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Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (Introduction)

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COMMITMENT AND COMPLIANCE

The Role of Non-Binding Norms in the International Legal System

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Introduction

Law, Non-Law and the Problem of 'Soft Law'

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The studies in this volume concern three interrelated issues: (1) the nature of international law, (2) the role of legally non-binding norms or 'soft law' in the international system, and (3) compliance with international norms. The interaction of the three issues raises questions about law-making and the boundaries of international law in the modern world. The subject of compliance with non-binding norms draws the issues together, being concerned with why states and other international actors choose to conclude non-binding rather than binding normative instruments and whether or to what extent that choice affects their consequent behavior.

Non-binding norms have complex and potentially large impact in the development of international law. Customary law, for example, one of the two main sources of international legal obligation, requires compliance (state practice) not only as a result of the obligation, but as a constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also may be considered a form of state practice.

Considerable recent scholarship on compliance has questioned what motivates governments and other actors to give effect to international law, but few of the studies have concerned compliance with non-binding norms.[1] As discussed below by Peter Haas, many scholars question whether conforming acts result from habit or motivated, self-interested decision. Others ask whether sanctions or other forms of coercion are necessary to achieve compliance or

[1] Several scholars have considered the theoretical legal effect of non-binding norms without examining whether in fact such norms are followed. See e.g. Dupuy, R.J., 'Droit déclaratoire et droit programmatoire: de la coûtume sauvage à la "soft law"', in SFDI, *L'Elaboration du droit international publique* (1973) 132; Seidel-Hohenveldern, I., 'International Economic "Soft Law"', 1979-II *RCADI* 173; Bothe, M., 'Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?' (1980) XI *Neth. YB Int'l L.* 65; Weil, P., 'Towards Relative Normativity in International Law?' (1983) 77 *Am. J. Int'l L.* 413; Francioni, F., 'International "Soft Law": A Contemporary Assessment', in Lowe, V., and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice, Essays in Honor of Sir Robert Jennings* (1996) 167.

whether managing problems through incentives is more effective.[2] Managerial approaches suppose that states comply with rules in regulatory regimes out of enlightened self-interest and respond to non-coercive tools such as reporting and monitoring. The existence of international bureaucracies created and driven by treaty regimes they supervise makes compliance possible and likely, helping resolve ambiguity or indeterminacy of norms, assisting regulatory targets to overcome deficits in capacity to comply through technical assistance, and otherwise inducing conforming behavior. International institutions thus are a focal point for maximizing compliance and reducing the likelihood of defection.[3]

The present introduction sets forth a framework for the present study, beginning with a discussion of the traditional characteristics of international law. It then looks at recent changes in the international system and the difficulties they pose for resolving problems through traditional international law-making, leading to a discussion of the role of law and the rule of law generally, including the importance of compliance. It suggests several hypotheses about the reasons states have recourse to non-binding norms and what may be expected from a study of compliance with them. First, the background and scope of the ASIL project is presented.

A. BACKGROUND AND SCOPE OF THE STUDY

The project to study compliance with international non-binding norms or 'soft law' began with a workshop held on May 8–10, 1996. The workshop brought together participants from several disciplines to identify and explore issues raised by compliance with 'soft law' and to design the elements of a research agenda. In part, the meeting sought to test the hypothesis that countries sometimes comply with non-binding legal instruments as well as they do with binding ones. The term 'soft *law*' itself seems to contain a normative element leading to expectations of compliance.[4]

The workshop paid particular attention to environmental soft law, due to the recent work of Edith Brown Weiss and Harold Jacobson on compliance with international environmental treaties.[5] Participants also looked at ques-

[2] Compare e.g. Downs, G., *et al.*, 'Is the Good News About Compliance Good News About Cooperation' (1996) 50 *Int. Org.* 379, with Chayes, A., and Chayes, A.H., *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) and Young, O., *International Governance: Protecting the Environment in a Stateless Society* (1994).

[3] See Abbott, K.W., 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale J. Int'l L.* 335.

[4] Elements in a possible definition of soft law are addressed in Chapter 1 by Christine Chinkin. Throughout the project, the participants debated the appropriateness of using the term 'soft law', given its ambiguity and questionable correctness as a legal term. The various usages in this volume reflect the unresolved discussions.

[5] Jacobson, H.K., and Brown Weiss, E, 'Compliance with International Environmental Accords' (1995) 1 *Global Governance* 119.

tions of compliance in other subject areas of international law.[6] They identified numerous issues as needing study: do states comply with soft law; what factors compel states to comply; do these factors differ depending on whether law is hard or soft; do states respond to soft law in ways that look like responses to hard law? A hypothesis emerged from the workshop that 'soft law' is used more frequently in some fields of international law than others. Some suggested that soft law norms are more frequently utilized in the subject areas of environment and human rights than in trade and arms control.

