VARIETIES OF EFFECTIVENESS: WHAT MATTERS?

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Editor's note: The following is the second contribution to an AJIL Unbound symposium[1] on "The Idea of Effective International Law," a continuation of the panel discussion[2] at the 2014 ASIL-ILA joint meeting in Washington, DC.

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What would it mean for international law to be effective? There are different senses of the word. In a discussion of the idea of effectiveness, then, the first step is to distinguish a variety of different ideas. The aim is not to decide which sense of the word is the right one, conceptually or linguistically. The aim should be to discuss which of these ideas of effectiveness is important, worth thinking about.

Hans Kelsen introduced a notion of effectiveness into legal theory in order to distinguish what was for him a factual issue of effectiveness from the (for him) normative issue of validity, and to discuss the relation between the two. Effectiveness for Kelsen just meant that the norms of a legal order are generally applied and complied with. The relation between this factual issue and the normative issue of validity is that there can be for Kelsen no validity (and therefore no genuine legal obligation) unless the legal order is by and large effective in this sense. Suppose that New York University School of Law published a document with the title "Code of Global Administrative Law." Assuming that the norms of this code are not suddenly (or already) by and large complied with by international organizations, the code would not be in effect and would therefore not be valid on the Kelsenian model, nor a system of genuine oughts.

Other positivist legal theorists would put the point differently. For H. L. A. Hart, legal validity did not imply an obligation to comply; legal validity for Hart is one thing, and what reason we have to comply is another. But the connection between effectiveness and validity remains the same: if a legal order is not generally applied and complied with (not effective), its rules and standards have no validity. They are not in force.

All positivists would agree about the invalidity, today, of Roman law. Roman law exists in the sense that we can say what the content of that legal order is. But it is not in effect and so its norms have no validity for anyone alive today. Ronald Dworkin's nonpositivist legal theory in *Law's Empire* also agrees. On that theory the first stage of legal interpretation is to identify "pre-interpretive" law, that which most participants in the practice agree are examples of valid law. Nobody thinks that Roman law is valid for anyone alive today.

So, our first sense of effectiveness we may call *effectiveness as compliance*. And one reason why we might be interested in effectiveness as compliance in the context of international law is that unless international law is by and large complied with and applied, it isn't a legal system that is actually in effect. Being in effect is a

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[1] Vijay Padmanabhan, *The Idea of Effective International Law: Continuing the Discussion*, 108 AJIL UNBOUND 91 (2014).

[2] Gary J. Shaw, *The Idea of Effective International Law*, ASIL CABLES (Apr. 11, 2014).

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precondition of validity and, in turn, of there being any obligation to follow its norms. If the norms of international law were not generally complied with they could not have moral force for states as law.

(It is interesting to note that according to the view Dworkin held at the end of his life, effectiveness as general compliance is not a necessary condition of a legal order having genuine moral force. This is because on the late Dworkinian view, there is no pre-interpretive stage in which the brute fact of agreement on paradigm cases of law generates the data for interpretation. Rather, legal obligations are those moral obligations that flow from morally relevant past political decisions. Statutes are sources of law not because everyone thinks they are, but because their provenance gives them moral weight for citizens. The reason that Roman law has no moral force is that the political decisions made in ancient Rome have no moral significance for anyone now alive. Thus if international law were not generally complied with, it might still be a source of genuine obligations, so long as the political decisions, practices, and agreements that generate its norms have moral significance for states. I find this late Dworkin view implausible as an account of law, so I will not pursue the matter further here.[3]

There is also a more direct and pragmatic reason why effectiveness as compliance matters for international law. If international law is not generally complied with, we will naturally want to know whether there is anything that can be done to increase compliance. To the extent that the answer to that question is "No," we would have very good reason to give up on the whole exercise. There is no point engaging in a legal practice that is always going to be ignored by its subjects. We might as well just talk about international right and wrong.

So it is good to learn, from good empiricists who have studied the question, that Louis Henkin's commonsense observation of thirty-five years ago that "almost all nations observe almost all principles of international law and almost all of their obligations most of the time" seems to have been accurate.[4]

But now, evidence of the fact of compliance does not tell us why subjects comply. Effectiveness as compliance is a simple affair; it asks only whether the subjects of international law are complying or not. Their motives are irrelevant. Since effectiveness in the sense of compliance is blind to motives, effectiveness in this sense doesn't imply that international law is actually affecting the behavior of legal subjects. They might have done the same thing anyway. There is a very different notion of effectiveness that turns precisely on whether international law makes a difference affects subjects' behavior. Call this *effectiveness as inducing compliance*. This sense of effectiveness also obviously matters. In fact, it appears to be more important, as Timothy Meyer argues[5] in his contribution to this symposium. I said that if no legal subjects complied with international law and there was no prospect of that changing, then we should spend our time and money on something else. But the same is true if though subjects do comply with international law they would act the same way in the absence of law.

We should not overstate this point, however. Though it is important to know whether international law induces compliance at present levels of compliance, it is not as important as it might seem, so long as it is possible to increase compliance. If compliance were perfect it would be an urgent question to figure out whether international law made any difference. But compliance is not perfect and so, assuming that greater compliance would make the world better, we have reason to investigate ways of increasing it.

Another word of caution about effectiveness as inducing compliance: it is very hard to find out, empirically, whether international law affects legal subjects' behavior. We should distinguish, in this connection, between the empiricists who investigate compliance and the theorists who model the incentives law provides

[3] *See, e.g.*, Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2 (2013).

