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Behavioural Compliance Theory

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ABSTRACT

Following in the wake of its social science siblings, international law scholarship is experiencing a 'behavioural turn'. One particularly fruitful area in which to explore the utility of behavioural insights is compliance. The contributions to the present symposium represent some of the first efforts to explore how psychological influences may shape the compliance decision-making process and to study the theoretical and practical advantages offered by pursuing a behavioural analysis of compliance. This essay addresses several cross-cutting issues of importance. First, it outlines the epistemological stance that is implicit in behavioural approaches to compliance. It draws a parallel with economic theory, suggesting that the persistent dominance of rational choice theory in that field belies a teleological difference between international law and economics. The essay then turns to suggest how psychological influences both interact with and build on the material and normative considerations that are posited in existing theories to determine actors' compliance-related behaviour. It continues to address the limitations of adopting a behavioural approach to compliance, from both a methodological and normative point of view. The final section provides a brief introduction to the pieces included in this symposium and outlines avenues for future research.

1. INTRODUCTION

Following in the wake of its social science siblings, international law scholarship is experiencing a 'behavioural turn'. Legal scholars are increasingly looking towards insights into psychological processes as a way of explaining actors' behaviour and evaluating the potential of norms and institutions. Whilst initial work staked the broad parameters of the field,¹ more recent scholarship has focused on conducting

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1 See T Broude, 'Behavioral International Law' (2015) 163 *University of Pennsylvania Law Review* 1099; A van Aaken, 'Behavioral International Law and Economics' (2014) 55 *Harvard International Law Journal* 421.

empirical studies, including laboratory experiments, to test the power of explanatory theories based on psychological factors.²

One particularly fruitful area in which to explore the utility of behavioural insights is compliance.³ The theories of compliance that dominate the extant literature, such as realism, constructivism, and liberal theory, all rely explicitly or implicitly on psychological processes that take place on the individual level for their operation.⁴ Realism, for example, presupposes a calculation based on the perceived costs and benefits of a particular course of action, a calculation that can only take place if there is someone (or something) assessing those costs and benefits in the first place. Similarly, constructivism rests on the idea that continuous interaction with norms and other actors influences a State's behaviour. Yet, this iterative process depends very much on *how* the State views the actors and norms with which they interact; the likelihood that a State's identity will converge with institutions or norms that it perceives as being, for example, illegitimate or unfair would seem to be small. This, in turn, begs the question *why* States might have such perceptions, and this is where psychological insights might play a role.

Often the psychological processes that underpin compliance theories are not made explicit. Adopting a behavioural approach to compliance, then, rests on a two-fold commitment: first, to deconstruct the psychological underpinnings of current theories of compliance; and, secondly, to explore how psychological influences may shape the compliance decision-making process, whether or not those influences neatly fall under the rubric of the well-known compliance theories. The articles in this symposium take the first steps in this direction in several ways: by challenging the myopic focus on the compliance 'moment' to better understand how psychological factors may influence decision-making; by understanding how different group identities affect the effectiveness of sanctions on compliance; and by exploring how accountability might be leveraged to increase compliance.

This framing essay to the symposium addresses, first, the epistemological stance that is implicit in behavioural approaches to compliance; put another way, what do these scholars think is worth knowing? It draws a parallel with economic theory, suggesting that the persistent dominance of rational choice theory in that field belies a teleological difference between international law and economics. The second section of the essay then turns to suggest how psychological influences both interact with

- 2 See, for example, D Peat, 'The Tyranny of Choice and the Interpretation of Standards: Why the European Court of Human Rights uses Consensus' (2021) 53 *New York University Journal of International Law & Politics* 381; A Strezhev, B Simmons and M Kim, 'Rulers or Rules? International Law, Elite Cues, and Public Opinion' (2020) 30 *European Journal of International Law* 1281; T Broude and I Levy, 'Outcome Bias and Expertise in Investigations under International Humanitarian Law' (2020) 30 *European Journal of International Law* 1303; Y Shereshevsky and T Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts' (2018) 28 *European Journal of International Law* 1287.
- 3 For overviews of the compliance literature, see I Wuerth, 'Compliance' in J d'Aspremont and S Singh (eds), *Concepts of International Law: Contributions to Disciplinary Thought* (2018); J von Stein, 'The Engines of Compliance' in J Dunoff and M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, 2012).
- 4 We define psychological processes broadly to encompass all matters of cognition, including the operation of heuristics and cognitive biases, emotions and judgment.

