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Abstract

In this Article, I develop a model of the enforcement of human rights that attempts to account for financial globalization. I advance two principal arguments. First, I argue that, in practical terms, the traditional approach to protecting human rights, documenting violations of human rights to embarrass states into changing their ways, is becoming much less likely to succeed. This reputational approach, often referred to as naming and shaming, has long been the primary mechanism of enforcing human rights norms. Shaming was sometimes accompanied by a form of economic shunning, with countries who violated human rights norms finding it more difficult to find trading partners in the developed world. The rapid economic growth that is characteristic of globalization, particularly in China and India, has altered this dynamic. Increased competition for the raw materials necessary to sustain economic growth has rendered it more difficult to ignore resource-rich states, even if they are regular violators of human rights. Many states no longer face a powerful incentive to maintain a good reputation for compliance with human rights norms. Second, I argue that as the reputations of states have become less critical, the reputations of corporations have become more important. Two relatively new features of financial globalization have changed the picture and created incentives for firms to act as the watchdogs of other firms. The market for capital is now global. It is only a slight exaggeration to say that firms everywhere are competing for the same investors. Similarly, it is no exaggeration to say that firms from around the world are selling their products in the same markets. Thus, as capital and consumer markets have become more integrated, firms now face powerful incentives to police the human rights conduct of their rivals.

FINANCIAL GLOBALIZATION AND HUMAN RIGHTS

*Patrick J. Keenan**

INTRODUCTION

The past decade has seen a sea change in the ways that money moves around the world, including the rise of private equity and hedge funds,¹ the growth of derivatives and currency swaps,² and the increasing mobility of labor and capital.³ That these changes are occurring is impossible to deny, and scholars and commentators have debated their impact on economic growth, investment strategies, and a host of similar issues. But this vast and growing literature has devoted much less attention to a related and important issue: what do these changes mean in the lives of ordinary people in the developing world? In particular, how does global finance affect human rights practices in developing countries? Scholars who do consider the effect of financial globalization on the lives of poor people usually debate whether it reduces or increases the incidence of poverty, and this is certainly an important issue.⁴ But the lives of poor

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¹ See generally Eswar S. Prasad, et al., *Effects of Globalization on Developing Countries: Some Empirical Evidence*, INT'L MONETARY FUND OCCASIONAL PAPER NO. 220 (2003) (describing the details of financial integration and its impact on countries in the developing world).

² These changes are complicated and closely related to each other. Consider this description of financial globalization from the International Monetary Fund's quarterly journal:

Banks have increasingly moved financial risks (especially credit risks) off their balance sheets and into securities markets—for example, by pooling and converting assets into tradable securities and entering into interest rate swaps and other derivatives transactions—in response both to regulatory incentives such as capital requirements and to internal incentives to improve risk-adjusted returns on capital for shareholders and to be more competitive.

Gerd Hausler, *The Globalization of Finance*, 39 FIN. & DEV. 1 (2002).

³ Between 1990 and 2000, global “gross capital flows” underwent a “fourfold increase,” to \$7.5 trillion. Net capital flows increased “from \$500 billion in 1990 to nearly \$1.2 trillion in 2000.” Hausler, *supra* note 2, at 1.

⁴ See generally Barbara Stallings, *The Globalization of Capital Flows: Who*

people in the developing world are affected not just by poverty. Poor people are not just poor; too often, they are also vulnerable to a wide range of abuses. It is the relationship between financial globalization and these human rights violations that I consider. I address two fundamental questions. What are the financial incentives that affect the human rights practices of states? Second, what are the *pathways* through which these measures work their influence? Put more simply: how can we harness changes in the financial arena brought about by globalization to improve human rights practices?

In this Article, I develop a model of the enforcement of human rights that attempts to account for financial globalization. My approach, unlike many others, assumes that any viable model of human rights enforcement must focus on corporations as well as states. To be sure, this is not the only approach to human rights, and I do not claim that it is the best in every conceivable case. The reality remains that, either through their actions or inactions, states are responsible for most human rights violations but I argue that corporations have an increasingly powerful role to play in the age of globalization. My analysis begins where most scholars of human rights and international relations begin: with an examination of theories of compliance with the law. Whether and why states comply with international law has puzzled scholars since at least the time of Thucydides.⁵ Even by the standards of international law more generally, human rights law is gloriously easy to develop and notoriously difficult to enforce. To avoid this problem—at least in part—my theory focuses on incentives and constraints, not on the efficacy of any particular formal legal mechanism of enforcement. It is thus both normative and positive, proposing an ideal while accounting for the empirical realities of globalization.

I advance two principal arguments. First, I argue that, in practical

Benefits?, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 202 (2007) (arguing that financial globalization has increased economic volatility in poor countries and failed to produce benefits for poor people); INTERNATIONAL MONETARY FUND, REAPING THE BENEFITS OF FINANCIAL GLOBALIZATION (June 2007) (arguing that the potential of financial globalization to reduce poverty depends in part on the financial and monetary policies of host countries); Frederic S. Mishkin, *Is Financial Globalization Beneficial?*, NAT’ L BUREAU ECON. RES., WORKING PAPER 11891 (Dec. 2005) (arguing that financial globalization promotes economic growth under specified conditions).

⁵ See, e.g., Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’ L L. 88, 98 (2006) (arguing that Thucydides’ History of the Peloponnesian War contained an attempt to account for the relationship between states and international rules).

terms, the traditional approach to protecting human rights—documenting violations of human rights to embarrass states into changing their ways—is becoming much less likely to succeed. This reputational approach, often referred to as “naming and shaming,” has long been the primary mechanism of enforcing human rights norms. Shaming was sometimes accompanied by a form of economic shunning, with countries who violated human rights norms finding it more difficult to find trading partners in the developed world. The rapid economic growth that is characteristic of globalization, particularly in China and India, has altered this dynamic. Increased competition for the raw materials necessary to sustain economic growth has rendered it more difficult to ignore resource-rich states, even if they are regular violators of human rights. At the same time, most wealthy countries and many poor countries have removed restrictions on the movement of capital. Almost any company can go almost anywhere in the world in search of a profit. Taken together, these facts means that as wealthy countries (and the firms working to satisfy their economic needs) compete for resources, the states in which those resources are found are increasingly powerful. As a result, many states no longer face a powerful incentive to maintain a good reputation for compliance with human rights norms. Capital mobility and competition for resources have made it possible for states with deplorable human rights records to attract investment and development assistance.

Second, I argue that as the reputations of states have become less critical, the reputations of corporations have become more important. Brands have become global and the technology revolution has made it possible for victims of human rights violations to document and share their stories quickly and without intermediation. Corporations have long had an incentive to police themselves to protect their brands. But two relatively new features of financial globalization have changed the picture and created incentives for firms to act as the watchdogs of other firms. The market for capital is now global. It is only a slight exaggeration to say that firms everywhere are competing for the same investors. Similarly, it is no exaggeration to say that firms from around the world are selling their products in the same markets. Thus, as capital and consumer markets have become more integrated, firms now face powerful incentives to police the human rights conduct of their rivals. What is missing are the legal mechanisms to give effect to this incentive. Despite the growing integration of markets, there remain important differences in the legal and reputational regulatory environments in which firms operate. Integrating these environments—homogenizing the constraints that firms face—is a

critical part of any approach to improving human rights practices.

Before moving on, a short explanation is in order. Although I use the term “globalization” in this Article, I do not define it in any detail. In previous work, I devoted considerable attention to the problem of defining globalization.⁶ Ultimately, I concluded that what matters more than a standard definition is a nuanced understanding of the component parts—the various effects that, taken together, are typically taken to demonstrate that globalization is occurring.⁷ I take the same approach in this Article. Rather than attempting to divine a definition of financial globalization that will fit every circumstance, I identify the components that are most salient to the enforcement of human rights.

This Article proceeds in three parts. In Part I, I argue that financial globalization has changed the incentives that shape the behavior of states and corporations. I specify several new (or newly-salient) phenomena. I discuss the rise of sovereign wealth funds, which are vehicles through which states can invest in the financial markets. These funds compete with traditional investors, but have different constraints and incentives. Next I consider the mobility of capital and the concurrent increase in competition for many of the inputs necessary for sustained economic growth. Critical to both trends are the ways that firms and states manage their reputations.

In Part II, I critique the primary approaches to the enforcement of human rights laws and norms from both international law and international relations. I focus on the failure to adequately account for the effects of financial globalization. I divide the theories into three main schools: rational choice, constructivist, and legal process. The rational choice model grows out of two ideas: that individuals and entities seek to maximize their utility, and that they attempt to select the optimal path to this goal. In the context of the enforcement of human rights, this means that law is less important than self-interest. States comply when it suits them, and refuse to comply when it does not. In contrast, the constructivist approach gives great weight to internalized values and preferences. States comply with human rights norms because they (or an influential constituency) has become convinced that such behavior is appropriate. Behavior is driven by values, not self-interest. Process-oriented models build on the constructivist model and attempt to specify

⁶ See Patrick J. Keenan, *Do Norms Still Matter? The Corrosive Effects Of Globalization On The Vitality Of Norms*, __ VANDT. J. TRANSNAT'L L. __ (forthcoming 2007).

⁷ *Id.*

the interactions that can produce the necessary changes in values. In my critique, I devote particular attention to considering what these models suggest about the enforcement of international human rights laws and norms. These models all have much to commend them, but all are flawed in important ways.

In Part III, I present my own theory. In doing so, I consider the conventional theories, but also draw on two additional sources of insight. The first is evidence from recent empirical tests of the various models of enforcement. There is convincing evidence—from both quantitative and qualitative analyses—that the constructivist and process-oriented models of enforcement are less effective than other models. Second, I consider the ways that financial globalization has changed the set of incentives and constraints facing governments and firms. These real-world changes reinforce the insights from theory. At their most basic, effective enforcement models operate by seeking to impose a cost on the violator. The most obvious kind of cost is financial: if an offender is sued and loses, he (or it) may be required to pay damages. The other potential cost is less obvious but more salient (and complicated) in the real world. States, firms, and individuals conform their behavior to human rights standards because of reputational concerns. Either they wish to avoid the damage to their reputation that would come from being known as a violator of human rights, or they wish to reap benefits that may come from being known for respecting human rights.

I conclude by discussing two possible mechanisms to give legal effect to my theory. First, if reputational sanctions matter more than ever, the law should develop mechanisms to systematize the creation of reputations and the implications of having a particular reputation. One current example of this comes from credit rating agency ratings of states. These ratings are based on a wealth of financial data and political analysis, and they provide potential investors with information about a state's fitness as a financial partner or a location for investment. Many of these ratings, although compiled by private entities, can have profound legal and financial consequences for states. There are similar ratings of human rights conditions, but to date these ratings have had only limited legal effect. I identify ways to give these ratings teeth, which would create an incentive for states to concentrate as closely on their human rights practices as they do on their financial practices. Second, I argue that the reputation market is likely to work best when all actors compete under the same rules. China and Chinese firms, by far the most energetic new player in the area of economic development in the developing world, are

not subject to the same restrictions on ethical conduct (such as laws that prohibit the payment of bribes) and sell many of their products in a market in which consumers are not able (or inclined) to pressure firms to behave ethically. To help reduce the gap between the regulatory regimes facing Chinese and Western firms, I propose to harness the increasing integration of financial markets by extending the reach of the Foreign Corrupt Practices Act and similar European measures that place limits on the behavior of firms.