The project took up the questions raised by the workshop. The initial aim was to study compliance with soft law in general, with a focus on environmental law because soft law has played a particularly important role in that new field. After further reflection, however, a decision was made to compare four subject areas: human rights, environment, arms control, and trade and finance. Each of the fields has particularities that result in different uses for non-binding norms and a different ratio of non-binding norms to 'hard' law. Human rights law has developed over the past fifty years into a broad code of behavior for states and state agents, not only in their relations with other states, but primarily as non-reciprocal, unilateral commitments towards all those within the jurisdiction of the state. Environmental law, in contrast, aims more at regulating non-state behavior: most environmental harm is caused by private entities and not by state agents. Arms control is a classic inter-state issue related to securing international peace and security, requiring regulation of both state and private entities. Trade and finance is perhaps the most varied of the four areas, one where there are examples of a high degree of regulation and others where there is virtually no law. *Quid pro quo* is more easily perceived in the trade and arms control subject areas than in environment and human rights. Consequently, bilateral enforcement is easier in the former and perhaps compliance is easier to measure and to ensure. With incorporation of human rights and environmental concerns into the trade and finance area, and linkage of human rights and security in the OSCE, greater complexity appears.

The limited time and resources available also led to a methodology that confines the project to drawing out relevant factors from specific cases rather than from a broad empirical study. Within each subject area, cases were chosen for analysis on the basis of hypotheses about factors that might influence compliance. Those factors are:

(1) The institutional setting. Soft law has been adopted by global general organizations, global specialized organizations, regional organizations, and private groups. The project participants discussed at length whether or not to include norms adopted by non-state actors. Ultimately it was decided to

[6] Papers from the workshop have been published by the American Society of International Law as No. 29 in its *Studies in Transnational Legal Policy: International Compliance with Nonbinding Accords* (Weiss, E.B., ed., 1997).

include them because they are usually intended to impact on state behavior or to circumvent state policies. In addition, with increasing globalization, transnational entities that make their own rules prepare and enter into normative instruments that look much the same as state-adopted norms. Our hypothesis was that the participation of the relevant stakeholders in the creation of the norm would lead to greater compliance.

(2) Regional diversity. We sought to examine norms from different regions where there are different levels of economic development and thus varying capacity to comply. In addition cultural differences in attitudes towards informal agreements might affect compliance.

(3) Type of obligation. Some of the cases call for state abstention from action (e.g. not violating human rights) while others demand positive measures (e.g. pesticide labeling). We assumed that costly positive measures would produce less compliance because lack of capacity to comply would become a greater factor.

(4) Generality and specificity. Some of the norms are very general while others (e.g. the driftnet fishing ban) are detailed and specific. We assumed that compliance would be better for specific norms that clearly convey what behavior is expected than with ambiguous or vague norms.

The grouping of the cases by topic is based on the original assumption that subject matter is a factor in use of and compliance with non-binding norms. The study could be re-sorted according to the type of actor adopting the norm or nature of the target group. These may be significant factors, but may themselves depend on the nature of the subject matter.

Throughout the project, participants debated whether binding instruments (law) and non-binding ones (soft law or non-law) are strictly alternative, or whether they are two ends on a continuum from legally binding to complete freedom of action. Recent inclusion of soft law commitments in hard law instruments suggests that both form and content are relevant to the sense of legal obligation. Some soft law instruments may have a specific normative content that is 'harder' than the soft commitments in treaties. Other non-binding instruments may never be intended to have normative effect, but are promotional, serving as a catalyst to further action. This appears to be the case with some of the concluding acts of international conferences. It may be suggested that the interplay of form and substance lead to four possible alternatives:

Table 0.1: Normative Intent

	Form:	Legal instrument	Non-binding instrument
Content:	Normative	Law	Commitment
	Promotional	Hortatory language	Freedom of action

Throughout the study, we attempted to distinguish compliance, enforcement, implementation, monitoring, supervision, and effectiveness. **Implementation** of international norms refers to incorporating them in domestic law through legislation, judicial decision, executive decree, or other process. **Compliance** includes implementation, but is broader, concerned with factual matching of state behavior and international norms: 'compliance refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted'.[7] **Effectiveness** is the question whether the goals of the norm are achieved, and may be independent of compliance. **Norms** includes all rules of conduct, while **standards** refer to the measures of compliance or technical objectives. **Instruments** are the variety of texts in which they are contained. It should be noted that there can be compliance without implementation (not stockpiling chemical and biological weapons) and implementation without compliance (legally, but not in fact, banning trade in endangered species). **Monitoring** and **supervision** refer to the procedures and institutions which are used to assess compliance.