and build on the material and normative considerations that are posited in existing theories to determine actors' compliance-related behaviour. The following section moves to outline the limitations of adopting a behavioural approach to compliance, from both a methodological and normative point of view. The final section provides a brief introduction to the pieces included in this symposium and outlines avenues for future research.

2. NAILING ONE'S COLOURS TO THE MAST

Disagreements about theory are often disagreements about what the proper role of scholarship should be.⁵ Theoretical abstractions may have intellectual attraction, enabling the author to neatly frame a subject with aesthetically pleasing conciseness. But when they are measured up against the messy, confused reality of everyday life, their theoretical simplicity looks rather like an impediment. The rule of recognition might be the key to understanding what the law is,⁶ but identifying it 'on the ground' in a convincing manner is another thing. A self-interested State might, on paper, look like a good way to explain State action;⁷ in reality, focusing on material self-interest as the principal factor that motivates States to comply with law seems, *at best*, only partially true, and begs myriad follow-up questions (*What* does the State see as a cost/benefit? *How* does it weigh those?).

Those that adopt a behavioural approach to compliance reject pure theoretical abstraction in favour of grounded empiricism. This is driven by a conviction that international law scholars need to know how and why States act the way they do before making suggestions for change or criticizing the *status quo*.⁸ If we want to act constructively as scholars, we need an empirical basis on which to ground our work. If one adheres to this position, a corollary is that we should explore all influences that potentially impact decision-making regarding compliance, whether those be material, normative or psychological in nature, or something else. And while these might be tested within the framework of existing theories, the empirical impulse of behavioural scholars means that the construction of 'grand theories' of compliance will take a back seat until a sufficient body of evidence of the impact of psychology on State behaviour has formed.

In thinking about the interaction between international legal theory and behavioural insights, it is instructive to look to another field in which behavioural approaches have taken hold—indeed, the one in which they originated: economics. Exploring the psychological processes that challenge the rational choice assumptions that underpin *homo economicus* has a long tradition in economics, stretching back to the 1950s.⁹ Yet, despite the profound impact that behavioural economics has had

5 For an illustrative example, see R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 36.

6 HLA Hart, *The Concept of Law* (OUP, 3rd edn, 2012) 100–10.

7 See JL Goldsmith and EA Posner, *The Limits of International Law* (OUP 2005).

8 cf C Engel, 'Behavioral law and Economics: Empirical Methods' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (OUP, 2014) 125.

9 HA Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99; HA Simon, *Models of Man, Social and Rational* (Wiley, 1957). For a detailed overview, see F Heukelom, *Behavioral Economics: A History* (CUP, 2014).

both within and beyond the field of economics, the dominant paradigm for explaining individual and group action has remained rational choice theory. Why is this so? And, more importantly for our purposes, why should international lawyers—unlike many mainstream economists—move beyond existing theories of compliance towards more empirically grounded, behaviourally sensitive research?

Economists have advanced several arguments to explain the enduring persistence of rational choice theory. Some suggest that theories are not—and should not be—straightforward descriptions of the real-world;¹⁰ instead, the proper role of theories is to generate testable hypotheses, which may subsequently be subject to empirical verification. According to this approach (referred to as ‘instrumentalism’), theories act as nothing more than ‘codification schemes or scaffolding’¹¹ that allow for the summary and classification of different hypotheses.¹² As a consequence, the value of a theory is not measured by how well its assumptions reflect the real-world, but rather by the predictive capacity of the hypotheses it generates.¹³

