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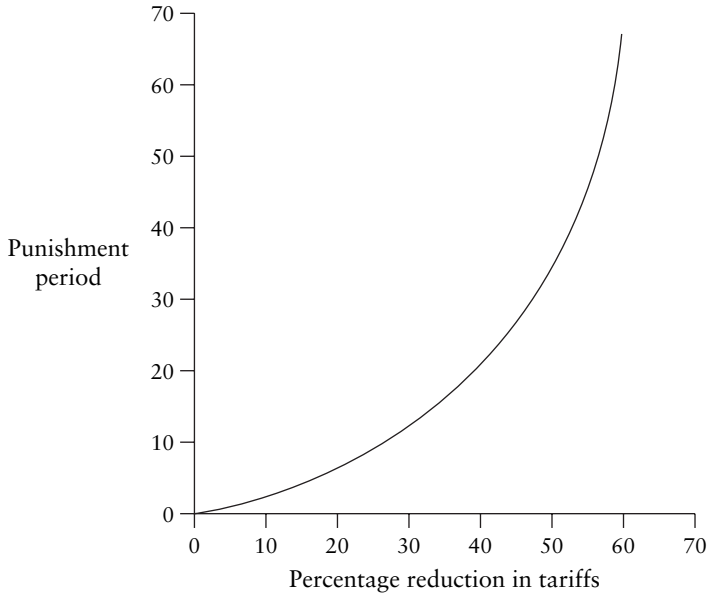

FIGURE 5.2. Punishment required to support treaties of various sizes

be misleading. We need to worry about the possibility that both the high rate of compliance and relative absence of enforcement threats are due not so much to the irrelevance of enforcement as to the fact that states are avoiding deep cooperation – and the benefits it holds whenever a prisoners' dilemma situation exists – because they are unwilling or unable to pay the costs of enforcement. If this were true, prescribing that states ignore enforcement in favor of other compliance strategies would be equivalent to telling the school orchestras to avoid wasting their time rehearsing. Just as the latter would condemn the orchestras to a repertoire of simple compositions, the prescriptions of the managerial school would condemn states to making agreements that represent solutions to coordination games and shallow prisoners' dilemmas.

* * *

Given the circumstances, it seems advisable to sidestep any attempt to inventory the nature of the underlying game and to evaluate some of the implications of the rival theories. We examine two. First, we will assess the depth of cooperation and the level of enforcement connected with prominent regulatory agreements that involve the reduction of behaviors that states have concluded are collectively counterproductive but that

contain few enforcement provisions. Ideally, one would like to examine the correlation between enforcement and depth of cooperation, but as we noted above, we agree with the managerial school's observation that such strongly enforced regulatory agreements are relatively rare. If the managerial school is correct, the absence of strong enforcement provisions or the informal threat of enforcement should have no bearing on the depth of cooperation. There should be numerous examples of states agreeing to alter dramatically the trajectory that they were following at the time a treaty was signed while paying little attention to enforcement. If the game theorists are correct that most important regulatory agreements are mixed-motive games of some variety, any tendency of states to avoid committing themselves to punishing noncompliance is likely to be associated with either a world in which there are relatively few deeply cooperative agreements or in which violations run rampant. Since we agree that while regulatory violations exist they are not frequent, we expect the former to be true.

Second, we will examine the managerial school's claim that self-interest rarely plays a conspicuous role in the treaty violations that do take place and that violations are driven instead solely by a combination of the ambiguity of treaties, the capacity limitations of states, and uncontrollable social and economic changes. We are skeptical of this assertion because the set of violations should be less distorted by selection than the set of treaties. This is true because we expect that, ceteris paribus, the rate of violation connected with mixed-motive game treaties should in the absence of perfect information and appropriate enforcement be much higher than the rate of violation connected with coordination game treaties. Hence, even if there are fewer such treaties they would be overrepresented relative to coordination game-based treaties in any sample of violations.