Part I of the study introduces the topic of compliance with soft law by first attempting to define the terms, then presenting an overview of the recent changes that have occurred in international society and the international legal system, focusing on the role of non-binding norms. Part II of the book presents the four subject areas, with the select cases in each one. The limited number of cases means that the conclusions must be tentative. Further studies and evaluations will be needed. Future research could undertake comparative national studies of state compliance, including the issue of the extent to which the autonomy of state agencies and mechanisms serves to diffuse shared understandings. Such studies can help elucidate the nature and meaning of international law in the next century. For the present, consideration of the international legal system as a whole, in its past and present forms, can provide necessary background.

B. THE INTERNATIONAL LEGAL SYSTEM

Scholars and judicial decisions have characterized the international legal system as a system of equal and sovereign nation states whose actions are limited only by rules freely accepted as legally binding.[8] Brierly defines international law as 'the body of rules and principles of action which are binding upon civilized

[7] Jacobson, H.K., and Brown Weiss, E., *supra* note 5; Brown Weiss, E., and Jacobson, H.K., *Engaging Countries: Strengthening Compliance with Environmental Accords* (1998).

[8] See the Case of the S.S. 'Lotus,' 1927 P.C.I.J., ser. A, No. 10, at 18 ('International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims').

states in their relations with one another'.[9] Traditionally, this state-centered system excluded any role for non-state actors and was based upon a belief in the factual as well as legal independence of states. Obligations were largely bilateral and reciprocal in nature, enforced by self-help. Thus, breach of an obligation by one state could lead to a withdrawal of equivalent benefits by the offended state. The subject-matter of international legal regulation was limited, largely concerned with diplomatic relations, the seas and other international waterways, trade, and extradition.

At the close of World War I, states agreed upon the means to identify binding international obligations for the purpose of resolving their disputes. As formulated in the Statute of the Permanent Court of International Justice, the Court should decide an international dispute primarily through application of international conventions and international custom.[10] This formulation remains in the Statute of the present Court. Although the Statute is directed at the Court, it is the only general text in which states have articulated the authoritative procedures by which they agree to be legally bound to an international norm. Treaties and custom thus must be recognized by scholars and other non-state actors as the means states have chosen to create international legal obligations for themselves. A question posed in this study is whether state behavior in adopting and complying with non-binding instruments evidences acceptance of new modes of law-making not reflected in the Statute of the Court. *Ab initio*, however, we take the view that international law is created through treaty and custom, and thus 'soft law' is not legally binding *per se.*

It has become commonplace to note that the international system has undergone tremendous recent changes. From a community of predominately western states, the global arena now contains more than four times the number of states that existed at the beginning of the last century. In addition, other communities have emerged to play important international roles: intergovernmental organizations, non-governmental organizations, professional associations, transnational corporations, and mixed entities comprised of members of different communities. They both contribute to the making of international norms and increasingly are bound by them.

The subject matter of international concern similarly has expanded, paralleling developments within states where governments have taken on an increasing number of tasks. Subjects once deemed private passed into the public sector and from there into issues of transnational concern. International law now governs human rights, environmental protection, weapons systems, and the use of force. It directly regulates individual conduct through

[9] Brierly, J., *The Law of Nations* 1 (Waldock, H., 6th edn., 1963).

[10] General principles of law are a third, more rarely used, source of international law, with judicial decisions and teachings of highly qualified publicists providing evidence of the existence of a norm. For the present Court, see Art. 38, Statute of the International Court of Justice.

the development of international criminal law and criminal tribunals. Most of these topics, as well as the expanding management of the commons areas, are regulated through complex multilateral regimes with supervisory organs established to monitor implementation and compliance. Some of the commitments are non-reciprocal in nature, e.g. human rights, where the duties are owed towards those within the territory and jurisdiction of the state and less towards other states parties to the instrument. In such a system, the traditional method of self-help to induce compliance through withdrawal of benefits is untenable.

Technological change also has made possible communications and travel that place new problems rapidly on the global agenda, including issues of transnational crime and the spread of disease. More information exists and that information is more readily available, creating an awareness of the multiplicity of problems that require international solutions. The relative simplicity of traditional international law necessarily has given way to complex forms, processes, instruments, and norms. Successful or unsuccessful attempts to resolve problems that arise in one subject area cannot always be projected into other subject areas. The needs and approaches of international environmental law, for example the notion of 'common but differentiated responsibilities', may not be appropriate to the human rights field or that of arms control. On the other hand, there has been considerable cross-over, from national law to international law and back (vertical cross-over) as well as from one subject area of international law to another (horizontal cross-over). An example of the latter is state reporting as a supervisory mechanism, which began in the human rights field and has become widespread in instruments concerning environmental protection.