The suggestion that theories do not—and are not intended to—represent the real world is well-developed in the economic literature, most prominently by Milton Friedman.¹⁴ In an influential 1953 essay, Friedman expounded a ‘strong’ variant of instrumentalism, arguing that it simply does not matter whether the assumptions underpinning economic theory are unlikely to be true if that theory generates hypotheses that are more likely to be predict real-world behaviour.¹⁵ Since Friedman’s essay, however, the growth in experimental evidence that challenges rational choice assumptions has put pressure on the strong variant of instrumentalism that he adopted. More recent theorists adopt a toned-down version of instrumentalism (or ‘neo-instrumentalism’) that explains how theories operate in the reasoning of economists while nevertheless accepting the instrumentalist idea that theories need not reflect reality. Itzhak Gilboa and colleagues, for example, suggest that the persistence of rational choice assumptions in economics, such as the maximization of expected utility, may be explained by the fact that economists engage in analogical, as opposed to rule-based, reasoning. According to this account, theories are used by economists as a way to reason

10 A Rosenburg, *Philosophy of Social Science* (Routledge, 5th edn, 2018) 108–09.

11 J Worrall, ‘Scientific Realism and Scientific Change’ (1982) 32 *The Philosophical Quarterly* 201, 201.

12 cf P Duhem, *The Aim and Structure of Physical Theory* (Princeton UP, 2nd edn, 1991) 7.

13 cf M Friedman (ed), ‘The Methodology of Positive Economics’ in *Essays in Positive Economics* (University of Chicago Press, 1953), in particular 53 (‘A theory or its ‘assumptions’ cannot possibly be thoroughly ‘realistic’ in the immediate descriptive sense so often assigned to this term’).

14 For a discussion of the legacy of Friedman’s 1953 essay, see U Mäki, *The Methodology of Positive Economics: Reflections on the Milton Friedman Legacy* (CUP 2009). On Friedman’s instrumentalism, see *ibid* 62–63.

15 Friedman did not address the assumption of rational actors in his essay. Rejecting the relevance of evidence from behaviour economics would, however, be the logical extension of his instrumentalist position; see JJ Mearsheimer and SM Walt, ‘Leaving Theory Behind: Why Simplistic Hypothesis Testing is Bad for International Relations’ (2013) 19 *European Journal of International Relations* 427, 433. For an instrumentalist approach in international relations, see CH Achen and D Snidal, ‘Rational Deterrence Theory and Comparative Case Studies’ (1989) 41 *World Politics* 143, 164 (‘... rational deterrence theory predicts that decision makers will decide whether to go to war as if they did expected-utility calculations. But they need not actually perform them.’)

about new cases.¹⁶ A theory represents a new, hypothetical case (a *Gedankenexperiment*) that the observer can compare to the real-world problem that they are trying to understand, making a subjective judgment about the similarity and relevance of the theoretical case and their real-world problem. If sufficiently analogous, they might use the theoretical model to guide their 'prediction (or classification, diagnosis, or ethical or legal judgment) in the current case.'¹⁷ Accordingly, a theory might not inform us of anything new or bring in novel empirical data, but—if successful—it should be insightful and change how we think about the issue being analysed.¹⁸

According another group of scholars—'scientific-realists'¹⁹—theories are tools that help researchers to isolate certain behaviour, allowing them to explore causal relationships that would be otherwise too complex to investigate directly. According to this school of thought, which most closely resembles the prevalent view in political science,²⁰ the role of theories is more than merely to act as an intellectual construct upon which to hang hypotheses or from which to draw analogies. Instead, theories are 'statements about real entities and processes, even unobservable ones, which affect natural and social phenomena'.²¹ A corollary is that useful theory must at least approximate reality, including the assumptions upon which those theories are based.²² Of course, few people nowadays maintain that theories can, or should, accurately reflect nature in all its complexity.²³ Instead, the prevalent view is that theories should be pared-back representations of the real-world that allow us to better understand certain elements of reality without necessarily providing a mirror-image of it.²⁴ By focusing on specific causal elements, actors, and relationships, theories lay 'bare the essential elements in play and indicate the necessary relations of cause and interdependency—or suggest where to look for them'.²⁵ In this respect, theories are like maps:

[b]oth aim to simplify a complex reality so we can grasp it better. A highway map of the United States, for example, might include major cities, roads, rivers, mountains, and lakes. But it would leave out many less prominent features, such as individual trees, buildings, or the rivets on the Golden Gate Bridge. Like a theory, a map is an abridged version of reality.²⁶

16 I Gilboa, A Postlewaite, L Samuelson and D Schmeidler, 'Economic Models as Analogies' (2014) 124 *The Economic Journal* F513. A similar idea has been expressed by Peter Sugden in his conception of economic models as 'credible worlds'; see P Sugden, 'Credible Worlds, Capacities and Mechanisms' (2009) 70 *Erkenntnis* 3.