I. FINANCIAL GLOBALIZATION

The relationship between financial globalization and human rights practices has not been systematically analyzed. Part of the reason for this failure is that financial globalization is a dynamic, ongoing process that defies easy definition. In this Part, my aim is to identify the salient international financial practices that are most relevant to human rights practices. My consideration of these issues--which revolve around the relationship between state behavior and corporate activity--is in service of my larger goal of developing a theory of incentives and constraints that can be manipulated to reduce the incidence of human rights violations. I highlight two particularly important issues. One is the increasing role of states as players in the market. Acting through sovereign wealth funds—vehicles for investing a state's money in the market—states now pursue financial gains in ways that were rare in the recent past. Because they are run by states, these funds have different objectives than other investors that might destabilize financial markets. More important for my theory, because these funds operate largely without oversight or transparent accounting practices, they can enrich corrupt leaders and make them less accountable to their own populations, decrease financial transparency, and further impoverish local people. The next issue I highlight is the increasing mobility of capital. As most countries in the world have removed or weakened restrictions on the movement of money into and out of the country, investors are now able to invest almost anywhere. My focus is on the ways that capital mobility can affect the incentives that shape human rights practices. Two effects warrant particular attention. First, with more mobile capital, there is more competition for assets in places that are most at risk for human rights violations. Second, as competition for returns has increased, these pressures have increased investors' risk tolerance decreased the weight given to non-economic concerns such as reputation.

A. STATES IN THE MARKETPLACE

Sovereign wealth funds—investment vehicles through which

governments invest foreign currency reserves—have dramatically altered the way that states interact in the market place. Just as critically, these funds have altered the transparency of state conduct. Historically, governments have kept reserves of foreign currency as a kind of self-insurance against financial crises or similar sudden, unexpected problems. Most governments kept their reserves in U.S. Treasury bills or similar bonds issues by other governments.⁸ Compared to well-managed investments in securities, these investments provided sparse returns (apart from some hedge against inflation), but were secure and were sufficiently liquid to provide quick stabilization in a currency crisis.⁹ In just the past five years, this picture has changed dramatically. Governments have much more cash on hand than ever before—by some estimates foreign currency reserves have grown from \$1.9 trillion to \$5.4 trillion in just five years—and more than they need to address a financial crisis.¹⁰ This allows governments to seek more substantial returns with part of their portfolio while maintaining enough in reserve to stave off a financial crisis. Russia, for example, is doing just that by splitting its stabilization fund into two separate sets of assets. One will act as a traditional insurance reserve. The other will be managed much more aggressively, including investing in foreign securities.¹¹

The rise in sovereign wealth funds has been fueled by at least two related factors. The first is the sheer volume of money that many states have accumulated, with much of the growth coming in states rich with oil and gas.¹² The oldest and best-established sovereign wealth funds are those from the United Arab Emirates, Norway, Kuwait, Alaska, and the Canadian province of Alberta, all of which were created using revenue

⁸ See, e.g., Michael R. Sesit, *The Limits of Free Market Principles: Sovereign Wealth Funds Raise Hackles in the West*, INT'L HERALD TRIBUNE, Jul. 23, 2007 (noting that most countries typically invested in bonds issued by the U.S. Treasury or European governments).

⁹ See, e.g., Joanna Chung & Tony Tassel, *The \$2,500 Billion Question: How Sovereign Wealth Funds are Muscling in on Global Markets*, FIN. TIMES, May 25, 2007, at 7 (“Until now, the foreign reserves of countries such as China have been largely parked in passive investments, mostly in US Treasury bonds. The investment priority of their managers, usually central banks, was security and liquidity”).

¹⁰ See Sebastian Mallaby, *The Next Globalization Backlash*, WASH. POST, June 25, 2007, at A19 (describing increase in currency reserves).

¹¹ See Chung & Tassel, *supra* note 9, at 7 (describing Russia’s decision to divide its stabilization fund into two parts, one to address financial emergencies and one to “invest more in domestic and international equities”).

¹² See Mallaby, *supra* note 10, at A19 (arguing that the rise in oil and gas prices has driven much of the increase in reserves).

from oil or natural gas.¹³ With the rapid rise of oil prices in recent years, a number of states have seen their reserves swell to the point that there is pressure for them to begin to invest the money more aggressively.¹⁴ The second factor is the global trade imbalance, which has seen states with strong manufacturing sectors like China and Singapore amass enormous reserves.¹⁵ Indeed, Singapore's fund, Temasek, with assets of approximately \$208 billion under management, has been one of the most sophisticated players in the field.¹⁶

Broadly speaking, there are two ways that sovereign wealth funds structure their investments. One approach is for the fund to take direct equity positions in firms, either by buying shares in listed companies or by investing in private ventures. For example, in 2006 Temasek bought a Thai telecommunications group.¹⁷ The other approach is for the sovereign fund to buy shares in an intermediary that takes equity positions. For example, China recently invested \$3 billion in the private equity firm the Blackstone Group. Regardless of the approach, sovereign wealth funds illustrate the ways that transparency issues can create incentives that can undermine human rights practices. A major concern of financial regulators is that sovereign wealth funds are less transparent than many other kinds of investment vehicles.¹⁸ Although regulators are concerned primarily because of the possibility that secretive investments could undermine predictability in global financial markets, there are other reasons to attend to transparency concerns. Of the possible negative effects of the rise of sovereign wealth funds, I focus on those that might contribute to worsening human rights practices. Sovereign wealth funds operate mostly outside the purview of financial regulators. For this reason, they are almost a perfect vehicle for potentially corrupt leaders who wish to enrich themselves without facing international scrutiny.

¹³ See *Factbox: Sovereign Wealth Funds Brim with Money*, REUTERS, Aug. 2, 2007, at <http://www.reuters.com/article/fundsFundsNews/idUSN0222812320070802> (listing assets under management, source of funds, and years of existence for leading sovereign wealth funds).

¹⁴ See Mallaby, *supra* note 10, at A19 (describing increase in reserves of Russia and Nigeria, among others).

¹⁵ See *id.*

¹⁶ See *Factbox: Sovereign Wealth Funds Brim with Money*, *supra* note 13.

¹⁷ See Chung & Tassel, *supra* note 9, at 7 (describing Temasek's purchase of Shin Corp.).

¹⁸ See Ralph Atkins & Mark Schieritz, *IMF Joins Call for Scrutiny of Sovereign Funds*, FIN. TIMES, June 27, 2007, at 6 (noting that the chief economist at the IMF stated that "increasing numbers of financial flows are going through black boxes ... We don't know what happens and we should worry about that").

Particularly in states with weak political and civic institutions, the enrichment of the ruling regime is a recipe for human rights abuses. There is substantial evidence demonstrating that when income from state assets is channeled through a small group of individuals, the state's economy, institutions, and human rights practices suffer.¹⁹

B. CAPITAL MOBILITY AND RESOURCE COMPETITION

Of all the features of financial globalization, capital mobility has attracted the most attention. As I use the term, capital mobility means the degree to which investors (whether states or firms) can move capital into and out of states. Capital mobility is a broad term that includes, for example, whether (and under what restrictions) an investor can purchase an asset in a foreign country; whether foreign investors are permitted to expatriate the proceeds of their investments; and the circumstances under which a host country's currency may be traded.²⁰ These related but distinct phenomena—often referred to as liberalization—have produced an increase in the mobility of capital, making it possible for those with capital to invest it virtually anywhere.

One of the promises of removing restrictions on capital is that it should, in theory, permit developing countries to better manage risk. For example, in a country that derives a significant portion of its income from the export of a few commodities, there is a risk that changes in the price of exports could destabilize the domestic economy. By permitting capital to move freely, investors in poor countries can invest some of their wealth abroad, and foreigners can invest in the domestic economy. By “effectively selling off a stake in their domestic output in return for a stake in global output,” poor countries can diversify their economies and better account for volatility.²¹ The economic effects of loosening restrictions on the movement of capital are by no means universally positive, and there is a burgeoning literature analyzing the many

¹⁹ See, e.g., PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 38-52 (2007) (describing the relationship between resource wealth, control over the wealth by national elites, and failures of governance); see generally Michael L. Ross, *Does Oil Hinder Democracy*, 53 *WORLD POL.* 325 (2001) (reviewing empirical evidence of the association between tightly-controlled income from natural resources and governance failures).

²⁰ See MATTHEW BISHOP, *ESSENTIAL ECONOMICS* 41 (2004) (describing capital mobility as “the ability of capital to move in or out of a country, ...[including] limits on foreign investment in a country's financial markets, on direct investment by foreigners in businesses or property, and on domestic residents' investments abroad”).

²¹ Prasad, et al., *supra* note 1, at 3.

consequences of this approach to economic development.²² The debate about economic consequences notwithstanding, there is little doubt that capital mobility is increasing; it is growing easier and easier for investors to move money around the world, investing in assets and economies that many investors would not have noticed even two decades ago.²³

The removal of restrictions on the movement of capital has created a global competition for returns to capital. In the words of economist Robert Samuelson, “There are more investors in more countries moving more money into more securities in more other countries than ever before.”²⁴ Although most foreign capital is invested in the developed world, the greatest increases in investment have come in the developing world, particularly in resource-rich countries that are most at risk for human rights violations.²⁵ One reason for this is the relatively slow pace of economic reform in many poor countries. Foreign investors could not enter many economies until significant legal reform had occurred, and it is only relatively recently that such change has taken place.²⁶ In addition, changes in technology have made it easier for investors to move their money from one financial jurisdiction to another, removing one of the practical constraints on capital mobility. Finally, the global hunt for

²² Few globalization issues have generated as much interest among scholars and policymakers as the wisdom and effects of capital mobility. Particularly since the financial crisis in Asia in 1997 and 1998, there has been heated debate about whether the removal of restrictions on capital contributed to the crisis. For a flavor of the debate from its two of its most thoughtful participants, see JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 199-207 (2004) (arguing that removal of restrictions on capital contributed to welfare increases but left developing countries open to the risk of financial crisis caused by capital flight) and JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 89-132 (2002) (arguing that premature and irresponsible capital market liberalization caused the Asian financial crisis). In this Article, my aim is not to argue that increased capital mobility will necessarily produce positive or negative outcomes. Instead, my goal is to show that capital mobility—regardless of its other effects—can also affect the incentives that face developing countries.

²³ See, e.g., Prasad, et al., *supra* note 1, at 1 (describing a “surge in capital flows among industrial countries and ...between industrial and developing countries”).

²⁴ Robert J. Samuelson, *Storm Clouds at the Global Bazaar?*, WASH. POST, Feb. 21, 2007, at A15.

²⁵ It is well documented that resource-rich states in the developing world tend to do worse economically and have worse human rights practices than would be expected. See, e.g., COLLIER, *supra* note 19, at 38-52 (summarizing evidence that there is a “natural resource” trap that appears to contribute to the impoverishment of the residents of resource-rich states in the developing world).

²⁶ See, e.g., INTERNATIONAL MONETARY FUND, *REAPING THE BENEFITS OF FINANCIAL GLOBALIZATION*, *supra* note 4, at 10-12 (describing the rapid removals of legal restrictions on capital mobility and accompanying changes in investment practices).

energy, particularly petroleum products, is behind a great deal of the movement of capital.