C. THE ROLE OF LAW AND NON-LEGAL APPROACHES TO RESOLVING PROBLEMS

The proposed solutions to problems are not always in the form of law. All human societies strive to maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources. The specific problems that arise in achieving each of these aims differ from one society to another and within every society over time. The threats to order and justice that emerge over time can give rise to a number of responses, of which legal regulation has become perhaps the most prevalent this century. Laws reflect the current needs and recognize the present values of society. As such, legal regulation is almost inevitably responsive; it can rarely anticipate or imagine future problems. Regulation of outer space activities, for example, only became a matter of interest and concern when such activities became possible. Guarantees of a right to privacy were articulated only when the threats to

privacy from technology and government intrusion necessitated a response. While it may be possible to anticipate some emerging problems from current human activities, the ability to design responsive laws still requires defining the problem and identifying potential solutions to it.

Law is not the only means of seeking to prevent or resolve social problems. Issues of justice can and are also addressed through market mechanisms and private charity, while conflict resolution can be promoted through education and information, as well as negotiations outside legal institutions. Maintenance of order and societal values can occur through moral sanctions, exclusion, and granting or withholding of benefits, as well as by use of legal penalties and inducements. In the international arena, law is not the only form of social control or normative claim. Other basic requirements of behavior emerge from morality, courtesy, and social custom. They form part of the expectations of social discourse. Compliance with such norms may be expected and violations sanctioned. Like legal norms, they grow out of the understanding and values of society.

Law, however, is often deemed a necessary, if usually insufficient, basis for ordering behavior. The language of law, especially written language, most precisely communicates expectations and produces reliance, despite inevitable ambiguities and gaps. It exercises a pull toward compliance by its very nature. Its enhanced value and the more serious consequences of nonconformity lead to the generally accepted notion that fundamental fairness requires some identification of what is meant by 'law', some degree of transparency and understanding of the authoritative means of creating binding norms. A law perceived as legitimate and fair is more likely to be observed.

Identifying law can be problematic in a decentralized, some might say anarchic, system like the international society of states. It is not always clear where law ends and non-law begins, or, to use the current terminology, where 'soft' law should be placed. The issue can be important for compliance. Effective application of the principle *pacta sunt servanda*—that legal agreements should be carried out in good faith—proceeds from some basic agreement on what constitute '*pacta*' or legal agreements. The question then becomes whether or not it is necessary for a norm to be contained in a legally binding instrument in order for it to be accepted as binding (*pacta*). Traditional international law clearly distinguished between binding and non-binding instruments, but the distinction may be blurring, as discussed below.

D. COMPLIANCE WITH LAW

The half century since the end of the Second World War has witnessed the proliferation of international norms, not only in traditional areas of international regulation, but in new fields once thought within the exclusive domes-

tic jurisdiction of states. As the systematization and codification of norms becomes relatively complete in some subject areas, it is natural that attention then turns to the implementation and effectiveness of the norms adopted. Compliance with international law is thus a subject of increasing interest, enhanced as concern with the rule of law emerges from within states to become an inter-state issue.

The rule of law requires compliance in order for law to be effective and makes compliance a matter of general international concern. Although any given state may be unaffected by non-compliance with a particular norm, all states are concerned to uphold the rule of law to ensure they are not affected by non-compliance in the future. It may not be necessary for all those subject to the law to comply all of the time, but upholding the rule of law as a general principle requires that measures be taken to encourage compliance, deter non-compliance, and remedy injury caused by violations of legal norms. Consistent non-compliance with a law not only impugns the particular norm, but undermines the rule of law generally. Understanding the factors that compel and condition compliance is thus important to international lawyers and motivates this study, which generally seeks to determine whether states comply with soft law and, if so, why.

States enter into a variety of international commitments, some of which they have chosen to label law. States negotiated the Vienna Convention on the Law of Treaties to govern the most formal of these undertakings. The variety of international commitments, together with concern for compliance, generally raises the question whether the form of a normative instrument, or the formality with which it is approved, as opposed to its language and its content, is crucial to securing compliance. Does formalism, or adoption of a norm according to approved 'law-making' methods, make a difference in compliance with the norm being asserted, with state decisions to comply or not comply? Does it matter to non-state actors, who may be more or less willing to pressure states to comply with a given norm?