17 Gilboa et al (n 16) F517.

18 Note that this is different to Friedman's approach, for whom the utility of theory lies *only* in its ability to generate accurate predictions; see Friedman (n 13) 15.

19 This term is taken from Mearsheimer and Walt (n 15).

20 See Mearsheimer and Walt (n 15).

21 PK MacDonald, 'Useful Fiction or Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory' (2003) 97 *American Political Science Review* 551, 554.

22 Worrall (n 11) 201.

23 For some examples of those that think it can, see those that Gunitsky classifies as pursuing 'ontological parsimony'; S Gunitsky, 'Rival Visions of Parsimony' (2019) 63 *International Studies Quarterly* 707, 709.

24 See, for example, Mearsheimer and Walt (n 15); U Mäki, 'MISSing the World. Models as Isolations and Credible Surrogate Systems' (2009) 70 *Erkenntnis* 29.

25 K Waltz, *Theory of International Politics* (Addison-Wesley, 1979) 10.

26 Mearsheimer and Walt (n 15) 431. See also Gunitsky (n 23) 711.

To what extent is the instrumentalist justification for the persistence of rational choice theories of action applicable to international law? The answer to that question depends in turn on the extent to which the objectives of economic scholarship and those of international law scholarship align. And this is where we think that the epistemological ambitions of international law more closely match those of economic scientific-realists than instrumentalists.

Theories are important in international law because we understand them to explain—inevitably, in shorthand form—how, in whole or in part, international law works. They are understood to purport to depict reality, not to act simply as scaffolding within which to construct testable hypotheses.²⁷ This is borne out by the claims that particular compliance theories provide ‘better and more nuanced explanations of state behaviour’,²⁸ that they aim ‘to offer a persuasive explanation’²⁹ of why and when international law works, or to provide a theory that ‘fully resonate[s] with the contemporary practice of international law-making and application’.³⁰ A theory that had no pretence of describing reality would not only be wildly unsuccessful but also fail in helping us make sense of the world.

Why is this so? In our view, this approach to theory is connected to what might be called the ‘applied nature’ of much international law scholarship. International law scholars are often intimately linked to the practice that they observe, and relatively frequently exert a direct influence over the shape of international law. For example, international law scholars frequently serve on the international bench,³¹ as members of a State’s delegation to multilateral law-making conferences,³² or as members of influential groups that frame the international law-making agenda.³³ This means that the theories upon which international lawyers draw, in order to prove useful, must broadly reflect the practice that is seen in daily life.

To engage with, and to inform, the practice of States, international organizations and courts and tribunals, international legal theory (including theories of compliance) must, therefore, at least purport to depict reality. Theoretical parsimony should not be privileged at the expense of descriptive accuracy. Accordingly, it is imperative for compliance theory to engage with—and, where relevant, integrate—behavioural insights in order to continue to serve its purpose.

27 cf A van Aaken, ‘Experimental Insights for International Legal Theory’ (2019) 30 *European Journal of International Law* 1237.

28 JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, 2006) 7–8.

29 A Guzman, *How International Law Works: A Rational Choice Theory* (2008) ix.

30 J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010) 5.

31 See M Rask Madsen, ‘Who Rules the World: the Educational Capital of the International Judiciary’ (2018) 3 *UC Irvine Journal of International, Transnational, and Comparative Law* 97, 101.

32 Fourteen members of the International Law Commission were, for example, present at the Vienna Conference on the Law of Treaties as members of State delegations; JD Mortenson, ‘The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?’ (2013) 107 *American Journal of International Law* 780, 809.