This competition has contributed to the second important effect of capital mobility, an increased tolerance for risk. This has two primary effects. First, with more capital in search of a return, investors have an incentive to look further afield than ever before. Despite the theoretical arguments about the indifference of investors to issues other than economic returns to their investments, the evidence is that, until recently, many investors had a strong regional bias. Most capital was invested in the investor's home country or in a close neighbor.²⁷ Although the removal of some of the legal impediments to foreign investments is important, equally important is the pressure that investors now face from global competitors. No longer can investors find safe returns in their own neighborhoods; they must search for opportunities in places that until recently attracted little notice from investors.

The competition for resources is a related phenomenon. For example, as oil and gas prices have climbed, it now makes economic sense to develop more costly oil projects.²⁸ For example, this makes the relatively expensive oil found in the sands of Alberta more attractive than ever before.²⁹ But it also means that companies are willing to risk threats to their brands—reputational costs—if the reward is higher revenues from oil. Thus, despite the enormous risks of working in the Niger Delta region of Nigeria, oil companies still compete to do business there.³⁰

Consider an example. Much of the competition is driven by China's need for natural resources to fuel its astounding record of

²⁷ See generally Alan G. Ahearne, et al., *Information Costs and Home Bias: An Analysis of US Holdings of Foreign Equities*, 62 J. INT'L ECON. 313 (2004) (demonstrating the bias of many investors in favor of home equity markets and testing hypotheses to explain the bias).

²⁸ It is not just the demand for oil and gas that has intensified. Concrete, for example, is now in high demand and is sparking intense competition. See *America's Creaking Infrastructure: A Bridge Too Far Gone*, ECONOMIST, Aug. 11, 2007, at 70 (“America must compete” for raw materials “with countries (such as China) that are investing heavily in infrastructure. The price of structural concrete has gone up by 73% in the past two years alone”).

²⁹ See, e.g., Frances J. Hein, *Heavy Oil and Oil (Tar) Sands in North America*, 15 NAT. RESOURCES RES. 67, 69 (2006) (arguing that as more easily accessible oil reserves are depleted, it has become more economically viable to develop petroleum reserves trapped in sand).

³⁰ See, e.g., Thomas Catan, et al., *The Warriors of Warri: How Oil in Nigeria is Under Siege*, FIN. TIMES, Apr. 7, 2006, at 13 (describing the threats to oil industry assets in the Niger Delta).

economic growth, and the response of Western firms to China's activities. In the past decade, China's economy has grown at a rate never seen before,³¹ and it is now the sixth largest in the world.³² As its economy has grown, China's need for oil has increased. China is now one of the largest importers of oil in the world,³³ and imports a substantial portion of that oil from a handful of states in Africa.³⁴ A complicating factor for China is that its need for oil is relatively recent. The U.S. and other Western states have been large oil consumers—and importers—for many years. China is thus at a strategic disadvantage because many oil-rich states, such as those in the Persian Gulf, already have strong relationships with U.S. and European firms. To meet its needs, China has had to look to places, such as Sudan, that are not attractive to Western firms.

One reason that Chinese firms have looked for oil in difficult environments is necessity. Another factor that has made this possible is the different risk management conditions that Chinese firms face. For firms doing business in the developing world, there are two kinds of risk that they must consider. One is the risk of damage to the firm's brand, and the other is the risk that the project will not make money. Chinese firms face different risk portfolios in both areas. The behavior of many Western firms is constrained in part by their desire to maintain a reputation as socially responsible.³⁵ A vibrant and growing network of interest groups attempts to monitor Western firms. These groups attempt to affect the behavior of those firms by urging consumers to punish irresponsible firms.³⁶ Chinese firms do not face these pressures for at

³¹ See UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2006 331-334 (2006).

³² See Ali Zafar, *The Growing Relationship Between China and Sub-Saharan Africa: Macroeconomic, Trade, Investment, and Aid Links*, 22 WORLD BANK RES. OBSERVER 103, 104 (2007).

³³ See David Zweig & Bi Jianhai, *China's Global Hunt for Energy*, 84 FOREIGN AFF. 25, 25 (2005).

³⁴ See HARRY G. BROADMAN, AFRICA'S SILK ROAD: CHINA AND INDIA'S NEW ECONOMIC FRONTIER 82 (2007). Oil made up 62 percent of Africa's total exports to China in 2004. *Id.* at 81.

³⁵ See, e.g., Paul A. Argenti & Bob Druckenmiller, *Reputation and Corporate Brand*, 6 CORP. REPUTATION REV. 368, 372-373 (2004) (presenting results of qualitative empirical research suggesting that corporate managers seek to create socially responsible identities for their brands).

³⁶ See, e.g., Jill Gabrielle Klein, et al., *Why We Boycott: Consumer Motivations for Boycott Participation*, 68 J. MARKETING 92, 93-95 (2004) (surveying research findings suggesting reasons for consumer boycotts). For an extended treatment of this issue, see

least two reasons. First, many do not sell directly to Western consumers, which is an important factor in making firms vulnerable to such pressure.³⁷ Second, Chinese consumers are much less capable of affecting the behavior of Chinese firms. The behavior of Chinese firms is therefore less constrained by pressure to maintain a reputation as socially responsible.³⁸ Chinese firms face different conditions regarding economic risk as well. Here my focus is not on all types of economic risk, but on political risk; that is, the risk that political conditions in the host country will decrease the value of the investment.³⁹ Western firms must purchase insurance against such risks in the open market. Most Chinese firms need not bear this cost because they receive support from the government.⁴⁰ Chinese firms are therefore able to pursue projects that are more risky than a Western firm would for the same cost.

II. CONVENTIONAL THEORIES OF COMPLIANCE

For generations, scholars have sought a theory to explain the ways that states and their leaders comply with, ignore, or otherwise approach international legal obligations. Most scholars agree with Professor Louis Henkin's assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."⁴¹ The difficult job is to explain why this might be so, especially given the relative absence of enforcement mechanisms in the international arena.⁴² Determining why people, states, or other actors comply or do

NAOMI WOLF, NO LOGO 311-420 (2002 ed.) (describing campaigns by activists designed to affect the behavior of firms).

³⁷ To be sure, direct contact with Western consumers is not the only important factor, but it clearly matters, and its importance can extend through the corporations supply chain. Thus, not only are firms that come into contact with consumers susceptible to such pressure, so too are its suppliers. See, e.g., Michael J. Maloni & Michael E. Brown, *Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry*, 68 J. BUS. ETHICS 35, 37-38 (2006) (describing the impact of corporate social responsibility pressures throughout the supply chain).

³⁸ See, e.g., Charles J. Fombrun & Matthew Pan, *Corporate Reputations in China: How Do Consumers Feel About Companies?*, 9 CORP. REPUTATION REV. 165, 169-170 (2006) (arguing, based on survey data, that Chinese corporations do not incorporate corporate social responsibility issues into brand management decisions).

³⁹ See generally MULTILATERAL INVESTMENT GUARANTEE AGENCY, OPERATIONAL REGULATIONS (2002) (describing insurance products available to manage risks of expropriation, breach of contract, war and civil disturbance, and other related issues).

⁴⁰ See BROADMAN, *supra* note 34, at 271-272 (2007).

⁴¹ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

⁴² In addition to the theoretical work, there is a growing body of empirical evidence that suggests that Henkin's observation is accurate. For a useful summary of the recent literature, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE

not comply with the law is challenge that every legal or regulatory authority faces. Although theories abound, there are three broad currents that I explore in this Part. The first is the rational choice perspective, which holds that people perform a rough cost-benefit analysis when determining whether to comply with the law. If the costs of non-compliance are higher than the costs of compliance, then people comply. The second is what I will call a constructivist or normative perspective.⁴³ Under this approach, people comply with the law because they believe the law is just or because they believe that the regulatory authority has the power and the right to prescribe conduct.⁴⁴

In the context of international affairs, rationalists start from the premise that most states (and the leaders or constituencies that direct them) act to maximize their interests. The rationalist school encompasses a broad range of theories and assumptions,⁴⁵ but almost all of them place weight on self-interest than do constructivist scholars, and most have a thinner conception of self than do constructivists. As with the rationalist approach, the constructivist approach contains a broad range of theories under its umbrella. Scholars writing in the normative vein emphasize the power of international law, institutions, and interactions to modify the values that motivate behavior.

The third approach to understanding compliance with international law focuses on the processes that affect the behavior of states. In the process model, there are actually two related theories that challenge the distinction between the rational choice and constructivist approaches. One is Dean Harold Koh's theory of transnational legal processes, in which he argues that a "complex process of institutional interaction" provides opportunities for debates about the substantive content of "global norms," eventually leading the internalization of those norms "by domestic legal systems."⁴⁶ The second promising new theory, put forth by Professor Ryan Goodman and Professor Derek Jinks, is acculturation theory.⁴⁷

L.J. 2599, 2599-2600 n.2 (1996).

⁴³ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3 (1990) (contrasting normative reasons for compliance with the law with other possible reasons).

⁴⁴ See *id.* at 4.

⁴⁵ For an excellent explication of the variations on rational choice theory, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060-1066 (2000).

⁴⁶ Koh, *supra* note 42, at 2602.

⁴⁷ See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (hereinafter Goodman & Jinks, *How to Influence States*).

Professors Goodman and Jinks argue international law can change state behavior by inducing “actors to adopt the beliefs and behavioral patterns of the surrounding culture,”⁴⁸ even if there is not a complete shift in values.

At the outset I should acknowledge that these three categorical approaches are not mutually exclusive as there can be overlap between them. In addition, there is no reason to believe that most people choose one reason or another when they comply with the law; most people likely act in accordance with the law’s dictates for a range of reasons. In the end, because my focus is on ways that various changes in capital mobility and resource competition pose to compliance with the law and norms of human rights, it is not necessary to identify a single variable that does more than any other to encourage compliance with the law, or to fully embrace one or the other of the main strands of compliance theory. Instead, what matters is to identify those factors that may encourage or discourage compliance in some cases. In this connection, several issues are important.

The first is the centrality of information to compliance with the law. The rational choice model works best if states or their leaders have substantial amounts of information about the penalties for violating the law, the likelihood that any violations will be detected by others, and the benefits that a violation would bring to them. How states or leaders obtain this information is also important. One possibility is that a close relationship between law enforcers and those subject to regulation might lead to a flow of information about detection and sanctions from institutions to leaders. (Though this might not be optimal if the likelihood of detection or the legal sanction were too low to deter illicit activity.)

Another possibility is that states and their leaders acquire information through trial and error, or by seeking information not from the law enforcers but from law breakers. Another important issue is reputation. For rationalists, the reputation of a state matters because it can contribute to that state’s ability to assert its interests. For constructivists and process theorists, reputation matters in a more oblique way. States behave as they do because they wish to conform their behavior to their values. Reputation is important as a signal to and from other states.