The question being asked may recall debates in the post-war period over form and function in architecture. Functionalism has inherent limits imposed by the laws of physics and human knowledge, but it has nonetheless had an important impact on the visual landscape, as many architects subordinate form to function. Form in law may also follow function. It is generally assumed that denominating something 'law' makes a difference in expectations of compliance and consequences of non-compliance. While some modern critics deny that law is significant to international commitment and the behavior of states, recent activity in the international political arena does not support this conclusion.[11] It was clear at the Rio Conference on Environment and Development, for example, that the non-governmental representatives

[11] See Johnston, D.M., *Consent and Commitment in the World Community* (1997).

had a strong preference for a binding Earth Charter over the ultimately-adopted Rio Declaration, and that states were unwilling to accept a legally binding text because of the consequences flowing from legal obligations. Both groups clearly felt that the form of the commitment made a difference.

While legal obligation brings with it greater expectation of conforming behavior and consequences for non-compliance, states also are demonstrating concern about compliance with other forms of international commitment. The Heads of State and Government of the Member States of the Council of Europe, meeting for their first summit conference in Vienna in 1993, reaffirmed that accession to the Council of Europe presupposes compliance with basic principles of democracy, the rule of law and respect for human rights, including freedom of expression and the media, and protection of national minorities. The Summit Statement of October 9, 1992 emphasized: '[w]e are resolved to ensure full compliance with the commitments accepted by all member states within the Council of Europe' and referred to three specific instruments, two of which are legally non-binding.[12]

E. HARD LAW AND SOFT LAW

The line between law and not-law may appear blurred. Treaty mechanisms are including more 'soft' obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of instrument may have compliance procedures that range from soft to hard. The result seems to be a dynamic interplay between soft and hard obligations similar to that which exists between international and national law. In fact, it is rare to find soft law standing in isolation; instead, it is used most frequently either as a precursor to hard law or as a supplement to a hard law instrument. Soft law instruments often serve to allow treaty parties to authoritatively resolve ambiguities in the text or fill in gaps. This is part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule of law framework. The development of complex regimes is particularly evident in international management of commons areas, such as the high seas and Antarctica, and in ongoing intergovernmental cooperative arrangements. For the latter, the memorandum of understanding has become a common form of undertaking, perhaps 'motivated by the need to circumvent the political constraints, eco-

[12] See Council of Europe, *Monitoring of Compliance with Commitments Entered Into by Council of Europe Member States: An Overview*, 27 March 1997, Monitor/Inf (97) 1 at 9.

nomic costs, and legal rigidities that often are associated with formal and legally binding treaties'.[13]

In many cases, hard law instruments can be distinguished from soft law by internal provisions and final clauses, although the characteristics of each are increasingly difficult to identify. Recently, supervisory organs have been created to oversee compliance with non-binding norms. The Commission on Sustainable Development, for example, supervises implementation of Agenda 21. In other instances, states have been asked to submit reports on implementation of and compliance with declarations and programs of action, in a manner that mimics if it does not duplicate the mechanisms utilized in treaties. Some scholars have distinguished hard law and soft law by stating that breach of law gives rise to legal consequences while breach of a political norm gives rise to political consequences. Such a distinction is not always easy to make. Testing normativity based on consequences can be confusing, since breaches of law may give rise to consequences that may be politically motivated. A government that recalls its ambassador can either be expressing political disapproval of another state's policy on an issue, or sanctioning noncompliance with a legal norm. Terminating foreign assistance also may be characterized either way. Even binding UN Security Council resolutions based on a threat to the peace do not necessarily depend upon a violation of international law.

While the systematization and interpretation of rules and principles are crucial, it is first necessary to identify the process by which those rules and principles are authoritatively created. If states expect compliance and in fact comply with rules and principles contained in soft law instruments as well as they do with norms contained in treaties and custom, then perhaps the concept of international law, or the list of sources of international law, requires expansion. Alternatively, it may have to be conceded that legal obligation is not as significant a factor in state behavior as some would think. A further possibility is that law remains important and states choose a soft law form for specific reasons related to the requirements of the problem being addressed and unrelated to the expectation of compliance. Each of these possibilities is explored in the studies that follow.

It seems clear that compliance with soft law cannot be separated from the issue of why states have recourse to soft law forms for their international commitments. There are several possible reasons that could explain the choice of soft law over hard law.[14]

[13] Johnston, *supra* note 11 at p. xxiv.

[14] See Lipson, C., 'Why are Some Agreements Informal?' (1991) 45 *Int. Org.* 495. Lipson suggests four reasons for choosing informal agreements: to avoid formal and visible pledges; to avoid ratification; to be able to renegotiate or modify as circumstances change; and to achieve a result. He sees speed, simplicity, flexibility and privacy as part of informal agreements.