33 See in this context the work conducted by the ISDS Academic Forum, which produces background papers for the on-going reform process of the ISDS system that is currently taking place within UNCITRAL WGIII.

3. THE THREE PILLARS OF COMPLIANCE

Over the past 60 years, theories of compliance have proliferated, resulting in a rich and multifaceted literature that attempts to explain State behaviour. It is not the purpose of this essay to provide an overview of the extant literature on compliance, something which has been done well elsewhere.³⁴ Rather, we want to sketch how we think behavioural insights complement, and add to, existing theories of compliance. For the purposes of this essay, we divide the factors that have been identified in the existing literature as influencing compliance into two pillars: material considerations and normative considerations.³⁵ Material considerations may be tangible, such as the increased costs associated with compliance, or intangible, such as concern for the reputational impact caused by non-compliance.³⁶ Normative considerations are those that influence a State to comply with a legal obligation because it feels obliged to obey the law because it is the law, or because the legal norm has been internalized within the State by, for example, the process of socialization.³⁷ We think that behavioural insights can interact with these pillars in two different ways.

First, they can inform our understanding of *how* both material and normative considerations affect compliance-related behaviour by providing a more fine-grained, descriptively accurate account of how these factors are perceived by actors, and how they interact to result in compliance behaviour. To do this, we need to take a wide-angle view of compliance decision-making; a point that is elaborated in more detail by Daniel Peat in his article in this symposium. Suffice here to note here that behavioural insights could play a role in at least two distinct junctures in the compliance decision-making process, whether that process be driven by material considerations, normative considerations, or both. The first is how the State (and individual decision-makers within the State) perceives the *inputs* into that decision-making process. For example, there is abundant literature in behavioural economics that shows the systematic and predictable inability of individuals to estimate the costs and benefits of future trajectories accurately, instead giving outsize importance to, for example, highly salient pieces of information.³⁸ The second juncture at which behavioural insights may play a role is when a State *weighs* up different courses of action once the inputs have been identified. Behavioural literature suggests, for example, that costs and benefits do not carry the same weight in decision-making,³⁹ and that some 'taboo' costs may override any benefit, no matter how large the latter promises to be.⁴⁰

34 See Wuerth (n 3); Von Stein (n 3).

35 Von Stein (n 3) 478.

36 On the role of reputation in compliance, see R Brewster, 'Unpacking the State's Reputation' (2009) 50 *Harvard International Law Journal* 231.

37 See R Goodman and D Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013).

38 See A Tversky and D Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 4 *Cognitive Psychology* 207.

39 See A Tversky and D Kahneman, 'Advances in Prospect Theory: Cumulative Representation of Uncertainty' (1992) 5 *Journal of Risk & Uncertainty* 297. In the context of political science, see R McDermott, 'Prospect Theory in Political Science: Gains and Losses from the First Decade' (2004) 25 *Political Psychology* 289.

40 PE Tetlock and others, 'The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals', (2000) 78 *Journal of Personality and Social Psychology* 853.

Secondly, behavioural insights could *add* to the factors that influence compliance decision-making, standing alongside material and normative considerations as a third ‘pillar’ of compliance. This will be the case for psychological processes that may affect decision-making but which would be ill-placed under either material or normative pillars. Take the role of emotion in decision-making as an example. Over the past 20 years, scholars in international relations and political science recognized emotion to be a key factor in understanding human behaviour,⁴¹ something that is only now starting to make inroads into international law scholarship.⁴² Emotions are gatekeepers, acting as lens through which individuals perceive and assess new information.⁴³ Beliefs about other States may, for example, be motivated by emotions, and may be held with more certainty than the available evidence warrants.⁴⁴ An ‘emotional belief’ that a State is a untrustworthy partner or a vengeful actor may, one might hypothesize, affect not only the conclusion of agreements with that State but also subsequent compliance with those agreements. More than that, however, emotions themselves may cause States to act in certain ways. A feeling of fear or being cornered may, for example, cause a State to lash out, paying less heed to its international legal obligations than it might otherwise have done.⁴⁵

We do not believe, then, that international lawyers should feel constrained to work within the framework of existing compliance theories when exploring what behavioural insights might bring to the table. They should see psychological processes as both enriching the accounts given by the normative and material pillars of compliance theory, as well as operating alongside these pillars to add to our global understanding of State behaviour.