The Rarity of Deep Cooperation

Are we correct in our suspicion that inferences about the importance of enforcement are likely to be contaminated by selection? That is, does evidence show that there is little need for enforcement because there is little deep cooperation? Let us begin by considering the set of arms agreements that the United States has made since 1945 (see appendix B). We note at the outset that, however valuable, a number of the treaties such as the "Hot Line" agreement and the United States–Union of Soviet Socialist Republics Ballistic Missile Launch Notification Agreements do not directly regulate an arms output such as the number and/or location of a

weapons system. Of those that do, a significant subset such as the Outer Space Treaty, the Seabed Arms Control Treaty, and the Antarctic Treaty involve agreements to maintain the status quo trajectory rather than to alter it significantly. At the time the treaties were signed, neither the Soviet Union nor the United States had cost-effective plans for major weapons systems in these areas or possessed a strategic mission for which such a system was believed necessary. The fact that this situation has basically continued is the reason Chayes and Chayes can report that "there has been no repotted deviation from the requirements of these treaties over a period of four decades."[16] That there was more enforcement in this case than officially is embodied in these agreements might also play a role. Both the Soviet Union and the United States likely knew that if one broke an agreement in a dramatic fashion, the other probably would retaliate in kind. Even though these expectations were established tacitly, they are no less real than expectations described formally in the treaty.[17] While we are not denying that obtaining tangible reassurance of a rival's intentions through a treaty is valuable, it is difficult to argue that these treaties exhibit the deep cooperation that would have taken place if the superpowers had each agreed to terminate major modernization programs or dramatically reduce their defense budgets. Much the same argument can be made in connection with the Anti-Ballistic Missiles (ABM) Treaty. While the treaty may have provided a significant benchmark that helped prevent both states from exploiting the technological gains that were made during the period since the treaty was signed, neither side had the technology or the budget to deploy a major system when the treaty was signed in 1972. In 1967 when President Johnson and Premier Kosygin first began to move toward discussion, Soviet ABM efforts were limited to a spare system around Moscow and the United States announced that it would begin deployment of a "thin" system to guard against Chinese attack and possible accidental launches.[18] As the technology of these antiballistic systems gradually has advanced and attention has shifted away from defense against a terrorist state, the depth of the original agreement in terms of today's "counterfactual" (i.e., the ABM system that the United States would construct today in the absence of an agreement) probably has increased. Given a constant or decreasing level of enforcement because of the weakness of the former

[16] Chayes and Chayes 1993a, chap. 7, p. 9.
[17] Downs and Rocke 1990.
[18] Arms Control and Disarmament Agency 1990, 150.

Soviet Union and increasing depth, the game theorist would expect the agreement to come under increasing pressure in the form of violations on the part of the most powerful state. This appears to have occurred.

Neither the initial Strategic Arms Limitation Talks (SALT) Interim Agreement nor SALT II was characterized by much depth. The interim agreement froze the number of intercontinental ballistic missile (ICBM) launchers at the status quo level (the United States had none under construction at the time and the Soviet Union was permitted to complete those it was building), but it allowed increases in the number of submarine-launched ballistic missiles (SLBMs) on both sides and failed significantly to restrict qualitative improvements in launchers, missiles, or a host of systems that allowed both sides to increase their nuclear capabilities.[19] SALT II required significant reductions in each side's number of operational launchers or bombers but permitted the number of ICBMs equipped with multiple independently targeted reentry vehicles (MIRVed ICBMs) to increase by 40 percent between the time of signing and 1985. When this figure is added to the number of cruise missiles permitted each bomber, the total number of nuclear weapons was allowed to increase 50–70 percent. As Jozef Goldblat notes, "There is a remarkable compatibility between the Treaty limitations and the projected strategic nuclear weapons programs of both sides."[20]

Intermediate-range nuclear forces (INF), conventional forces in Europe (CFE), and the strategic arms reduction talks (START) agreements are deeper, of course. The first prescribes the elimination of intermediate- and shorter-range missiles in Europe; the second dramatically reduced conventional forces; and the third cuts the arsenals of strategic nuclear delivery vehicles that come under the agreement by about 30 percent and cuts warheads by 40 percent.[21] While one can argue in connection with START that the number of accountable weapons is smaller than the actual number of weapons, the cuts are significant in terms of either the status quo at the time of signing and each state's trajectory. Do these suggest that deep agreements that make no provisions for enforcement play an important role in arms control?

There is no easy answer. On the one hand, we are inclined to simply include these agreements in the set of deep regulatory agreements that seem to require little enforcement. We do not claim that such agreements

[19] Ibid., 168.
[20] Goldblat 1993, 35.
[21] Arms Control and Disarmament Agency 1991.

do not exist – they clearly do – simply that many important prospective agreements require enforcement. Yet, it is not clear that these agreements are as deep as they appear to be. After all, the counterfactual – whether estimated on the basis of the status quo or the trajectory of year-to-year differences in arms production – represents the behavior of a political system that no longer exists. No one would gauge the depth of cooperation represented by the North Atlantic Treaty Organization (NATO) by comparing German behavior during wartime with German behavior after the war.