(1) Bureaucratization of international institutions has led to law that is 'deformalized' through programs of action and other policy instruments. The reason for the growth of international institutions, bureaucracies and institutions is that they serve a purpose, in the same way that administrative agencies have become an essential part of national societies. Technical details, need for flexibility, and rapid response necessitate permanent institutions with the competence and mandate to initiate norm-creation, monitor and assist performance, and secure compliance. Where institutions can assess performance, hard law may not be necessary because state behavior is likely to change in response to the assessments. Moreover, international institutions generally lack the power to adopt binding instruments and can only have recourse to soft law.

(2) The choice of non-binding norms and instruments may reflect respect for hard law, which states and other actors view cautiously. They may use the soft law form when there are concerns about the possibility of non-compliance, either because of domestic political opposition, lack of ability or capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norm. When states do not feel they can comply with a norm, they are largely unwilling to put that norm in a binding instrument. Thus soft law may be the homage states pay to hard law and the result may be the adoption of more progressive norms than would be drafted if a hard law form were chosen.[15]

(3) Soft law instruments may be intended to induce states to participate or to pressure non-consenting states to conform. Some environmental treaties, e.g. CITES and the Montreal Protocol, have sought to influence the behavior of non-parties, but, in general, treaty rules preclude binding non-consenting states. Pressure on dissenting states through adoption of soft law instruments may be seen in particular as motivation for the UN General Assembly drift-net fishing resolutions.

(4) Soft law also may be emerging due to a growing strength and maturity of the international system. In on-going cooperative societies, from families to nations, it is recognized that not all relations need to be governed by law but some may be left to etiquette, social discourse, or informal commitments. Compliance is expected with all agreed norms, but 'law' is reserved for the serious or fundamental rules where its formality and binding-ness are important.

[15] David Victor suggests that non-binding norms may be better in regulating complex environmental problems because their actual influence in changing behavior may be better than that of treaties. Generally compliance is high with treaties because states negotiate treaties with which they can comply. The process of earning consent to binding commitments leads to commitments that are excessively modest or ambiguous and thus less effective than they could be. This is particularly the case where there is a high degree of uncertainty in goals, means or capacity or where exogenous factors may impact. States seem more willing to adopt clear and ambitious commitments when they are in non-binding form. Being clear, they are more effective.

(5) Legally binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, due to scientific uncertainty or other causes, but there is an urgent requirement to take some action. Similarly, it may be necessary where diverse legal systems preclude legally binding norms. Thus, soft law may be increasingly utilized because it responds to the needs of the new international system. In national legal systems, law-creating methods have always varied, from constitution-writing, to legislation, executive decrees, administrative regulation, and private contract, as well as common law. International law-making itself has changed over time. Where it was once almost entirely customary in origin, treaty-making, first bilateral, then multilateral, has come to be seen as the predominant form of law-making in the modern world.

(6) Soft law allows for more active participation of non-state actors. Where states once created and applied international norms through processes that lacked transparency, participation, and accountability, non-state actors have become a significant source of power alongside, if not outside, state control. Public participation is not only a goal but a reality in the development and implementation of international norms. Soft law permits non-state actors a role that is possible only rarely in traditional law-making processes.

(7) Soft law generally can be adopted more rapidly because it is non-binding. It can also be quickly amended or replaced if it fails to meet current challenges. Its flexibility extends to implementation and compliance where the dynamic interaction of the various actors can play a crucial role. Soft law may thus substitute for hard law when no agreement on hard law can be achieved or when recourse to the hard law form would be ineffective (less progressive norms or less likelihood they would be acceptable in the national political arena). It may be that an increased number of negotiating states makes it more likely that there will be few hard law agreements in the global setting. If this is the case, we would expect to see more soft law on the global than the regional level, and that appears to be the case.

F. COMPLIANCE WITH SOFT LAW

In this study of compliance with soft law, several factors were identified in advance as possibly affecting state performance. While most of them apply to all subject areas in the study, the relative importance of each varies from one subject to another. The hypotheses center on the form or process of adoption, the content of the instrument, the institutional setting, and the follow-up procedures envisaged. All the hypotheses stem from a general theory that states adopt and accept international norms when it is in their self-interest and they comply for the same reason. When they do not comply, the interests of others lead to various responsive actions. The notion of self-interest can include

survival, domestic politics, moral values, altruism, and economic progress. Further, compliance may result not from the possibility of sanctions but from recognition of the need to ensure sustainability of the common good. Public goods theory may be more appropriate, in fact, to the subjects of environment and human rights than game theory, which may apply to arms control and trade.[16] The factors that were hypothesized to affect compliance include:

(1) The context of the norm-creation, especially the relationship between soft law and hard law. Soft law can be used to fill in gaps in hard law instruments or supplement a hard law instrument with new norms. Conversely, a soft law instrument may be adopted as a precursor to a treaty. Our hypothesis is that soft law adopted pursuant to a widely-accepted hard law agreement will reflect greater commitment and therefore produce better compliance than a new norm in soft law form chosen because there was no agreement on a hard law text. On the other hand, in subject areas of rapid change, where states agree that action needs to be taken without delay, compliance may be high even in the absence of a binding norm. The contextual setting also includes the overall level of compliance. It is assumed that the greater the consensus in the international community for the norms and the more compliance, the greater the likelihood that any single state will comply.