4. THE LIMITS OF BEHAVIOURAL COMPLIANCE THEORY

So far, this essay has argued that international lawyers should pay attention to the psychological processes that influence State behaviour, as they open the doors to a more accurate, detailed description of how and why States act the way that they do. There are, however, limitations to what a behavioural approach can tell us as well as problems that must be overcome to realize the full potential of behavioural insights.⁴⁶ These can be divided into two categories.⁴⁷

41 See, for example, JW David and R McDermott, ‘The Past, Present, and Future of Behavioural IR’ (2021) 75 *International Organization* 1, 8; R Jervis, *Perception and Misperception in International Politics* (rev. edn, 2017) lxix; RK Herman, ‘How Attachments to the Nation Shape Beliefs about the World’ (2017) 71 *S1 International Organization* S61.

42 A Spain Bradley, *Human Choice in International Law* (CUP 2021) 31–33; A Saab, ‘Emotions and International Law’ (2021) 10 *ESIL Reflections*; R Sutton, ‘How the Emotions and Perceptual Judgments of Frontline Actors Shape the Practice of International Humanitarian Law’, in SA Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar 2021).

43 David and McDermott (n 41) 12.

44 J Mercer, ‘Emotional Beliefs’ (2010) 64 *International Organization* 1, 2.

45 T Brader and GE Marcus, ‘Emotion and Political Psychology’ in L Huddy et al (eds), *The Oxford Handbook of Political Psychology* (2nd edn, 2013) 178.

46 For a more detailed treatment of the topic, see the contributions to ‘The Limitations of the Behavioral Turn in International Law’ symposium (2021) 115 *American Journal of International Law Unbound*.

47 See E van der Zee, V Fikfak and D Peat, ‘Introduction to The Limitations of the Behavioral Turn in International Law’ (2021) 115 *American Journal of International Law Unbound* 237.

The first is methodological limitations: *how* can we isolate and study psychological influences that affect State behaviour? Here, we run into issues caused by the methodological individualism that a behavioural approach necessarily implies. It is highly unlikely, for example, that we would be able to gain access to the elite decision-makers that actually decide whether a State complies or not with its international law obligations.⁴⁸ Can a laboratory experiment conducted on members of the general public tell us something about how psychological processes may affect elite decision-makers? Or are the latter too different to the former to be able to extrapolate findings between groups?⁴⁹

A related point is how do psychological processes that occur on the *individual* level affect *State* behaviour? One might say that State action is determined by relatively few elite decision-makers, such as presidents or foreign ministers, and that the psychological processes that affect these individuals directly affect State action.⁵⁰ However, it is clear that some State action is the result of a process of group decision-making, or the culmination of a long series of individual decisions, for which it may be impossible to single out the impact of psychological factors. How should we approach studying such behaviour? Should we renounce any attempt to explore psychological factors because of the difficulties encountered? Or should we nevertheless explore how psychological factors might be tempered, exacerbated or aggregated from the individual to the State level? We think that research must take the latter direction, but international lawyers will need to be innovative in the methodologies they adopt to overcome this problem. This may entail adopting qualitative methodologies, such as process tracing and interviews that go beyond the lab experiments that are characteristic of behavioural research to date.

Finally, reference to psychological processes may help to explain actors' behaviour, but often so too might other factors, such as rational choice considerations, capacity constraints, or normative influences. For example, is the use of boilerplate clauses in bilateral investment treaties a result of the *status quo* bias, or is it simply the most efficient manner to create a new treaty that regulates the same subject-matter as previous treaties?⁵¹ Might the outsize impact of judgments of international courts in the evolution of the law of the sea be explained by rational updating or the availability bias?⁵² The methodology that one chooses might be better or worse at isolating the effects of behavioural influences on compliance behaviour. Researchers need to reflect on what external indicators are specific to behavioural influences, as opposed to other non-psychological factors, and design their research projects accordingly.