Before moving on, one caveat: in this Section I consider some theories that take as their unit of analysis the individual and some that focus on more complex units, including firms, states, or communities. I do not argue, of course, that there are no relevant differences between

⁴⁸ *Id.* at 626.

these units of analysis. At the level of micro-theory, there are surely compelling differences that demand careful consideration. But my purpose in this section is to critique, at a broad level of generality, the different theories that seek to explain the ways that states relate to international law and norms. For my purposes, the differing responses to incentives of individuals versus states or communities are relatively unimportant.⁴⁹

A. RATIONALIST APPROACHES

In its simplest form, rational choice theory predicts that individuals will act so as to maximize their utility.⁵⁰ Russell Korobkin and Tom Ulen develop a taxonomy of theories of rational choice, ranging from what they call “thin conceptions” to “thick conceptions,” in which increasingly specific notions of the goals of individuals are assumed.⁵¹ At the “thin” end of the scale, they highlight what they call the “definitional version” of rationality, in which rationality “is understood as suiting means to ends”

⁴⁹ For a much fuller consideration of this issue, see Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promises and Pitfalls*, 31 J. LEGAL STUD. S285, S291-S294 (2002). Thompson argues that a rational choice model can be best applied to explain the “behavior of any unitary actor.” *Id.* at S291. He argues that scholars “who treat states as unitary assume either that the state aggregates all domestic preferences—of individuals, interest groups, and various intragovernmental actors—and acts as if it were a single actor or that state decision making is in fact channeled through a single or small group of crucial individuals who make important decisions.” *Id.* at S291. For Thompson, the problem is that “collective actors do not behave according to rationalist principles in the same way unitary actors do—they do not have coherent beliefs, goals, and preferences.” *Id.* at S292. Although I am mindful of this critique, it does not undermine my argument for two primary reasons. First, I assume that, in Africa at least, decision making is indeed “channeled through a single or small group of crucial individuals.” There is substantial empirical support for this assertion. See generally Nicolas van de Walle, *Africa’s Range of Regimes: Elections Without Democracy*, 13 J. DEMOCRACY 66 (2002). Second, even if the preferences and goals of states are not completely coherent in every instance, there is no reason to assume that it is impossible to discern the broad outlines of a state’s preferences or goals. It is not farfetched to assume that the survival of the ruling regime is an important goal, for example. For another view, see Richard A. Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. LEGAL STUD. S321 (2002). Judge Posner argues that “nations in their relations with each other, whether commercial or noncommercial, or even belligerent, behave much like individuals in their commercial relations.” *Id.* at S321.

⁵⁰ See, e.g., Jack L. Goldsmith & Eric A. Posner, *Introduction: Rational Choice and International Law*, 31 J. LEGAL STUD. S1, S3 (2002) (“Rational choice is the general label for a variety of related methodological approaches for the study of goal-directed behavior under constraints of scarcity”).

⁵¹ Korobkin & Ulen, *supra* note 45, at 1061.

without assuming a “normative theory of either means or ends.”⁵² At the “thick” end of the spectrum is the “wealth maximizing version,” in which individuals are predicted to “maximize their financial well-being or monetary situation.”⁵³ Surveying the range of theories from “thin” to “thick” shows the various ways that rationalist scholars have identified what individuals want; that is, what objectives motivate behavior, and why? This is important to law-and-economics generally, and is important to scholars of international law and international relations because much of the disagreement between rationalist scholars and others centers on differing ideas about the goals of states, and what they are willing to give up to achieve those goals.

The economic theory of rational choice has thoroughly penetrated almost every field of legal scholarship. Much of rational choice theory regarding compliance with the law⁵⁴ is based on a 1968 article by Gary Becker.⁵⁵ Becker argued that the decision to comply or not comply was based on a simple calculation. If the benefits that would come from breaking the law were higher than costs of breaking the law, discounted by the likelihood of suffering the sanction that non-compliance would bring, then the person would break the law.⁵⁶ Alternatively, if the cost of breaking the law was higher than the benefits, then the person would comply. This approach depends on at least two assumptions about human behavior. The first and most important is “that individuals act so as to maximize their expected utility.”⁵⁷ Applied to decisions regarding compliance with the law, this means that a potential lawbreaker will “commit the act if and only if his expected utility from doing so, taking into account his gain and the chance of his being caught and sanctioned,

⁵² Korobkin & Ulen, *supra* note 45, at 1061.

⁵³ *Id.* at 1066.

⁵⁴ Although I draw largely on law-and-economics literature to describe and analyze this strand of compliance theory, economists are by no means alone in asserting that people comply with the law for what amount to selfish reasons. Sociologists sometimes refer to “instrumental” reasons for compliance with the law, by which they mean that people modify “their behavior to respond to changes in the tangible, immediate incentives and penalties associated with following the law.” TYLER, *supra* note 43, at 3.

⁵⁵ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker was not the first to apply economic analysis to the study of criminal law. *See, e.g.*, CESARE BECCARIA, ON CRIMES AND PUNISHMENTS; JEREMY BENTHAM, PRINCIPLES OF PENAL LAW.

⁵⁶ Becker, *supra* note 55, at 176 (“[A] person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.”).

⁵⁷ Korobkin & Ulen, *supra* note 45, at 1075.

exceeds his utility if he does not commit the act."⁵⁸

Embedded in this calculation is the second important assumption: that most individuals are able to make at least a rough calculation about several important variables.⁵⁹ First, the potential lawbreaker must have some insight into what the benefits will be to her of both compliance and non-compliance with the law. Next, she must calculate the likelihood that she will be caught if she decides to break the law. Finally, she must consider the sanction she will suffer if she breaks the law, and the likelihood that she will actually suffer the sanction.

International relations and international law scholarship have embraced, however tentatively, some of the insights of rational choice. From Hans Morgenthau's early work⁶⁰ to John Mearsheimer's recent authoritative analysis of the concept,⁶¹ the "realist" approach to international relations has emphasized two linked concepts. The first is that states seek to maximize their power.⁶² The second is that states, acting through their leaders, attempt to choose the optimal means to achieve their desired ends.⁶³ Although realist scholars agree broadly on these simple tenets, there is substantial disagreement on preferences: whether the thing that states seek to maximize is power, or wealth, or utility, or something else altogether.⁶⁴ There is also disagreement about whether, and to what extent, states are able to select the optimal means to achieve their goals.⁶⁵ Despite these disagreements, the realist approach bears important parallels to the rationalist approach. Both assume that actors seek to maximize something important (be it wealth, power, or utility). Both assume that actors try, however imperfectly, to pursue their objectives in the way that is most likely to achieve them; that is, that states' actions are guided by their goals.

Recent international relations scholarship has undertaken a more

⁵⁸ A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 47 (2000).

⁵⁹ This assumption has been the subject of much analysis in recent years. For a thorough review, see Korobkin & Ulen, *supra* note 45.

⁶⁰ See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (1967).

⁶¹ JOHN MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001).

⁶² See *id.* at xii-xiii (arguing that the behavior of states is motivated by a desire "to maximize their share of world power").

⁶³ See, e.g., Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1438 (1997) (describing the circumstances under which institutions may display rational behavior).

⁶⁴ See, e.g., Stephen G. Brooks, *Dueling Realisms*, 51 INT' L ORG. 445, 446 (1997) (describing disagreement within realism about "state preferences").

⁶⁵ See, e.g., Rubin, *supra* note 63, at 1437-1439 (arguing that many accounts of the ways that states may optimize their strategies are incorrect).

explicit and nuanced consideration of rational choice issues. Consider the example of norms. In the past decade scholars have assessed the ways that norms, as opposed to raw power, shape the behavior of states. For some realists, to label a particular behavior a norm was to assert that the behavior was regularly observed, regardless of the reason that the behavior occurred.⁶⁶ Recently, however, scholars have begun to more fully integrate consideration of norms in the rational choice analysis. Again, the treatment of norms can vary widely. For some scholars, norms are “standards of behavior that can alter the calculations of costs and benefits” associated with a particular policy or action.⁶⁷ For others, norms are important because of the way they moderate the collision of domestic politics and international affairs.⁶⁸ What unites these theorists is that they employ a roughly rationalist perspective, but include in their calculus a broader conception of utility that includes the benefits that come from being held in high esteem by other states (or the costs associated with low esteem).

B. NORMATIVE THEORY

The second conventional approach is what I call normative or constructivist theory. At its core, this approach maintains that behavior is driven by internalized values or preferences. As with rational choice theorists, constructivists begin their analyses with a set of assumptions about human and institutional behavior. First, constructivists believe that individuals and institutions are motivated primarily by “ideational factors, not simply material ones,” and that the most important ideational factors are those that are “widely shared.”⁶⁹ Second, they believe that “these shared beliefs construct the interests and identities of purposive actors.”⁷⁰ The problem for constructivist scholars is to identify the pathways by which ideational factors—beliefs, morals, and the like—are put into action. That is, what is the process by which beliefs are transmitted from one

⁶⁶ See, e.g., Janice E. Thomson, *Norms in International Relations: A Conceptual Analysis*, 23 INT’ L J. GROUP TENSIONS 67, 81 (1993) (arguing that norms are those practices in which states regularly engage).

⁶⁷ Ann Florini, *The Evolution of International Norms*, 40 INT’ L STUD. Q., 363, 365 (1996).

⁶⁸ See, e.g., Richard Rosecrance & Arthur A. Stein, *Beyond Realism: The Study of Grand Strategy*, in THE DOMESTIC BASES OF GRAND STRATEGY 3, 4 (Richard Rosecrance & Arthur A. Stein, eds., 1993).

⁶⁹ Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 2001 391, 393 (2001) [hereinafter Finnemore & Sikkink, *Taking Stock*].

⁷⁰ *Id.* at 393.

entity to another, and, when the entity is a state, how are those beliefs processed through the domestic legal and political system and into state behavior?⁷¹ As it pertains to international law or international relations, the goal of constructivist scholarship is to explain how a state's conception of its interest can change, and how moral or normative factors can contribute to this change.⁷² Although there is no agreement as to the weight to give to any single contributor to preference change and behavior modification,⁷³ there are two broad themes that warrant attention: process and legitimacy.⁷⁴

The process by which beliefs or values become norms and then motivate changes in behavior has been the subject of extensive theoretical and empirical work.⁷⁵ In their book *The New Sovereignty: Compliance with International Regulatory Agreements*,⁷⁶ Abram Chayes and Antonia Handler Chayes identify two strategies for enforcing international law, "enforcement" and "management."⁷⁷ The Chayeses reject the enforcement model—involving various forms of coercion—on the ground that it is usually ineffective and can actually reduce the likelihood of success over the long term.⁷⁸ In its place, they propose what they the "management" approach, in which states attempt to influence other states

⁷¹ See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics & Political Change*, 52 INT'L ORG. 887, 893-894 (1998) [hereinafter Finnemore & Sikkink, *International Norm Dynamics*] (identifying the ways that norms may move from the domestic to the international arena).

⁷² See, e.g., Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain's Sixty-year Campaign against the Atlantic Slave Trade*, 53 INT'L ORG. 631, 632 (1999).

⁷³ Constructivist scholars have used a broad range of modes of analysis to explore these core questions. In a comprehensive reassessment of constructivist scholarship, Martha Finnemore and Kathryn Sikkink identify many of the various approaches within constructivism: "Foucauldian analyses of the power of discourse ..[;] theories of agency and culture..[;] analyses about self-presentation in public life ..[;] notions about security communities ..[;] theories about organization behavior ..[;] social movement theory ..[;] Habermasian theory about communicative action ..[;] and mediation theory." Finnemore & Sikkink, *Taking Stock*, *supra* note 69, at 394.

⁷⁴ By considering these themes separately, I do not mean to suggest that they are in opposition to each other.