It also may be expected that the process of norm-creation, which by itself can induce some compliance, would probably have less impact when the norms are non-binding than when they are binding. People are conditioned to obey the law and feelings of obligation often play a significant role in compliance choices.[17] Thus, the form of the rules may play a role in decision making.[18]

(2) Content of the norm. We assume that the harder the content of the obligation the better compliance is likely to be. Ambiguity and open-endedness of international standards can limit efforts to secure compliance, because states may be unsure of the required conduct or unwilling to move beyond minimal efforts to implement the perceived norm. Ambiguity may also reflect lack of agreement, in which case compliance will be uneven.[19] Content also varies in its impact on state sovereignty. The more intrusive the rule, the harder it may be to comply. Thus, compliance with international 'non-binding' norms may be greatest for 'rules of the road' on common

[16] See Brown Weiss and Jacobson, *supra* note 7.

[17] Young, O., *Compliance and Public Authority: A Theory with International Applications* (1979) 23. 'Rules constitute an essential feature of bureaucracies and . . . routinized compliance with rules is a deeply ingrained norm among bureaucrats.' *Ibid.* at 39.

[18] See Kratochwil, F.V., *Rules, Norms and Decisions* (1989), 15, 95–129.

[19] Normative ambiguity may be a deliberate strategy, however, to ensure maximum agreement, especially when coupled with processes of review that can lead to normative strengthening of the provisions over time. The stability of the process and the institutional matrix for making and applying decisions on environment and development are crucial. See Handl, G, 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio' (1994) 5 *Col.J.Int'l Envtl. & Pol'y* 305.

spaces, where the ability of all to use the road depends on each respecting the rules and only international rules will work.

The perceived economic costs of compliance or non-compliance also must be considered. 'Positive' obligations to take action may have costs that are absent when states are merely obliged to refrain from certain actions. Capacity thus may be crucial to achieving compliance with positive obligations. The majority of nations, for example, face issues of capacity to combat and remediate harm from local pollution, preventing full compliance with international norms.[20] Where capacity is the issue, compliance may be improved by increasing opportunities to engage in desirable behavior.

Competition in the international economy introduces incentives to non-compliance with some obligations, particularly in the area of trade. States may choose to lure investment, for example, by reducing legal controls over environmental protection, treatment of workers, or financial accountability. Incentives to defect can be very high in some areas, e.g. money laundering, but linkage of subject areas may overcome some of the disincentives. The OSCE process, coupling human rights and security concerns, demonstrated how separate subject areas may be linked in ways that promote greater compliance with the different sets of norms than would likely be achieved if each subject area was regulated on its own. Incentives also may be built into the normative instrument.[21]

(3) The institutional setting. Institutions and mechanisms capable of giving authoritative interpretations may foster compliance because they can 'harden' the norm through judicial or quasi-judicial rulings. It has been asserted that '[the] normal way of inducement of compliance with legal obligations is . . . to submit allegations of non-compliance to a court'.[22] While this model may be challenged as overly litigious, supervisory mechanisms are crucial, especially in subject areas where the norm is accompanied by strong incentives not to comply. Monitoring and publicly revealing non-compliance may be the most effective, if not the only, method of inducing compliance in the face of strong disincentives. It may even be possible that some stronger monitoring mechanisms exist in soft law precisely because it is non-binding and states are therefore willing to accept the scrutiny they would reject in a binding text.

Compliance review mechanisms are an intermediate phase in treaty implementation, between domestic application and sanctions for non-compliance. They have a significant impact on the level of compliance because the expec-

[20] Parker, R.W., *Choosing Norms to Promote Compliance and Effectiveness: The Case for International Environmental Benchmark Standards* (unpublished paper on file).

[21] See Mitchell, R.B., 'Regime Design Matters: Intentional Oil Pollution and Treaty Compliance' (1994) 48 *Int. Org.* 425.