Managerialists might respond to this analysis by arguing that there are good reasons for believing that the connection between enforcement and depth of cooperation in the areas of international trade and the environment is different from that connection in security. Not only are many of the actors obviously different but security historically has been dominated by the realist logic that managerialists find so inadequate. We are not unsympathetic to this argument. The dynamics of cooperation may indeed differ across policy areas, just as they may vary within the same policy area over time. Nonetheless, at least with respect to the relationship between enforcement and depth of cooperation, the areas are not as different as one might imagine or as some might hope.

* * *

Perhaps the best test of the relationship between the depth of cooperation and enforcement can be found when we examine the history of a specific policy area in which regulations have become increasingly strict over time. The game theorist would predict that as regulatory rules tighten, the magnitude of the punishment needed to deter defection would also have to increase. Even if the system achieves some dynamic equilibrium, there should be some tangible sign of this under imperfect information.

If we discount the events that occurred in arms control after the downfall of the Soviet empire, the best examples of steadily increasing depth of cooperation are to be found in the areas of trade and European integration. In each case the role of enforcement has increased accordingly. Thomas Bayard and Kimberly Elliott, for example, conclude that the Uruguay Round has "substantially reduced many of the most egregious trade barriers around the world," but they also emphasize the enhanced ability of the World Trade Organization (WTO) to respond to and punish trade violations.[22] The WTO's procedures for dealing with

[22] The quotation is from Bayard and Elliott 1994, 336.

violations are now more automatic and less manipulable by individual parties. Time limits on the establishment of panels have now been set to nine months with the conclusion of panels within eighteen months, eliminating the inexorable delays under GATT. The principle of consensus voting in the adoption of panel reports has been reversed; previously, both parties to a dispute had an automatic veto on panel recommendations and retaliation. The new system provides for automatic adoption of panel reports, including approval for retaliation, unless a unanimous consensus rejects it. Previously, sanctions were utilized only once in GATT's history. Now, retaliation will be authorized automatically in the absence of a withdrawal of the offending practice or compensation to the defendant. We believe that the negotiating history of the WTO demonstrates that the more demanding levels of cooperation achieved by the Uruguay Round would not have been possible without its having reduced the likelihood of self-interested exploitation by member states.

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The Causes and Cures of Noncompliance

The principal goal of the managerial school's investigation of compliance is to design more effective strategies for overcoming compliance problems in regulatory regimes. It is thus useful to shift our attention away from the likelihood of selection and the relationship between depth of cooperation and enforcement to why those compliance problems that do exist have occurred and how they might be remedied.

* * *

As the centerpiece of a sometimes problematic postwar trade regime, the GATT provides researchers with a wealth of material about the sources of noncompliance and the ability of its signatories to deal with them. Typical examples of GATT violations include EC payments and subsidies to oilseed producers, U.S. quantitative restrictions on sugar, Japanese import restrictions on beef and citrus, and Canadian export restrictions on unprocessed salmon and herring.[23] This is just a sample of the long list of commonly employed discriminatory techniques states have used to satisfy protectionist political elements in contravention of the GATT's rules and norms.

[23] See, respectively, Hudec 1993, 559 and 568; Bayard and Elliott 1994, 233; and Hudec 1993, 217–19.

Ambiguity about what constitutes noncompliance is a source of some of these problems, but no one denies a considerable number of violations indeed has occurred. The framers of the GATT were careful not to limit its policing or dispute settlement procedures to actions that were prohibited explicitly. Instead, they based enforcement provisions on the nullification or impairment of benefits that countries might expect. Indeed, Article 23 permits that settlement procedures be initiated:

> If any contracting patty should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.[24]

Although variation in expectations doubtless exists, few parties – including the states responsible – have argued that the EC subsidies of wheat flour or pasta or the Multifiber Agreement, which clearly violated the most-favored nation (MFN) principle, were based on confusion about the expectations of other trading partners.