⁷⁵ Both Dean Koh's transnational process model and Professors Goodman and Jinks' s acculturation model are, of course, process-oriented theories. I discuss them separately to emphasize the ways that those approaches have broken productive new theoretical ground.

⁷⁶ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

⁷⁷ *Id.*

⁷⁸ *Id.* at 32-33.

through extensive interaction and discussion of interests and norms.⁷⁹ Although they do not specify the micropathways by which this process might work,⁸⁰ they suggest that, through the iterative process, potentially recalcitrant states might be persuaded by the beliefs of other states and reform their behavior.⁸¹ The management approach emphasizes dialogue, interaction, and a constant exchange of ideas and concerns. In this way, the management approach is really about the need to create opportunities for discussion, not the process by which discussion can lead to behavior modification.

Another important strand of the constructivist approach focuses on the perceived legitimacy of both the content of the law—what is being regulated—and the authority of law makers and law enforcers.⁸² In its simplest version, this model suggests that people “obey the law because they believe that it is proper to do so.”⁸³ Why people come to believe that it is proper to obey the law is, of course, a complicated and important question. At the level of individual behavior, several considerations appear to be at work. First, people consider the content of the law to determine if the behavior being prohibited or encouraged squares with their sense of morality or justice. For example, laws that prohibit commonly-accepted behavior, such as laws prohibiting sodomy, are routinely ignored because they are seen as illegitimate. The next set of considerations relate to the enforcement of the law. Individuals ask whether the police or other enforcers accurately represent “their group’s moral values.”⁸⁴ Put another way, people consider whether the police are “supporting and defending community norms” as they enforce the law.⁸⁵ Related to this is the issue of fairness: whether enforcement decisions—both at the level of policy (which neighborhood should have more officers) and at the individual level (who should the police stop and how should those stopped be treated)—comport with individual notions of fairness.

Among scholars of international law and international relations, Professor Thomas Franck is best known for consideration of legitimacy.

⁷⁹ *Id.* at 109-111.

⁸⁰ See Koh, *supra* note 42, at 2637 (noting that Chayes and Chayes do not specify “how, precisely, does a managerial approach to treaty compliance work”).

⁸¹ CHAYES & CHAYES, *supra* note 76, at 109-111.

⁸² See generally TYLER, *supra* note 43, at 19-39.

⁸³ *Id.* at 178.

⁸⁴ Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group’s Moral Values*, 66 SOC. PSYCHOL. Q. 153, 163 (2003).

⁸⁵ *Id.* at 162.

For Professor Franck, legitimacy is “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.”⁸⁶ Although Professor Franck is not an adherent to the constructivist approach, his theory of legitimacy is consonant with the constructivist focus on the centrality of preference change.⁸⁷ Constructivists argue that individuals and states are more likely to accept and internalize norms if they view the process by which those norms were derived as legitimate or fair.

For those concerned with the legitimacy of rules, both process and substance matter. That is, just as the way that a rule is created and enforced matter to its perceived legitimacy, so too does the substantive content of the rule. But from the standpoint of theory, assessing the content of a rule is much more difficult. Some constructivist scholars have attempted to do so—mainly those concerned with cognition or culture.⁸⁸ These scholars, though writing within the broad constructivist school, apply what amounts to a rationalist model. They posit that, in a competition of ideas, one idea wins out over another because the winning idea might “clarify uncertainty or reconcile the interests of elites.”⁸⁹ On this view, the legitimacy of a rule is in part a function of the utility the rule produces for those bound by it or charged with enforcing it.

C. PROCESS THEORIES

In the past decade or so, two new versions of process theory have emerged that engage both the constructivist and rationalist approaches. Process theory has its roots in Georg Simmel’s concept of sociation, the

⁸⁶ Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’ L L. 705, 706 (1988)

⁸⁷ I consider Professor Franck’s legitimacy theory as part of a my larger discussion of constructivism because both approaches attend to the reasons that states comply with rules or laws, with particular focus on those reasons that contribute to state identity. For legitimacy theorists, the preference at the domestic level for rules, law, and adjudication is constitutive of a liberal state, and states with this preference can be expected to demonstrate it at the international level as well. For constructivists, rules and norms contribute to the creation of the state and its identity. See, e.g., Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 71. For a somewhat different view of the relationship between legitimacy theory and constructivism, see Koh, *supra* note 42, at 2633-2634 (arguing that in the liberal, legitimacy-centered model, states construct institutions and norms, whereas in the constructivist model, institutions and norms help to constitute states).

⁸⁸ See, e.g., Finnemore & Sikkink, *Taking Stock*, *supra* note 69, at 405-407 (summarizing scholarship that seeks to explain, based on the content of the idea, why one idea might win out over another).

⁸⁹ *Id.* at 406.

idea that interaction, including conflict, is vital to the health of human societies. Pursuant to this theory, interaction involves the creation and resolution of conflicts that can lead to mutual understanding.⁹⁰ For scholars of international law and international relations, process theory means devoting close attention to the many opportunities that international actors have to interact. Their goal is to identify the mechanisms by which norms and ideas spread. International process theorists focus on the ways that states interact and spread norms.⁹¹ Dean Harold Koh is the scholar who has contributed the most to our understanding of transnational process theory. In his work, he considers why states obey international law or comply with international norms. For him, it is essential to identify the “pathways whereby ...[an] international rule penetrates into the domestic legal system, thus becoming part of that nation’s internal value set.”⁹² His goal is to explain “the evolutionary process whereby repeated compliance gradually becomes habitual obedience.”⁹³ The process involves actors and institutions at all levels. As various actors interact, they “create patterns of behavior that ripen into institutions, regimes, and transnational networks.”⁹⁴ These new patterns of behavior are reinforced by domestic and international actors and institutions until the domestic system is “’enmeshed’ with international legal norms.”⁹⁵

The second recent theory to emerge comes from Professors Ryan Goodman and Derek Jinks’s acculturation theory. Building on Dean Koh’s version of process theory,⁹⁶ Goodman and Jinks seek to identify the “microprocesses” by which “actors adopt the beliefs and behavioral patterns of the surrounding culture.”⁹⁷ Their project is to specify the means by which the process described by Dean Koh actually occurs. The core of their argument is that “identification with a reference group generates varying degrees of cognitive and social pressures—real or

⁹⁰ See Donald N. Levine, et al., *Simmel’s Influence on American Sociology*, 81 AM. J. SOC. 813, 823 (1976) (describing Simmel’s theories regarding the effects of interaction and exchange).

⁹¹ See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’ L ORG. 421, 446-447 (2000) (arguing that interactions among states can cause some states to change their preferences).

⁹² Koh, *supra* note 42, at 2603.

⁹³ *Id.*

⁹⁴ *Id.* at 2654.

⁹⁵ *Id.*

⁹⁶ Goodman & Jinks, *How to Influence States*, *supra* note 47 at 626, n.8 (“[W]e consider our project an extension of Koh’s and others’ work on transnational norm diffusion.”).

⁹⁷ *Id.* at 626.

imagined—to conform” to norms of the reference group.⁹⁸

III. TOWARD A NEW THEORY: MAKING REPUTATION MATTER

Although the conventional theories have much to offer, they do not adequately explain why states behave as they do. In this Part, I offer my own theory, one that accounts for the important features of financial globalization, and operates by harnessing the power on reputational incentives. I first argue that, for a variety of reasons, states are able to opt in to and out of the kinds of processes that many scholars believe will lead to changes in values. Because states can opt out—thereby destroying the very process designed to change behavior—I argue that states must be given instrumental reasons to remain in the dialogue. I also highlight the importance of reference standards in this equation. Finally, I argue, based on a review of the best and most recent empirical evidence of state behavior, that reputational sanctions can be very effective, but only if they are connected to real consequences. It is here that firms become increasingly important as vehicles for affecting state behavior. As states are less sensitive to reputation, firms are more sensitive. I conclude by offering two tentative suggestions for means to give legal effect to my approach.

Process and constructivist theories fail to consider the impact of incentives. Why would a state begin to engage in the kind of interaction that is necessary to produce changes in behavior? Once the interaction has begun, process theory provides a compelling account of how norms can spread, but it does not identify the reasons that the interaction would begin in the first place. Rationalist accounts give great weight to incentives, but do an inadequate job explaining the ways that reputation and reference standards affect behavior. Although many rationalist accounts consider reputation, they do so in a limited way. Rationalist accounts (and the other conventional accounts as well) contemplate that recalcitrant states will modify their behavior to maximize utility, and consider the existence of a good reputation to be a form of utility. But what if, as recent research suggests, individuals choose their reference standards? For rationalists, this would mean that states could ignore this cost. For constructivists, the reference standard problem is slightly different. What if recalcitrant states, instead of being inextricably linked to righteous states whose good influence will inevitably spread, are free to divorce themselves from the righteous states and choose to link their fates to other states whose influence may be less beneficent?

In addition, rationalists view reputation in instrumental terms—a

⁹⁸ *Id.*

good reputation increases future opportunities for exchange, or future opportunities to exercise power. In this way, a good reputation is like a savings account. A state might forego present utility that would cost reputational points in the hope of receiving greater utility in the future that would be available only if the state maintains a good reputation. This account of state behavior is less convincing in the age of financial globalization. When states can receive future benefits regardless of their reputations, there is no reason to reduce current utility in the service of a good reputation.

Another problem for process scholars and constructivists alike is time. The evidence suggests that mechanisms designed to improve state behavior are often not effective, even over time. One response to this observation from constructivist scholars is that changes take time and occur incrementally; that is, that those who see little change in state behavior are looking at too short a time period or are expecting too great a change. If constructivist scholars are correct, participation in treaty regimes should lead to changes in behavior, but these changes might occur with a substantial time delay. Using methods to account, at least partially, for the time-lag problem, a recent study largely suggests that the passage of time does not enhance the effectiveness of the process model. After controlling for a variety of political and economic factors, the study reached several conclusions: (1) human rights practices are not improved by commitment to human rights treaty regimes, even when that commitment endures for many years;⁹⁹ (2) treaty regimes improve human rights practices the most in democracies that already have strong civil societies;¹⁰⁰ and (3) human rights treaty regimes are least effective in the states in which there are the worst human rights abuses.¹⁰¹ Even if we discount this empirical evidence, the process and constructivist approaches ignore an important cost: as states engage in the process of constructing norms and modifying their behavior, human beings suffer. The speed with which a mechanism improves state behavior matters a great deal, and conceding that change takes time is cold comfort for those waiting for the change. Thus even if we conclude that, in theory, constructivist or process approaches are more likely to be effective, we must ask how long those approaches will take. This is not to suggest that a rationalist

⁹⁹ Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, forthcoming J. PEACE RES. (2007).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

approach would, in every case, work more quickly. But time matters, especially to those who are suffering now.