[22] Fleischhauer, C.A., 'Inducing Compliance', in I United Nations Legal Order 231, 236 (Schachter, O. & Joyner, C., eds. 1995).

tation of being identified as not complying with a norm, *i.e.* verification by reliable sources, helps deter violations. The nature of the norm also is highly related to the need for and ability to undertake compliance review. In this regard, the compliance with the norm must be verifiable (the difficulty of measuring freedom of speech compared to mercury content of discharges into water makes it easier to conceal non-compliance with the former) and the information must be receivable by the relevant institutions. At the same time, the less precise the obligation, the more important the review to clearing up ambiguity and filling in gaps in the normative instrument.[23]

Other factors increase the importance of compliance mechanisms for specific subject areas. In the field of environmental law, compliance review is important because of the risk of irreversibility and potential magnitude of environmental problems, the lack of reciprocity as a tool for enforcing environmental norms, the failure to operationalize state liability and responsibility, and the need for compliance to be precisely measured and quantified.[24]

(4) Targets of the norm. States may find it easier to comply with norms that govern official behavior than with obligations to regulate non-state behavior. States have various direct sanctions available to control the behavior of state agents, from disciplinary measures to dismissal. States may be less willing to comply, however, if the requirements are perceived as undermining governmental power, as in the fields of human rights and arms control.

The regulation of non-state behavior is likely to require legislation that prohibits, requires, or regulates the specific conduct. Passage of such legislation may be difficult when the non-state actors play a powerful role in the domestic political arena. On the other hand, compliance by non-state actors may be easier to achieve when they are part of the drafting process, which is difficult to achieve through traditional law-making processes. Stake-holders who participate in drafting the norms that govern their behavior are more likely to feel a commitment to the norms adopted. While the need for and existence of organized non-state participation is important, it appears from hard law studies that decentralization does not necessarily affect compliance.

Among the questions addressed in the study are the relationship between negotiations (the reasons for recourse to soft law) and compliance and the extent to which concern with compliance drives both the form and the content of the norm. The impact or incentives and disincentives, which make a difference to compliance, will depend on the subject areas and different

[23] See Charpentier, J., 'Le contrôle par les organisations internationales de l'exécution des obligations des états', in 182 *R.C.A.D.I.* [1983-IV] 172. See also Imperiali, C. (ed.), *L'Effectivité du droit international de l'environnement: Contrôle de la mise en œuvre des conventions internationales* (1998); Sands, P., *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (1992); Wolfrum, R., *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1998) 272 RCADI.

[24] Lang, W., 'Compliance Control in International Environmental Law: Institutional Necessities' (1996) 56 *Heidelberg J. Int'l L.* (ZaöRV) 685.

results may be expected at different points in time. Soft law may be used precisely because compliance is expected to be difficult; it begins a dynamic process over time that may lead to hard law or the norm may remain soft at the international level but become hard law internally.

CONCLUSION

The growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior with regard to an ever-growing number of transnational problems. It is unlikely that we will see the return of a law/freedom of action dichotomy. Instead, the various international actors will create and attempt to comply with a range of international commitments, some of which will be in legal form, others of which will be contained in non-binding instruments. The lack of a binding form may reduce the options for enforcement in the short term (*i.e.* no litigation), but this does not deny that there can exist sincere and deeply held expectations of compliance with the norms contained in the non-binding form.

Various incentives and disincentives to compliance may be identified but there is little that can be done to quantify these factors, as the decisions of states and non-state actors to comply or not comply involve complex and holistic determinations, not always based on rational preferences. While this study seeks to identify the elements that go into the decisions of states and non-state actors to comply with soft law norms, quantification was not attempted, given the impossibility of identifying the causal relevance of international commitments at any particular time for any given state: correspondence of behavior with legal rules is not the same as compliance.[25]

The study is not premised on deriving a 'recipe' for success that will ensure the effective resolution of international problems and conflicts. While there may be particular factors that appear to influence state behavior across the four subject areas, determinants of implementation, compliance, and effectiveness vary even in a single subject area. Ultimately, the study is concerned with international legal commitments, whether binding or non-binding, as tools to prevent and resolve conflict and promote international justice. It implies that once international regulation has been perceived as necessary and action has been taken, compliance is expected and necessary, but not always sufficient, for the norm to become effective. The implications of this for particular states, especially the most powerful, in particular cases needs further study. States are not unitary actors and there may be elements of compliance

[25] In this regard, we agreed with Chayes and Chayes that 'the general level of compliance with international agreements cannot be empirically verified.' Chayes, A., and Chayes, A.H., 'On Compliance,' (1993) 47 *Int. Org.* 175 at 176.

and non-compliance simultaneously within a given state. The role of civil society, transparency, and participatory governance are broader themes that emerge from the project. In the end, the international legal system appears to be a complex, dynamic web of interrelationships between hard and soft law, national and international regulation, and various institutions that seek to promote the rule of law. In this system, soft law is playing increasingly important and varied roles.