There are also certain methodological issues that remain specific to compliance research. The most pressing of these is to define what we mean by compliance.⁵³ Is

48 Although see EM Hafner-Burton, 'Elite Decision-Making and International Law: Promises and Perils of the Behavioral Revolution', (2021) 115 *American Journal of International Law Unbound* 242.

49 cf Shereshevsky and Noah (n 2) 1306.

50 See, for example, Broude and Levy (2) 1304. See further, A van Aaken and T Broude, 'The Psychology of International Law: An Introduction' (2019) 30 *European Journal of International Law* 1225, 1232.

51 L Poulsen and M Waibel, 'Boilerplate in International Economic Law' (2021) 115 *American Journal of International Law Unbound* 253.

52 E Yildiz and U Yüksel, 'Understanding the Limitations of Behaviouralism: Lessons from the Field of Maritime Delimitation' (forthcoming, on file with the authors).

53 See Wuerth (n 3) 117–18.

late compliance still compliance, even years after the initial breach?⁵⁴ How about partial compliance, for example, if a State pays only a certain percentage of the compensation awarded by an investment arbitral tribunal?⁵⁵ And, relatedly, are the considerations that motivate compliance with legal obligations ('primary' compliance) the same, or similar, as those that motivate compliance with the judgments or awards of international courts or tribunals ('secondary' compliance)?⁵⁶ Moving forward, scholars should be specific about the conception of compliance that they adopt, and explain why that conception is most appropriate for the purposes of their research. The clear insights into actors' behaviour that the behavioural research agenda aims to provide should not be obscured by conceptual opacity.

A second limitation is normative: once we start to understand the behavioural processes that affect compliance, *should* we capitalize on this to bring about better compliance?⁵⁷ This point mirrors a common objection in the domestic behavioural law and economics literature; namely, that designing institutions and norms based on psychological processes in some way manifests an unjustifiable 'legal paternalism'.⁵⁸ But we think this objection holds less weight on the international plane. Unlike on the domestic level, there is not a hierarchical relationship akin to that of the citizen/State on the international level. If behavioural insights have been integrated into treaty design, it is because States have decided themselves that this would be best course of action. Similarly, if international organizations or international courts and tribunals decide to integrate behavioural insights into their work, then they are accountable to their stakeholders, which, in most cases, will ultimately be the member States of the relevant organization. In contrast to the domestic plane, the actors who will be affected by behaviourally designed institutions are also the ones that have the power to change those institutions.

The preceding paragraph proceeds on the assumption that the actor whose compliance we want to change is the State. But that need not always be the case. The focus of some international rules may be the action of individuals, such as certain rules of international humanitarian law.⁵⁹ In that case, one would have thought that many of the same considerations arise here as in the domestic context. But, here again, we see a difference. On the domestic plane, the normative objection to using behavioural insights to inform law or policy design rests on an assumption of a lack of oversight or accountability of the law-maker. On the international level, however,

54 Consider for example, the UK's belated (and arguable) compliance of the *Hirst* (No. 2) judgment of the European Court of Human Rights; for more detail, see N Johnston, 'Prisoners' Voting Rights: Developments Since May 2015', UK House of Commons Library Briefing Paper No. 07461, <<https://commonslibrary.parliament.uk/research-briefings/cbp-7461/>> accessed 19 November 2021.

55 See, for example, Argentina's settlement agreement with award creditors, in which it paid 75% of compensation awarded to creditors in Argentinian bonds; Ministerio de Economía y Finanzas Públicas, Resolución no. 598/2013, 8 October 2013.

56 On the distinction between primary and secondary compliance, see B Simmons, 'Compliance with International Agreements' (2008) 1 *Annual Review of Political Science* 75, 78.

57 See further, D Teichman and N Zamir, 'Normative Aspects of Nudging in the International Sphere' (2021) 115 *American Journal of International Law Unbound* 263.

