosphere is one of actors engaged in a cooperative venture, in which performance that seems for some reason unsatisfactory represents a problem to be solved by mutual consultation and analysis, rather than an offense to be punished. States are under the practical necessity to give reasons and justifications for suspect conduct. These are reviewed and critiqued not only in formal dispute settlement processes but also in a variety of other venues, public and private, formal and informal, where they are addressed and evaluated. In the process, the circumstances advanced in mitigation or excuse of nonperformance are systematically addressed. Those that seem to have substance are dealt with; those that do not are exposed. Often the upshot is agreement on a narrower and more concrete definition of the required performance, adapted to the circumstances of the case. At all stages, the putative offender is given every opportunity to conform. Persuasion and argument are the principal engines of this process, but if a party persistently fails to respond, the possibility of diffuse manifestations of disapproval or pressures from other actors in the regime is present in the background.

In its most advanced form, this justificatory discourse is expressly recognized as a principal method of inducing compliance. The treaty itself or practices that have grown up under it require each member to report systematically and periodically on policies and programs relevant to the achievement of regime norms and objectives. After analysis by the secretariat (and sometimes by concerned nongovernmental organizations), these reports are reviewed and assessed at a general meeting of the members, where the reporting state presents and defends its report. The discussion and debate culminates in agreement on ever more narrowly specified undertakings and targets to be achieved by the reporting state in the next reporting periods (see Chapter 10).

The process works because modern states are bound in a tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics. The integrity and reliability of this system are of overriding importance for most states, most of the time. These considerations in turn reflect profound changes in the international system within which states must act and decide.

Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity. The state realized and expressed its sovereignty through independent action to achieve its goals. If sovereignty in such terms ever existed outside books on inter-

national law and international relations, however, it no longer has any real world meaning.[98] The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes—security, economic well-being, and a decent level of amenity for their citizens—without the help and cooperation of many other participants in the system, including entities that are not states at all. Smaller and poorer states are almost entirely dependent on the international economic and political system for nearly everything they need to maintain themselves as functioning societies.

That the contemporary international system is interdependent and increasingly so is not news. Our argument goes further. It is that, for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. To be a player, the state must submit to the pressures that international regulations impose. Its behavior in any single episode is likely to affect future relationships not only within the particular regime involved but in many others as well, and perhaps its position within the international system as a whole.[99] When nations enter into an international agreement, therefore, they tend to alter their mutual expectations and actions over time in accordance with its terms. The need to be an accepted member in this complex web of international arrangements is itself the critical factor in ensuring acceptable compliance with regulatory agreements. Robert Putnam, in *Making Democracy Work,* traces the difference between low levels of effective cooperation in regional governments in southern Italy and the much higher levels in the north to the existence of a similarly thick network of associations, on the domestic plane, in the northern regions. As in the international arena, "The sanction for violating [the norms and expectations generated by this network] is not penal, but exclusion from the network of solidarity and cooperation."[100]

Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system. Isolation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized. Connection to the rest of the world and the political ability to be an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements.

The need to be a member in good standing of the international system ensures that most compliance problems will yield to the management process we describe. If they do not, the offending state is left with a stark choice, between conforming to the rule as defined and applied in the particular circumstances and openly flouting a concrete and precisely specified undertaking endorsed by the other members of the regime. This turns out to be a very uncomfortable position even for a powerful state to find itself in. The Krasnoyarsk story represents an example of this process in action. Not even the so-called hermit state of North Korea has been completely able to resist this kind of escalating pressure. Indeed an important consequence of the process is the winnowing out of reasonably justifiable or unintended failures to fulfill commitments—those that might be consistent with a good faith compliance standard—and the identification and isolation of the few cases of egregious and willful violation. This in turn becomes part of the mobilization of consensus for harsher sanctions in the rare cases in which they may be necessary.

Inducing compliance through these interacting processes of justification, discourse, and persuasion is less dramatic than using coercive sanctions, but it is the way operational regimes in the real world go about it, for the most part. The remainder of this book is designed to show, first, the limited scope for the enforcement model in today's international system, and second, how the management model functions in practice and how it can be made more effective.