

BOOK REVIEWS AND NOTES

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The New Sovereignty: Compliance with International Regulatory Agreements. By Abram Chayes and Antonia Handler Chayes. Cambridge MA, London: Harvard University Press, 1995. Pp. xii, 404. \$49.95.

This impressive volume crowns the life's work of two of America's leading international lawyers and international legal process theorists, Harvard Law School Professor Abram Chayes, formerly legal adviser to the U.S. Department of State, and Antonia Handler Chayes, president of the Consensus Building Institute and former undersecretary of the U.S. Air Force. The book grows out of the Chayeses' vast practical experience, as well as their extensive teaching and writing about the architecture of international regimes and treaty compliance in the arms control and environmental fields. Their book seeks to describe how international regulation is accomplished through "treaty regimes," and to prescribe how those regimes may be better managed to promote greater compliance with treaty norms.

The opening chapter, "A Theory of Compliance," posits that three factors—efficiency, national interest and regime norms—foster a general propensity for nation-states to comply with treaty rules. Why, then, do nations deviate from those rules? The Chayeses explain noncompliance as stemming from the ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their treaty undertakings, and time lags between a state's undertaking and its performance. Given these pressures toward noncompliance, how can deviance be contained within acceptable levels? In parts 1 and 2, the authors derive and contrast two strategies for promoting treaty compliance. Part 1 develops an "enforcement" model, and after reviewing the various available coercive devices—treaty-based military and economic sanctions, membership, and unilateral sanctions—finds this approach largely doomed to failure. Sanctioning authority, the authors argue, "is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used" (pp. 32–33). Repeated use of sanctions entails

high costs to the sanctioner and generally requires great-power leadership, which can only rarely be mustered. Consequently, sanctions are applied sporadically and unevenly, creating serious problems of legitimacy.

After discrediting the coercive model, part 2 offers in its stead a "management" model, whereby national actors seek to induce compliance not through coercive strategies, but through a cooperative, managerial approach whose centerpiece is an interactive process of justification, discourse and persuasion. The Chayeses describe a regime not as a passive "switching system, facilitating the independent interactions of independent states," but as playing an "active role . . . in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime" (p. 229). Chapters 5 through 10 identify and assess the essential tools of this normative framework: ranging from devices such as transparency, norms and strategic interaction, reporting and data collection, and verification and monitoring, to "instruments of active management" such as dispute settlement, capacity building, jawboning, interpretation, and strategic policy review and assessment. The final two chapters evaluate institutions, both nongovernmental and intergovernmental, and argue that a management model will render such institutions more effective instruments of managing treaty compliance.

The Chayeses' book is a classic of international legal process. It is the most insightful and complete description available of the trans-substantive role that law plays in the international regulatory process. The book bristles with examples, many drawn from the Chayeses' rich experiential base as government and private lawyers. The authors support their arguments with myriad mini-case studies, cutting across the traditional realms of both private and public international law: use of force, economic sanctions, international trade, environmental law, maritime law, international transport and communica-

tions, human rights, nuclear nonproliferation, arms control, expropriation, international commodity agreements, labor and sovereign debt.

Helpful as these examples are, their kaleidoscopic range tends to disorient a reader seeking clear answers to three fundamental questions. First, what precisely are the contours of the "new sovereignty"? The authors suggest that sovereignty now means not freedom *from* external interference, but freedom *to* engage in international relations as members of international regimes. A state's sovereignty thus becomes contingent upon its ongoing web of international ties and obligations. No state can blithely ignore international norms because "there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to other issues to be ignored" (p. 119). The new sovereignty thus primarily consists not of territorial control or governmental autonomy, but of "status—the vindication of the state's existence as a member of the international system" (p. 27). "[N]o single country, no matter how powerful, can consistently achieve its objectives through unilateral action or ad hoc coalition" (p. 123), the Chayeses aver. "[I]n the last analysis, the ability of a state to remain a participant in the international policy-making process—and thus its status as a member of the international system—depends in some degree on its demonstrated willingness to accept and engage the regime's compliance procedures" (p. 230).

The second question, given the bounded nature of this new sovereignty, is, how precisely should treaty regimes "manage" state compliance with international law? To the Chayeses, the principal method of inducing compliance with regime norms is "jawboning"—an "iterative process" of "justificatory discourse" among regime members—not the imposition of sanctions (p. 25). This answer strongly evokes Abram Chayes's classic of domestic legal process, *The Role of the Judge in Public Law Litigation*,¹ which argued that domestic litigation in the United States had shifted from a retrospective, private-law paradigm into a prospective, public-law mode. Within the new paradigm, the judge sheds her passive and blinkered umpireal role in favor of an open-ended, managerial role, interpreting constitutive text, demanding and receiving in-

formation, declaring norms, and using broad and equitable supervisory tools to persuade and prod the parties into legal compliance.