58 See D Teichman and N Zamir, *Behavioural Law and Economics* (2018) 163–71.

59 See, for example, art 12 of the First Geneva Convention; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 17 UNTS 31 (1950).

that position is significantly less clear: if built into a treaty, the multilateral law-making process provides other States a chance to flag what they might conceive to be objectionable uses of behavioural insights; if implemented by an international organization, Member States would be in the position to challenge the same. The horizontal dimension of the international system may play, at least in theory, a check against the unwarranted, objectionable or improper uses of behavioural insights.

5. STEPPING INTO THE FIELD

The three papers in this symposium aim to make the first tentative steps into exploring how behavioural insights might inform our understanding of compliance. The first paper, by Daniel Peat, challenges the idea that international lawyers should focus on the ‘moment’ of compliance, arguing that, in order to understand where behavioural influences might affect compliance behaviour, we first need to expand our conception of the compliance decision-making process. Drawing on political science and international relations literature, he argues that behavioural compliance research should be focused around two pillars: first, how elite decision-makers *perceive* new information; and, secondly, how the *process* of decision-making might affect the outcome. Against this theoretical backdrop, he uses publicly available data from multilateral development banks and a sentiment analysis of Argentinian parliamentary debates to explore whether behavioural explanations might have purchase in one particular context: Argentina’s partial compliance in October 2013 with a series of investment treaty arbitration awards. Peat concludes that behavioural insights might be particularly useful in explaining how and why reputation shaped Argentina’s response to these adverse arbitral awards.

The second paper in the symposium, by Niccolò Ridi and Veronika Fikfak, tackles the question of compliance by focusing one of the ways in which it can be induced: sanctions. Drawing on behavioural and international relations theory, as well as on traditional doctrinal legal scholarship, the contribution problematizes the concept of sanctioning, laying emphasis on the purposive nature of the act as a means to induce behavioural change—an aspect which has been, barring few exceptions, largely neglected in international law literature. In so doing, the contribution also sheds light on the structure of the relationship between sanctioning and the ultimate goal of compliance by focusing on the triggers, actors, and strategies characterizing it, as well as on the normative limits imposed by international law. Ridi and Fikfak conclude by tackling the question of whether and to what extent sanctioning should be a pillar of compliance, calling for further reflection on this problematic relationship.

The final paper in the symposium is by Sophie Duroy, who employs behavioural theory to develop a ‘bounded rationality equation’ that predicts when States will comply with its international law obligations in intelligence activities. Duroy argues that her equation not only helps international lawyers to understand *when* States will comply with international norms, but also suggests that it helps to identify *why* they do so—the increased likelihood of being held effectively accountable. Accordingly, she calls for international lawyers to focus not on the normative framework that regulates intelligence activities, but on the mechanisms through which violators may be held accountable.

In terms of next steps in the field, we see two issues as being particular pressing. The first is mapping how individuals or groups interact on the sub-State level to produce State behaviour. Scholars have for some time identified the need to break down the 'black box' of the State,⁶⁰ but it is unclear what the inside of the box may look like. To be sure, we would benefit enormously by assessing the behavioural of sub-State actors individually.⁶¹ But in order to trace how behavioural influences ultimately play out on the international plane, we need to have a good idea of how these actors interact, and how psychological processes that occur on the individual level are aggregated or modified when scaled up to State level.

From a theoretical perspective, we need to think about what a behavioural theory of compliance might look like. To return to the map metaphor in section 2, international lawyers should discuss the scale of the map, the level of detail depicted, and whether the map should attempt to portray one or all States. Moving to a more fine-grained understanding of State behaviour may also mean that generalizations about compliance become both less likely as well as less helpful. However, on the other hand, we may find that psychological influences play out in certain stable and predictable ways regardless of the particular context in which decision-making occurs. In either case, behavioural compliance theory promises to bring useful insights to the table, advancing international lawyers' understanding of State behaviour and enabling better-informed, behaviourally sensitive international law-making and institutional design.

60 See, for example, A van Aaken and J Kurtz, 'Beyond Rational Choice: International Trade Law and the Behavioural Political Economy of Protectionism' (2019) 22 *Journal of International Economic Law* 601, 609.

61 cf A van Aaken (n 27) 1235.