Capacity limitations and uncontrollable social and economic changes rarely are cited as major determinants of violations. This is not so much because they are never present but because their effect is dwarfed by the most conspicuous cause of GATT noncompliance: the demands of domestic interest groups and the significant political benefits often associated with protection. Though GATT supporters would argue that any ill effects have been overshadowed by the GATT's positive achievement of reducing tariffs, the demand for protection is not being entirely ignored.

If the managerialists are wrong about the source of the GATT's problems, are they correct about the steps that appear to have reduced the rate of violations? The GATT provides a better laboratory for evaluating the managerialist claims about how compliance can best be improved than the Washington Treaty because unlike the latter, the GATT has evolved. Dispute resolution in the form of GATT panels undoubtedly has played some role, but certainly not an overwhelming one. Until recently, the panels moved at a ponderous pace and could easily be frustrated, especially by large states.[25] Far more successful have been

[24] The article is quoted in Bhagwati 1990, 105–6.
[25] Bayard and Elliott 1994, chaps. 3 and 4.

the rounds of multilateral negotiations that have operated over time to ensure that certain categories of disputes would reappear less often and that have extended the boundaries of the regime.

Nevertheless, enforcement also has played an important, if controversial, role in the operation and evolution of the GATT. Between 1974 and 1994, the United States imposed or publicly threatened retaliation in 50 percent of the cases that it took to the GATT. It did so independent of any GATT action and indeed even in five cases that Bayard and Elliott believe would have fallen under GATT jurisdiction.[26] Observers such as Robert Hudec credit increased enforcement and such "justified disobedience" of the GATT's dispute resolution process with being an important element in the process of GATT legal reform.[27] Others, like Alan Sykes, credit Section 301 and Super 301 unilateralism with having inspired – ironically given the claims of the managerial school – the enhanced dispute settlement procedures of the WTO.[28] As Bayard and Elliott conclude in their recent study, the "USTR [U.S. Trade Representative] generally wielded the Section 301 crowbar deftly and constructively, employing an aggressive unilateral strategy to induce support abroad for strengthening of the multilateral trade system."[29]

Even in the case of environmental regimes, the source of many of the managerialist examples, enforcement plays a greater role in successes than one is led to believe and its absence is conspicuous in some notable failures. For example, until very recently compliance with the weakly enforced agreements issued under eleven international fisheries commissions was highly problematic. Agreement ambiguity and social and economic changes were not a major source of these compliance problems. State capacity was more relevant since monitoring catches is costly, but scholars agree that the developed states that were often the principal violators could have coped with the monitoring issue if they believed it was in their interest to do so. The crux of the problem was the paradox of collective action: states saw little reason to pressure their fishermen to obey rules that other states were likely to flout.[30] The creation of the 200-mile exclusive economic zones was a dramatic improvement because it made enforcement much easier. Consequently, the role of enforcement is growing. For instance, in April 1995 a long-simmering

[26] Ibid., 70.
[27] Hudec 1990, 116.
[28] Sykes 1992.
[29] Bayard and Elliott 1994, 350.
[30] Peterson 1993, 280.

dispute over fishing rights in the North Atlantic among Canada, the EC, and the United States was resolved by an agreement that the *New York Times* reported, "could serve as a model for preserving endangered fish stocks throughout the world." The key to the accord, says the article, is "enforcement." The deal provides for elaborate verification measures and "imposes stiff fines and other penalties for violations."[31] The elaborate verification measures testify to the importance of transparency, but to believe that they would be effective in the absence of sanctions is naive. The benefits of cheating are too great to be offset by transparency alone.

The cost of ignoring the connection between enforcement and compliance when there is a substantial incentive to defect is well-illustrated by the Mediterranean Plan, considered by many to be an example of how epistemic communities have been able to play a significant role in effecting international cooperation. The Mediterranean Plan achieved consensus by eliminating any meaningful restrictions on dumping and providing no enforcement mechanism for those minimal targets and restrictions that were agreed to. As a result, it has been an embarrassing failure. Pollution has increased, dolphin hunting continues, and despite a European Union ban on drift nets longer than 2.5 kilometers, the rules are widely flouted.[32] The result has been a collapsing ecosystem in the Mediterranean.