The New Sovereignty argues that the treaty regime has assumed a similar managerial role with regard to the compliance of its member states. Like public-law litigation and the judges who manage it, "[t]he [regulatory] treaty and the regime in which it is embedded are best seen not as a set of prohibitory norms, but as institutions for management of an issue area over time" (p. 228). Like the public-law judge, the treaty regime's prime tool is the power to persuade, using norms and legal powers as leverage points and bargaining chips in a discursive, norm-creating process. In both cases, the overseer of legal process—the judge in domestic litigation and the treaty regime in international regulation—manages an interactive, dialectic process of justificatory discourse, in which norms are invoked, interpreted and elaborated in a way that generates pressure for compliance.

But third, what does it really mean to have a "discourse among states, international organizations, and to some extent interested publics, elaborating the meaning of [treaty] norms" (p. 110)? The authors portray the "interactive process for dealing with compliance" as proceeding in several stages: (1) development of data about the situation and parties under regulation; (2) identification of behavior that raises significant compliance questions; (3) diagnosis of the sources of apparently deviant behavior; (4) examination of the noncomplying party's capacity to carry out its obligations; (5) offers of technical assistance to redress any undercapacity; (6) the threat or invocation of dispute-settlement mechanisms; and (7) sometimes, the conclusion that the treaty norms themselves should be modified to accommodate the non-compliant conduct.

On reflection, this description seems correct, but incomplete, in two major respects: First, the book does not entirely persuade with regard to either the carrots or the sticks that give the managerial process its effectiveness. By focusing so intensely on *process*, the Chayeses only lightly discuss the *substance* of the rules being enforced. Yet all treaties are not created equal. States may have greater incentives to comply with some treaties, but greater obligations to comply with others (e.g., those enforcing *jus cogens* norms). Securing greater compliance with treaties is not good *per se*. In fact, securing compliance may

¹ 89 HARV. L. REV. 1281 (1976).

not be so desirable if the treaties themselves are unfair or enshrine disingenuous or coercive bargains.

The authors concede that the "legitimacy" of their managerial approach depends on procedural fairness, equal and nondiscriminatory application, and the substantive fairness and equity of the rules being applied. They acknowledge that "fairness considerations can hardly fail to play a major role in [the discursive] process" (pp. 127-34). But what remains unspecified is precisely how the process should account for such fairness considerations, by what means managerial processes can be adjusted to improve compliance with underenforced treaties with which states may have low incentives to comply (e.g., human rights treaties), and by what means unfair or illegitimate regime norms should be rendered unenforceable.

Similarly, by emphasizing the power of the managerial model and the weaknesses of the enforcement model, the Chayeses create the misimpression that the two are alternatives, when in fact they complement one another. The authors' case studies do not clarify the extent to which the managerial model sometimes succeeds not solely because of the power of discourse but also because of the shadow of sanctions, however rare or remote that possibility might be.

Second, the authors' picture of process omits any detailed description of how the member states *internalize* the constraining norms. It says nothing about the means—for example, judicial incorporation, legislative embodiment or executive acceptance—by which a complying state will signal its internal acceptance of the relevant international standard. Although the Chayeses are themselves experts on the nature and functioning of domestic courts, ironically, their discussion of the "instruments of active management" says nothing about the role that domestic courts—for example, the U.S. courts construing the Alien Tort Statute since the landmark decision in *Filartiga v. Pena-Irala*²—can play as enforcers and internalizers of international norms. As the authors recognize, the process of treaty compliance transpires in a two-level game, in which a member's relations with its treaty partners occur on one chessboard,

while its bargaining about compliance with its internal domestic constituencies transpires on a domestic chessboard. Yet the Chayeses do not closely examine how the transnational legal link between the domestic and international levels operates, even though it is that very link that often determines whether the "managerial process"—interstate bargaining at the global level—will actually reshape the national interests and identities of the participants.

Their failure to discuss internalization also leads the Chayeses to avoid explaining how their insights might be applied outside the realm of positive, treaty-based law to the vast and growing realm of customary and declarative international law. In the human rights area, for example, the Chayeses recognize that their managerial strategy has little compliance "bite," given that treaty regimes are notoriously weak and governments, for reasons of trade or *Realpolitik*, may hesitate formally and openly to declare that another government has engaged in human rights abuse. Yet human rights is an area in which core customary norms are clearly defined and often absolute. In such an area, the best compliance strategies may not be the kind of "horizontal" strategies of regime management at the international level that the Chayeses describe but, rather, strategies of internalization. Examples of the latter might include domestic litigation to provoke judicial incorporation of human rights norms, or lobbying to embed the treaty norms into binding domestic statutes that officials of the noncomplying government might be more inclined to take seriously.

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International Litigation and the Quest for Reasonableness: Essays in Private International Law. By Andreas F. Lowenfeld. Oxford, New York: Oxford University Press/Clarendon Press, 1996. Pp. xxvii, 239. Index. \$65.

For much of this century, courts and scholars have viewed public and private international law as separate disciplines that address separate concerns. Under this traditional view, public international law regulates relations among nations *inter se*, and private international law regulates transnational relations among private persons. International law teaching and scholarship still largely reflect this dichotomy. But today the dichotomy makes little sense. Modern "public"

² 630 F.2d 876 (2d Cir. 1980) (Paraguayan human rights victims may sue Paraguayan official under the Alien Tort Statute, 28 U.S.C. §1350, in United States court for civil damages arising from official torture).