Despite the problems with conventional theories, there are potential objections to reliance on reputation.¹⁰² First, regardless of whether a state desires a positive reputation mostly for instrumental reasons, or because the state has internalized a preference for the underlying behavior that will create a positive reputation, information about the state's behavior is important. One problem with a pure reputational sanction—one that is not directly associated with a more coercive sanction—is that states are much more sophisticated than ever before about their reputations.¹⁰³ Whereas in the past many states, particularly poor countries with the worst human rights records, were relatively unsophisticated in the way they managed their reputations. No longer. Now states employ many of the same tools that firms use to create a positive public image. States conduct market research to determine how they are viewed in the international community (and its specified smaller communities, such as potential consumers of the state's exports).¹⁰⁴ States attempt to “brand” themselves much as corporations do—creating an impression in the minds of members of the relevant audience that corresponds with the way the state wishes to be seen. Of course, such strategies are not entirely new, and I do not claim that there are normative reasons to object to them.¹⁰⁵ The problem is that if a state's reputation relating to its human rights practices is viewed as an impressionistic distillation of facts about those practices, then deliberate

¹⁰² For a fuller account of the complexities of reputational sanctions, see George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002). Professors Downs and Jones argue that reputational consequences are measurable but useful only in limited circumstances. *Id.* at S109. See also Markus Burgstaller, *Amenities and Pitfalls of a Reputational Theory of Compliance with International Law*, 76 NORDIC J. INT'L L. 39, 64-71 (2007) (discussing the differing effects of reputation on different areas of behavior, such as trade or human rights);

¹⁰³ See generally, Philip Kotler & David Gertner, *Country as Brand, Product, and Beyond: A Place Marketing and Brand Management Perspective*, 9 BRAND MGMT. 249 (2002) (describing the ways that states promote and manage their reputations and the reputations of their products).

¹⁰⁴ See generally, Tanja Passow, et al., *Country Reputation—From Measurement to Management: The Case of Lichtenstein*, 7 CORP. REPUTATION REV. 309 (2005) (describing metrics used by states to evaluate their reputations).

¹⁰⁵ See generally Deborah M. Levy, *Advice for Sale*, 67 FOREIGN POLICY 64 (1987) (describing U.S. lobbyists' work on behalf of foreign governments, including many with poor human rights records); James E. Grunig, *Public Relations and International Affairs: Effects, Ethics and Responsibility*, 47 J. INT'L AFF. 137, 137-138 (1993) (describing campaign to increase public support for U.S. invasion of Kuwait managed by public relations firm Hill & Knowlton).

attempts to shape that impression can produce unreliable results. Sophisticated states could end with reputations that are better than they deserve, with the opposite result for unsophisticated (or unmotivated) states. Regardless, there are reasons to be skeptical of the power of reputations that come from a process of deliberate creations as opposed to organic evolution.

Second, perhaps the most common model of the enforcement of human rights relies on what many call “name and shame.”¹⁰⁶ At first blush, it is easy enough to envision the mechanics of this approach. States, corporations, or non-state actors which engage in human rights violations are identified publicly, along with a description of the human rights violation.¹⁰⁷ Once their misdeeds are known, they presumably suffer the reputational repercussions for their behavior. Although this approach has some intuitive appeal—indeed, it is used in a vast array of situations—one problem is that it appears not to work all that well. In the only large-scale econometric analysis of the efficacy of publicizing human rights violations as a way to change state behavior, the results were not encouraging. “For the average state ... information campaigns appear to be at best ineffective and at worst counterproductive globally.”¹⁰⁸

Finally, as with any policy proposals, it is important to beware of unintended consequences. Consider the explosion of communications technology, particularly from the perspective of a corporation. As more brands become global, there is a greater likelihood that the actions of a subsidiary in the developing world can affect the value of the brand everywhere in the world. In addition, because of better telecommunications and the explosion of watchdog groups and non-governmental organization, it is more likely than ever before that news about a state’s repressive activities or a corporation’s misadventures will

¹⁰⁶ See, e.g., RICHARD B. LILICH, ET AL., *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 981 (4th ed. 2006) (Arguing that human rights groups “play an important role in investigating and documenting human rights violations and bringing them to the attention of international institutions, states, and the public at large”).

¹⁰⁷ “Name and shame” is a descriptive term of the model typically used by human rights campaigners. In using the term, my goal is not to assess whether human rights advocates have adequately specified the pathways through which this approach works. Indeed, it is possible to incorporate the “name and shame” approach into any of the theoretical models that I critique in Part II. My goal is more limited—to identify some of the practical issues associated with formation and management of reputations.

¹⁰⁸ Emilie M. Hafner-Burton, *Sticks and Stones, the Efficacy of Human Rights “Naming and Shaming”* 22 (2006) (unpublished manuscript, available at <http://www.princeton.edu/~ehafner/rd.shtml>).

become known around the world. The result is that states and corporations cannot obtain the benefits that can come from having a good reputation in the U.S. or Europe (such as government contracts or preferential trade status) while avoiding the costs of having a bad name in the developing world. As the world shrinks, it is harder for states and firms to effectively segment their reputations. One implication of this for firms is that if a firm cannot avoid the costs associated with the misbehavior of a subsidiary in Africa, then it might not make sense to put the corporation's valuable brand on that subsidiary. For states, this might mean that investing through intermediaries or via secretive sovereign wealth funds is more appealing.

Despite these possible objections, there are reasons to conclude that reputational sanctions, in the right setting, can be powerful. Recall the econometric study of the "name and shame" strategy. Although the results were generally negative, there was one situation in which shaming appeared to work. States with "considerable foreign investment" or "that receive high levels of aid," are more sensitive than other states to shaming.¹⁰⁹ My approach is to tie reputation to other considerations, so that reputational sanctions need not work entirely on their own.

A. OPTING IN AND OPTING OUT

The first issue the constructivist and process models leave out is a convincing theory of incentives. Why would a recalcitrant state enter into or sustain the kind of interaction that these theories envision? In all the process-driven models, the behavior of recalcitrant states is modified through a process of exchange and interaction with other states (or groups of states). On Dean Koh's view, the way to transform "occasional or grudging compliance with global norms into habitual obedience" is through "norm-internalization."¹¹⁰ This process, he suggests, would have three steps:

One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system.¹¹¹

¹⁰⁹ *Id.* at 26.

¹¹⁰ Koh, *supra* note 42, at 2646.

¹¹¹ *Id.*

Goodman and Jinks' s acculturation model focuses on the second and third steps in the Koh model. They lay out what they call the "microprocesses" of acculturation, which can include identification with others, mimicry of their behavior, and adoption of their behavior and normative structures.¹¹² The driving forces behind these processes—the engines that propel behavioral change—are many, including the "social-psychological costs of nonconformity," the "social-psychological benefits of conforming to group norms and expectations,"¹¹³ and the exertion of pressure by a group, such as "shaming or shunning" or "displays of social approval."¹¹⁴

States interact with each other, and with institutions and non-state actors as well, for a variety of reasons. The problem for the process-driven models is that the plausible explanations for interaction all amount to rationalist explanations. Dean Koh provides two examples of the kind of interaction that can produce the norm internalization and behavioral changes he contemplates. The first is drawn from the debates surrounding the reinterpretation of the Anti-Ballistic Missile Treaty, which centered on the desire of the U.S. to modify the settle interpretation of the treaty to permit, for the first time, a space-based antiballistic missile defense system.¹¹⁵ The debates lasted for eight years, and featured a number of prominent Americans arguing in favor of the original treaty interpretation and against the Reagan Administration' s proposed reinterpretation.¹¹⁶ In the end, the Reagan Administration abandoned its attempt to reinterpret the treaty. On Dean Koh' s telling, this was the result of transnational legal process, including interaction, interpretation and internalization. A variety of interest groups and prominent persons formed an "epistemic community," which initiated a series of interactions with the U.S. government, leading to the "internalization" of their idea into legislation and executive branch policy.¹¹⁷ The second illustration draws on the process by which the Oslo peace accords were negotiated and initially implemented.¹¹⁸ Although the setting was much different, the conclusions are the same: interaction begets interpretation, which produces internalization. In each example, Dean Koh tells a convincing story of the

¹¹² Goodman & Jinks, *How to Influence States*, *supra* note 47, at 639.

¹¹³ *Id.* at 640-641.

¹¹⁴ *Id.* at 641.

¹¹⁵ See Koh, *supra* note 42, at 2646.

¹¹⁶ *Id.* at 2647.

¹¹⁷ *Id.* at 2648.

¹¹⁸ *Id.* at 2651-2654.

processes by which the various actors influenced each other.

What is missing is a theory to help understand a critical question: why did the various actors enter into the process, and why did they remain in it. There are likely many answers to these questions, but the process-driven theories do not provide them. More important, the most prominent reasons are rationalist. States enter into negotiations because they want to obtain something positive or avoid something negative. Regardless of the specific catalyst, the motivation fits squarely into the rational choice framework that the process-driven theories reject. In addition, throughout the process that is central to these theories there are opportunities to exit. Thus, states that remain in the game have chosen, often repeatedly, to do so.

The case of China in Africa helps to illustrate the importance of this point. Consider again the examples of Zimbabwe and Angola. As I have already shown, in the past decade Zimbabwe has embraced what it calls a “Look East” foreign policy, shifting its allegiances from the West to China and other Asian states.¹¹⁹ Zimbabwe’s decision came in the face of Western criticism of Zimbabwe’s record on human rights and democratization.¹²⁰ Process-driven theories might have predicted that the process of interaction with the West might eventually lead to a change in Zimbabwe’s behavior, but this has not happened. Angola’s interaction with IMF provides another illustration of the point. After billions of dollars of oil revenue disappeared, the IMF indicated that it would impose strict new transparency requirements on Angola as part of any future assistance packages.¹²¹ Angola chose to exit the Western-led process and look to China for financial assistance, signing loan and aid packages of almost the exact same amount as the IMF package would have been, but without the transparency requirements.¹²² At least two factors made it

¹¹⁹ See Jeremy Youde, *Why Look East? Zimbabwean Foreign Policy and China*, 53 AFR. TODAY 3 (2007) (describing the roots of Zimbabwe’s new strategy).

¹²⁰ See, e.g., Geoff Hill, *Male Rape, the Latest Weapon for Mugabe’s Men*, NEW STATESMAN, June 31, 2003, at 31 (describing government’s practice of sexually torturing members of the opposition); John Reed & Mark Turner, *Zimbabwe’s Urban Clearance Policy “Catastrophic:”* UN, FIN. TIMES, Jul. 23, 2005, at 7 (describing the government’s program to eliminate slums and evict squatters).

¹²¹ See HUMAN RIGHTS WATCH, SOME TRANSPARENCY, NO ACCOUNTABILITY: THE USE OF OIL REVENUE IN ANGOLA AND ITS IMPACT ON HUMAN RIGHTS 36, table 8 (2004). The Human Rights Watch report was based on data uncovered by the IMF during its 2002 and 2003 consultations with Angola. *Id.* at 36 n.76; see also INTERNATIONAL MONETARY FUND, ANGOLA: 2004 ARTICLE IV CONSULTATIONS 17 (calling for improved oil revenue management, among other reforms).

¹²² See John Reed, *Angolan Oil Loan Likely To Raise Transparency Issues*, FIN.

possible for Zimbabwe and Angola to exit. First, both countries were able to exit because China was willing to step in and supply the kinds of assistance that had previously come from the U.K. and the U.S. In material terms, neither stood to lose little by exiting the Western-led process of interaction. Second, both countries already had negative international images. Thus, that they chose to exit the Western-led processes did not cost much in terms of reputation. In the end, the decision to exit may not be available to every recalcitrant state, but it is certainly possible under the right conditions.