[4] *See, e.g.,* Beth Simmons, *Treaty Compliance and Violation*, 13 ANNUAL REV. POL. SCI. 273 (2010).

[5] Timothy Meyer, *How Compliance Understates Effectiveness*, 108 AJIL UNBOUND 93 (2014).

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its subjects. The first is a factual inquiry, the second a theoretical one. The standard assumption of law and economics theorists is that only self-interest ever moves a state to comply with international law. Careful and ingenious modeling then predicts which parts of international law will induce compliance and which will not.[6] Though it is obviously good to know how to shape legal rules to provide self-interested incentives to compliance, and good to know which subject-areas are likely to be more successful, it is equally important to remember that this is a partial picture. The assumption that only self-interest motivates compliance is unwarranted. The truth is that we don't know why complying subjects comply when they do. Common sense suggests a variety of motives, including a sense that it is the right thing to do. Certainly no one has proved that international legal subjects are incapable of complying out of a sense of obligation.

Equally, no one denies that compliance increases where legal subjects see self-interested reasons to comply and not just moral ones. This should lead us, however, beyond investigation of the incentives international law currently provides its legal subjects and toward investigation of how those incentives can be strengthened. We need to move beyond effectiveness as inducing compliance to a third and narrower sense of effectiveness: effectiveness as enforcement. The law might induce compliance without the legal order itself doing anything to make that happen. What we might call "natural sanctions," such as harmed reputation, can induce compliance though the sanction is not itself provided for as part of the law. Effectiveness as enforcement concerns the ability of the legal system itself to induce compliance—as it were, deliberately. Can international law itself provide norms and institutional structures that will cause legal actors to comply with law rather than not?

Why does this question, as opposed to the question of whether the law in fact induces compliance, matter? It matters, as I have said, because compliance is not currently perfect. Given that we don't have perfect compliance, it matters whether the legal system can be reformed so that it enforces the law more effectively and thus increases compliance.

But there's another, purely theoretical, reason why it matters. There have always been some who claim that since international law is not enforced, it isn't really law. I say that this is a theoretical issue, and it is. It's an issue from legal philosophy but it also has enormous political significance in that the claim is often made (in the United States, at any rate) with the aim of discrediting any arguments about the normative significance of the international legal order.

But the claim is not credible. Coercion or enforcement is a not a condition for the existence of legal obligation. We don't have to imagine a society of angels who would still need law to prompt the intuition that there can be law without coercion. Much domestic law is not coercively enforced. Think of the law that applies to high executive officials. Though some have always happily embraced the idea that the sovereign, the executive branch, is not subject to law, most international law skeptics would not.

There is also a simpler reason to reject the claim that international law is not law because it is not enforced: it is not true that international law is not enforced. It is enforced in different ways than domestic law (and imperfectly), but reprisals, counter-measures, and exclusion from mutually beneficial arrangements[7] are all forms of enforcement. And perhaps there are other options. Though we may hope that we never have a world state with an effective enforcement apparatus, we may hope for more effective enforcement of international law in other ways.

I have distinguished three senses of effectiveness—effectiveness as compliance, as inducing compliance, and as enforcement. All of these notions of effectiveness matter. But I want to end with yet another sense of

[6] *See, e.g.*, Alan O. Sykes, *The Inaugural Robert A. Kindler Professorship of Law Lecture: When is International Law Useful*, 45 N.Y.U. J. INT'L L. & POL. 723 (2013). For a response see Liam Murphy, *More than One Way to Be of Use*, 45 N.Y.U. J. INT'L L. & POL. 821 (2013).

[7] *See* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

effectiveness that seems to me increasingly neglected in international legal theory. Focusing solely on effectiveness as inducing compliance for reasons of self-interest, and on effectiveness as enforcement, can leave us with too narrow a view of how international law might make a difference in the world. The widespread view that international law is useful only insofar as it engages motives of self-interest is not just narrow and inaccurate, it is politically harmful.

In my view, so long as general compliance with the international legal order is better than noncompliance, individual states (I here ignore other subjects of international law) have strong instrumental moral reason to comply with the law. This is for two main reasons that work in tandem. First, with enforcement comparatively weak, softer inducements to compliance such as Andrew Guzman's three R's of reputation, retaliation, and reciprocity have a very significant role to play.[8] Second, compared to other legal orders there are very few state subjects of international law. This means that, unlike in the case of private subjects of domestic law, noncompliance by a single state can make a significant difference to the compliance of others. The upshot is that each act of noncompliance by a state (and especially by a very powerful state) has a reasonable chance of being part of a pattern of increasing noncompliance that snowballs into a situation where compliance is no longer the norm. Given the positive role general compliance with (good enough) international law can play, this provides moral reason for individual states to comply.

What I want to emphasize is that we neglect this last sense of effectiveness—*effectiveness as providing moral reason for compliance*—at our peril. Analyses that indicate where self-interest alone will induce compliance are not just incomplete. They have the harmful effect of suggesting that there is, in fact, no reason other than self-interest for states to comply. It's not just that we can't count on states being moved to comply for moral reasons, it's that they would be irrational to be so moved as there are no such moral reasons. Effectiveness as inducing compliance by engaging self-interest and facilitating enforcement are very important. But international law can and does induce compliance by providing moral reasons for compliance that states (rightly) accept. Persuading the world that the perception of moral reasons for compliance is just an illusion will hardly make international law more effective in the sense of making the world a better place.

[8] *See, e.g.,* Andrew T. Guzman & Timothy Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515 (2008).

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