The complementary relationship between transparency and enforcement is exemplified by a case that the managerialists believe to be an archetype of their approach. The case, described by Mitchell, involves the attempt by the International Maritime Consultative Organization (IMCO) and its successor, the International Maritime Organization (IMO), to regulate intentional oil pollution by oil tankers. From 1954 until 1978, the regime had little success and oil discharges were over three to thirty times the legal limit.[33] In 1978 the IMO switched strategies and with the negotiation of the International Convention for the Prevention of Pollution from Ships (MARPOL) began to regulate oil pollution by requiring tankers to be equipped with segregated ballast tanks (SBT). Despite the reduced cargo capacity and increased costs of equipping new and old oil tankers with the new equipment, and "despite strong incentives not to install SBT, tanker owners have done so as required. . . . Compliance is almost perfect."[34]

[31] *New York Times,* 17 April 1995, A2.
[32] "Dead in the Water," *New Scientist,* 4 February 1995.
[33] Mitchell 1994b, 439 in particular.
[34] Mitchell 1994a, 291.

Why was the equipment regime so much more effective at inducing compliance? It is not difficult to argue that increased enforcement was anything but irrelevant. We learn for example, that "the [equipment violations regime] provided the foundation for a noncompliance response system involving far more potent sanctions than those available for discharge violations."[35] Statements such as these suggest that while increased transparency was critical to the success of MARPOL, it was also critical that tankers lacking the International Oil Pollution Prevention (IOPP) certificate could be barred from doing business or detained in port.

> The huge opportunity costs of having a ship barred from port or detained would force a tanker owner to think twice. . . . A single day of detention cost a tanker operator some $20,000 in opportunity costs, far higher than typical fines being imposed. . . . Detention provisions have altered behavior because they have had the virtue of imposing . . . high costs on the violator, making their use more credible and more potent . . . detention is a large enough penalty to deter a ship from committing future violations.[36]

ENFORCEMENT AND THE FUTURE OF COOPERATION

The significance of the cases discussed above lies not in their representing typical cases of noncompliance but in their salience and role as counterexamples to the unqualified prescriptions of the managerial theory. They should also make us skeptical of any contention that mixed-motive game-based cooperation (with its incentive for one or both sides to defect if they can get away with it) plays only an insignificant role in regulatory regimes. If some persistently have underestimated the value of interstate coordination vis-à-vis the solution of mixed-motive games, others should not commit the opposite error of pretending that the latter – and enforcement – is irrelevant. This is especially true in light of the likely evolution of regulatory cooperation.

Cooperation in arms, trade, and environmental regulation may begin with agreements that require little enforcement, but continued progress seems likely to depend on coping with an environment where defection presents significant benefits. It is not appropriate to counter skepticism about the success of treaties that require steep cuts in nontariff barriers, arms, or air pollution but that contain no enforcement provision with

[35] Ibid., 289.
[36] Ibid., 266 and 182–85.

statistics about the average rate of compliance with international agreements that require states to depart only slightly from what they would have done in the absence of an agreement. Techniques used to ensure compliance with an agreement covering interstate bank transfers cannot be counted on to ensure the success of the WTO's new rules governing intellectual property.

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We do not mean to imply that the managerial model and the failure to embrace the idea that enforcement is often necessary are the only things preventing deeper cooperation. Obviously, states have reasons to refrain from vigorous enforcement. The question is whether it is better to cope with such reluctance by declaring that its importance has been vastly exaggerated or by trying to remedy matters.

We obviously prefer the second course of action, and we believe that the managerialists' vision of cooperation and compliance distracts political scientists from a host of problems that lie squarely within their area of expertise. For example, the vast majority of political economists would argue that the reason the GATT has encountered compliance problems and the reason why states have not obtained the cooperative benefits that would be possible through the use of more aggressive enforcement strategies involves an agency problem. Political leaders, if not the consumers who make up their constituencies, are left better off if they acquiesce to protectionist demands during those periods (e.g., recessions, following a technological breakthrough by foreign competition) when interest groups are likely to pay a premium that is greater than the electoral punishment they are likely to receive. Because the timing of such events is uncertain and most leaders are similarly vulnerable to such events, they deal with this situation by creating penalties for violations that are high enough to prevent constant defection but low enough to allow self-interested defection when circumstances demand it. Even leaders of states that are, for whatever reason, more committed to free trade are reluctant to increase the penalty for violations to a very high level because they suspect (probably correctly) that the "protectionist premium" is at times far greater than the cost of any credible punishment for violations. Thus, their hand is stayed not by any appreciation for the accidental nature of defection but by an appreciation for just how unaccidental it is.[37]

[37] Downs and Rocke 1995.