Now let us reconsider an earlier issue: the complicating effect of states acting as corporations. First, recall that one of the tenets of constructivist and process-oriented theories of compliance is that states learn from interaction with other states. Whether through direct, bilateral discussion or through participation in treaty regimes, recalcitrant states are thought to change their preferences, and eventually change their behavior. One implicit assumption in this model is that the interaction is broad and rich. By this I mean that the subject of the interaction, even if nominally limited to a specific issue, will include opportunities for broader preference changes. In this model, the parties to the interaction will have the opportunity to influence their interlocutors on a variety of subjects, so that, for example, a negotiation about a bilateral trade agreement might lead the recalcitrant state to change its preferences about labor rights or other issues that are not at the core of the nominal subject of discussion. A related implication of this model is that financial considerations are among the issues on which preference changes might be seen. Sovereign wealth funds, particularly those invested through intermediaries, change this calculus. Consider a hypothetical example. Imagine that China decides to increase its stake in an oil company with rights to oil fields in Kazakhstan. To avoid the kind of backlash it faced when it attempted to purchase a U.S. oil company directly,¹²³ it might decide to do this through an investment in a hedge fund or private equity group with a stake in such an oil company. Instead of negotiating directly with the company and its other shareholders, China can make the investment without apparently directing the deal. Thus, no longer are states full participants in the

TIMES, Oct. 11, 2005, at 13 (“China has proved willing to lend to Angola where the IMF has hesitated. Last year China's Eximbank approved a Dollars 2bn loan to rebuild infrastructure devastated or neglected during the country's long civil war”).

¹²³ See Keith Bradsher, *China Says Blackstone Deal is Merely a Good Investment*, N.Y. TIMES, May 22, 2007, at C4 (noting that the attempt by China's state oil company to purchase Unocal was blocked by the U.S. Congress after public outcry about the deal).

interactive process by which preferences are supposed to change. There is no reason to expect that fund managers at a private equity group will be interested in any sort of preference changes, particularly changes that might affect the way that China views human rights norms.

Sovereign wealth funds pose a challenge for rationalist theorists as well. Recall that under the rationalist approach, states are motivated by their desire to maximize power or wealth (or some combination of these). One factor that states must consider is the effect of their actions on their reputations. For example, on the rationalist view, when the Commonwealth, a group made up of mostly former British colonies, suspended Zimbabwe for human rights abuses, the Commonwealth's likely aim was to enhance its reputation, whether for righteousness or respect for human rights, or some other issue.¹²⁴ The reputational effect of this action depended on its being public. If one of the issues that a state must weigh when deciding whether to take a particular action is the effect on its reputation, then those effects must be public. Sovereign wealth funds allow states to avoid this kind of scrutiny. Consider Abu Dhabi's sovereign wealth fund. It is widely considered to be one of the wealthiest in the world, but almost nothing is known about its investments.¹²⁵ By using a sovereign wealth fund, Abu Dhabi need not worry about the reputational effects of its investments, only the financial consequences.

B. THE CHOICE OF REFERENCE STANDARDS

Equally important is a second issue that process theories (and other) do not adequately consider. All three of the primary approaches to influence state behavior--the rationalist or coercion model, the normative or persuasive model, and the legal process or acculturation model--assume that recalcitrant states are susceptible to one or another form of pressure or influence. For realist scholars, this meant the use of a narrow range of sanctions, such as the threat or actual use of force or strong economic measures that would have a measurable effect on the target state.¹²⁶ For those in the persuasion or acculturation schools, the means the target state must place some value on the views and actions of other states.

¹²⁴ See *A Defiant Zimbabwe Withdraws From the Commonwealth*, N.Y. TIMES, Dec. 8, 2003 at A10 (describing Zimbabwe's withdrawal after the Commonwealth extended its suspension of Zimbabwe for human rights abuses and electoral fraud).

¹²⁵ See Chung & Tassel, *supra* note 9, at 7 (noting that the Abu Dhabi fund may be worth as much as \$875 billion, but "where this money is deployed is a matter of conjecture").

¹²⁶ See, e.g., Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI.L. REV. 89, 92 (2003) (arguing that the ICC would be ineffective due to the lack of a coercive enforcement mechanism).

Particularly for the persuasion or acculturation approaches, this is problematic. Both assume that sustained interaction between a recalcitrant state and a righteous state will eventually influence the recalcitrant state to change its ways, and scholars of both schools point to various psychological and sociological forces that would propel this process.¹²⁷ They leave out is another social phenomenon, one that comes into clear view when we consider China's engagement with Africa.

There is a growing body of research regarding reference groups or reference standards—the comparators against which individuals measure their relative status or performance.¹²⁸ The common assumption has been that reference standards are exogenously given; that is, that reference standards come from some outside force and are neither the product of choice nor susceptible to influence by the actor.¹²⁹ Recent social science evidence suggests that this is not the case. In fact, it appears that many people consciously choose their reference standards in order to satisfy social or psychological needs.¹³⁰ In other words, many people actively decide who will be in the circle of people whose actions or opinions will cause her to feel happy or proud or guilty (or motivated to change in some other way).

Although this evidence is drawn from studies of individual personal behavior, a close look at China's engagement with Africa

¹²⁷ See, e.g., Finnemore & Sikkink, *International Norm Dynamics*, *supra* note 71, at 894-909 (describing the mechanisms by which recalcitrant states are persuaded to adopt new norms). Professors Finnemore and Sikkink argue that there is a “life cycle” of norms, which includes the emergence of a norms, a broadening of its acceptance, and eventual internalization. *Id.* at 895-96. Although they do not state so explicitly, their account assumes that there will be a sustained interaction between current and prospective holders of the norm.

¹²⁸ For an excellent summary of recent research, see Thomas Mussweiler, et al., *The Ups and Downs of Social Comparison: Mechanisms of Assimilation and Contrast*, 87 J. PERSONALITY & SOC. PSYCHOL. 832 (2004). This research shows that people are almost constantly comparing themselves to others, and that such comparisons play an important role in the development of self esteem, lifestyle choices that people make, and the norms that people follow.

¹²⁹ See, e.g., Armin Falk & Markus Knell, *Choosing the Joneses: Endogenous Goals and Reference Standards*, 106 SCANDINAVIAN J. ECON. 417, 418 (2004) (arguing that, in most models of relative comparison, “the reference standard r is assumed to be exogenously given and it is often assumed that r is the same for all people in a given environment”).

¹³⁰ For example, it appears that many individuals choose reference standards people who are better off than they are—to motivate their own performance—and people who are worse off than they are—to provide themselves with some comfort or feelings of satisfaction. See *id.* at 418-419.

provides some examples of state behavior that appears consistent with the choice of comparator hypothesis. Consider Zimbabwe. Beginning in the 1990's, and officially announced in 2003, Zimbabwe has pursued what it calls a "Look East" foreign policy,¹³¹ by which it means to turn away from the West and focus its attention on Asia in general, and China in particular. The primary reason for this was Western criticism of Zimbabwe's record on human rights, particularly the government's campaign of razing the homes of hundreds of thousands of poor people in and around the capital Harare.¹³² Faced with Western criticism (and the economic sanctions that came with it), Zimbabwe's president Robert Mugabe declared that Zimbabwe would "look east," where "the sun rises," for trading partners and development assistance.¹³³ China, for reasons of its own, has been quite willing to continue to trade with Zimbabwe¹³⁴

For rational choice scholars, this is a perfectly predictable response: when the West stops providing money, looking to another source makes perfect sense. But this should trouble persuasion or acculturation scholars more. These theories posit that sustained interaction will lead to acceptance of international norms, and eventually, to changes in behavior. Zimbabwe's actions show that there is another option. Instead of remaining in the West's sphere of influence, and thereby susceptible to its approval or disapproval (or whatever other mechanisms of persuasion or acculturation there might be), Zimbabwe chose to exit one regime and enter another. To be fair, persuasion or acculturation scholars might plausibly put forward two arguments in response. First, they might argue that events in Zimbabwe show that constructivist mechanisms can take time, and that the growing internal opposition to the government is evidence that acculturation is happening, albeit through the slow and messy pathways necessary to oust an

¹³¹ See Youde, *supra* note 119, at 3-5 (documenting the evolution of Zimbabwe's relationship with China).

¹³² See Reed & Turner, *supra* note 120, at 7 (documenting violence against slum dwellers).

¹³³ Youde, *supra* note 119, at 13 (describing the history of Zimbabwe's relationship with China).

¹³⁴ See *China in Africa: Never Too Late to Scramble*, *ECONOMIST*, Oct. 28, 2006, at 63 (describing China's investments in Africa, including Zimbabwe). There is, however, some indication that even China's tolerance has limits as it has recently begun to scale back its engagement with Zimbabwe. Although the reasons for the apparent policy modification are unclear, it appears that China is rejecting what amounts to a bad business deal rather than embracing the norms that underlay Western criticism of Zimbabwe's treatment of its citizens.

authoritarian government. Second, they may argue that coercion has not worked either; that Zimbabwe has suffered significant economic sanctions with no change in policy. Both arguments have some validity, but neither undermines my basic point: that when reference standards are endogenous (that is, that they may be chosen), acculturation or persuasion alone cannot provide a full theory of changing state behavior.

To this point, my theory appears to be consistent with the neo-rationalist approach that argues that international law is irrelevant, and that utility calculations are all that matters. It is true that I am not convinced that the process of socialization is as influential as the new theories assert. Consider China's recent history in Africa, which shows that the processes that some argue lead to socialization can also perform other, critically important functions. Chief among them is the transmission of information about the costs associated with pursuing a particular policy or project. China's recent oil deals with Sudan and Somalia provide a useful illustration of this point. China has been sharply criticized for its engagement with the government of Sudan. The criticism was mild and not widely heard when all China did was employ the Sudanese army to guard its oil facilities in Southern Sudan. The criticism grew louder when the Sudanese army, paid by Chinese firms, was involved in what appeared to be political violence in the south. But the ongoing genocide in the Darfur region of Sudan has produced the most criticism, with calls for Western mutual funds to divest their holdings in Chinese oil companies¹³⁵ to a nascent movement to boycott the Beijing Olympics.¹³⁶ Despite this, China began negotiate oil prospecting and production deals with the nominal government of Somalia.¹³⁷ As this process has gone on, China has modified its approach slightly but its objectives have remained the same. To be clear, I do not argue that this single illustration proves beyond all doubt that socialization does not occur. Instead, my point is that the iterative process is useful mostly because it provides information about costs, not because it actually

¹³⁵ See Jeremy Pelofsky, *Activists Say Sudan Divestment Campaign Working*, WASH. POST, Aug. 12, 2007 (describing efforts to convince mutual funds to sell shares in PetroChina, among other firms).

¹³⁶ See Edward Cody, *One Year Out from the Olympics, A Test of Openness in Beijing*, WASH. POST, Aug. 7, 2007, at A1 (describing growing campaign to boycott 2008 Olympics in Beijing).

¹³⁷ See Barney Jopson, *China Wins Permit to Look for Oil in Somalia*, FIN. TIMES, Jul. 14, 2007, at 7 ("The Chinese state oil giant, CNOOC, has won permission to search for oil in part of Somalia, underlining China's willingness to brave Africa's most volatile regions in its hunt for natural resources").

changes preferences.

This is not a mere quibble. If we assume that socialization occurs—that the process of interaction leads to an internalization of new norms, and eventual compliance with some version of those norms, then the structure of the process should be something like that purportedly pursued by Israel and the Palestinians that produced the Oslo Peace Accords. The participants in that process assumed that several factors were important to produce a successful outcome. First, they assumed that building trust between the negotiators (and between their principals) was important. To accomplish this, they attempted to negotiate what they thought were simple issues first, leaving the thornier issues for consideration later, when the negotiators would presumably have developed a trusting bond.¹³⁸ Second, they assumed that it was important for each party to have the chance to tell its story. The assumption was that the open airing of grievances might contribute to trust, but also that it might provide some satisfaction to the teller of the story and make it more likely to accept the eventual outcome of the negotiations. Finally, the parties assumed that the passage of time would contribute to a positive outcome by lengthening the parties' engagement with each other and showing the parties that the other side had legitimate goals.¹³⁹ Although such a process may have been appropriate at that time and for that situation (though this is far from clear), there is no reason to think that it would produce significant beneficial changes in behavior in other circumstances. Recall the Sudan example. It appears that China's responds to criticism because it provides information about costs: declining to modify its approach to Sudan would diminish Beijing's reputation by some amount, whereas modifying its approach would reduce the cost. Drawing out the process—which a socialization theory might support—might be counterproductive in at least two ways. First, it would allow China to accumulate whatever benefits it seeks quickly. For example, in Somalia, one of China's primary objectives has to be to determine whether there is oil, and what the value of that oil might be. A slow socialization process would permit China to obtain this benefit without any real threat of suffering any consequences. Second, it would

¹³⁸ See generally Michael Watkins & Kirsten Lundberg, *Getting to the Table in Oslo: Driving Forces and Channel Factors*, 14 NEGOTIATION J. 115 (1998) (ascribing part of the success of the Oslo Peace Accords to the extensive prenegotiation interactions between Israeli and Palestinian negotiators).

¹³⁹ See Linda L. Putnam & Martin Carcasson, *Communication and the Oslo Negotiation: Contact, Patterns, and Modes*, 2 INT'L NEGOTIATION 251, 258-260 (1997) (arguing that the interaction between negotiators was a key to the accords).

give China a much clearer picture of the likelihood that any of the criticisms leveled by those opposing the genocide in Sudan could have any significant impact on China. Thus it is important to come to at least a tentative position as to whether the process of international dispute resolution, or international relations more broadly, is likely to have a socialization effect or merely provide information.

C. HARD AND SOFT REPUTATIONAL SANCTIONS

What role does reputation play in state decision making? There is, of course, no way to test this directly. But there is empirical evidence that strongly suggests that, under certain circumstances, state behavior is driven by reputational concerns. Monetary policy—“control over money”—is a core feature of state sovereignty, and the right to direct it is one that states are reluctant to relinquish.¹⁴⁰ But sometimes countries voluntarily give up important parts of this power, and the most likely explanation is that they do so to establish a reputation as a reliable trading partner and location for investment. When states join the International Monetary Fund, they face a choice as to whether to voluntarily assume certain obligations that limit their ability to regulate their own currencies.¹⁴¹ Importantly, the IMF “does not provide direct positive or negative incentives” for agreeing to the additional restrictions, and does not punish states that fail to fulfill the obligations they have made.¹⁴² Evidence from an econometric test of the factors that influence whether states fulfill their obligations suggests that reputational concerns are among the most important. The evidence suggests that “economic conditions alone” do not explain state behavior.¹⁴³ States are more likely to violate their obligations if other states in the same region do so: “the probability of noncompliance” is 79 percent greater in regions with many noncompliers than in regions with no noncompliers.¹⁴⁴ In addition, states “that have invested heavily in a reputation for respecting the rule of law” are less likely to violate their obligations.¹⁴⁵ To be clear, these associations, however well documented, do not tell us why states behaved as they did. But when states voluntarily relinquish sovereignty in a system

¹⁴⁰ Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT’ L ORG. 573, 573 (2000).

¹⁴¹ See *id.* at 574, 582 (describing opt-in provisions of Article VIII of the IMF Charter).

¹⁴² *Id.* at 582 & n.45 (noting that the IMF has not attempted to sanction a country for failing to fulfill its obligations since 1948).

¹⁴³ *Id.* at 597.

¹⁴⁴ *Id.* at 596.

¹⁴⁵ *Id.* at 598.

in which the only risk is to the state's reputation, it appears that states factor reputational concerns into their decisions.

Before moving on, I address one additional issue. One of the problems with much of the scholarship in both international law and international relations is that there is a firmly-held but usually unstated assumption of the normative righteousness of human rights. Many scholars of international law (and some scholars of international relations, though far fewer) pose a question that is slightly different than the one I consider. International law scholars often ask: Why do states comply with the *law*? Many international relations scholars ask a different question: Why do states *behave* as they do? This difference in focus is often glossed over, and indeed it is not all that important in many cases because both camps mean to express the same thing but with different terms. (Consider Harold Koh's work. Although he titled his path-breaking essay *Why Do Nations Obey International Law?*, his focus was on the role of "global norms."¹⁴⁶) The most compelling new theories from international law scholars—Dean Koh's legal process theory and Professor Goodman and Professor Jinks's acculturation theory—consider both norms and law. This is a useful move, but does not go far enough.

All of the conventional approaches assume, implicitly or explicitly, that there is a corpus of rules that can be called law or norms, and that the content of this corpus is known to the actors involved. Put another way, the conventional approaches assume that state behavior is either consistent with or inconsistent with international law; that states behave in a way that accepts, on some level, the existence and influence of international law, even if they behave inconsistently with it. When most scholars discuss human rights law, they contemplate a particular bundle of rights, immunities, and occasionally duties. The current form of this bundle of rights can be traced back to the foundational documents of the United Nations system, especially the Universal Declaration of Human Rights (though the roots of these rights have, of course, much deeper historical roots).¹⁴⁷ For most scholars of international law and international relations, this bundle of rights is so completely accepted that it forms an

¹⁴⁶ Koh, *supra* note 42, at 2602 (presenting a theory of "transnational legal process: the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems") (emphasis omitted). To be sure, Dean Koh's work integrated the ways that norms become a part of legal systems, so his work considered both law and norms.

¹⁴⁷ See generally Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004) (describing the evolution of human rights norms, particularly those protected by human rights law).

unstated foundation on which the rest of their analysis is built.¹⁴⁸ What these approaches leave out is any discussion of the contested nature of the corpus of human rights law and norms. Some scholars argue that the very notions of a universally-accepted bundle of rights, and the content of that bundle, should be open to debate.¹⁴⁹ For example, the conventional corpus of human rights law prioritizes civil and political rights, such as the right to vote or the right to free speech, over economic rights, such as the right to earn a living or the right to development.¹⁵⁰ Such a hierarchy of rights may have much to commend it, but it is important to acknowledge that it represents just one of many possible hierarchies, and that there is not universal agreement as to the legitimacy of the conventional approach. Acknowledging that there are multiple ways to comprehend and relate to human rights need not mean rejection of the conventional, U.N.-based corpus of law. And it may well be true that, as an empirical matter, the differences between different understandings of human rights are less profound than many might predict. But if theory is to keep up with the reality on the ground it is critical to acknowledge the basic point—that the corpus of human rights law and norms is contested and not universally accepted.

1. *The Material Consequences of Reputation*

The argument that reputations matter raises another question: under what conditions do states care enough about their reputations to change their behavior? Again, there is no direct way to test this issue, but there is some evidence that reputational sanctions must have some instrumental effect to be salient. The most comprehensive empirical test of the past decade is Oona Hathaway's study of the effect of treaty ratification on the incidence of human rights violations in the ratifying country.¹⁵¹ Professor Hathaway's conclusions are, in her view, inconsistent with the predictions of conventional theories—rationalist,

¹⁴⁸ To be clear: by arguing that most scholars generally accept the legitimacy of a particular bundle of rights, I do not mean to imply that there is not vigorous debate about individual components of the bundle of rights, or about the relative weight to be given to rights if they come into conflict.

¹⁴⁹ For a complete version of this argument, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001). Mutua argues that the current corpus of human rights law reflects European and American values. *Id.* at 214-216.

¹⁵⁰ See Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 838-841 (2002) (describing debates about the relative status of civil and political rights versus economic, social and cultural rights).

¹⁵¹ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).

normative, and process-oriented alike. She concludes that the econometric analysis supports four important inferences: (1) countries “with the worst human rights ratings often have very high rates of treaty ratification;”¹⁵² (2) treaty ratification is associated with more human rights violations than would otherwise be expected;¹⁵³ (3) functioning democracies have better human rights records than do other states;¹⁵⁴ and (4) that ‘treaties ... seem so consistently not to make [human rights practices] better.’¹⁵⁵ In her study, Professor Hathaway’s independent variable is treaty ratification, and she measures this by drawing on information from the U.N. and other international organizations.¹⁵⁶ Her dependent variable is human rights violations. To get at this issue, she examines five areas of human rights: “genocide, torture, civil liberty, fair and public trials, and political representation of women.”¹⁵⁷ To measure the incidence of human rights violations in each area, she draws on reports from a variety of sources, including official state sources, reports from non-governmental organizations, and reports from international institutions.¹⁵⁸

Professor Hathaway’s analysis suggests that in the human rights arena, states make public commitments and fail to fulfill them with alarming regularity, even when there is a strong likelihood that the fact of non-compliance will become public. Contrast that finding with Professor Simmons’ finding that, under similar circumstances, states *do* fulfill their obligations. What explains these different findings? In both cases, states know that their reputations are likely to suffer when they fail to comply with their obligations, and, perhaps more important, that there are no direct sanctions for their failure to fulfill their obligations. The most likely explanation is that in the area of monetary affairs, states have a strong instrumental reason to maintain a good reputation: investors consider this reputation when considering whether to establish or expand businesses in the state. Thus, even though there is no direct penalty in either circumstance, there is a powerful material penalty in the financial arena. There are no similar penalties for violations of human rights.

A separate quantitative study provides supports this argument. In a study published in 2005, Professor Emilie Hafner-Burton compared the

¹⁵² *Id.* at 1999 n.205.

¹⁵³ *Id.* at 1999.

¹⁵⁴ *Id.* at 2000.

¹⁵⁵ *Id.* at 2003.

¹⁵⁶ *Id.* at 2026, 2027-2028 (listing and then describing the treaties included in the database).

¹⁵⁷ *Id.* at 1965.

¹⁵⁸ *Id.* at 1968-1976 (describing in detail the sources of data for each measure).

effect of preferential trade agreements (PTAs) and human rights agreements (HRAs) on human rights practices.¹⁵⁹ Preferential trade agreements are treaties that govern access to markets. Although such agreements traditionally covered only trade-related issues, it is increasingly common for them to include human rights standards.¹⁶⁰ In her study, Professor Hafner-Burton identifies three kinds of agreements. The first are PTAs with “hard” human rights standards, which “establish enforceable conditions for integration.”¹⁶¹ Second are “soft” standards, which “appeal to voluntary principles of cooperation that do not require behavioral change to receive market access.”¹⁶² Third are traditional HRAs. Her independent variable is repression, which she uses to as a proxy for a state’s overall level of adherence to recognized human rights norms.¹⁶³ Professor Hafner-Burton’s study supports three primary conclusions: (1) HRAs do not have significant effects on levels of repression; (2) PTAs that contain aspirational or hortatory human rights provisions but do not condition benefits on adherence to those provisions have no significant effect on levels of repressions; and (3) PTAs that condition benefits on adherence to specific human rights provisions “are systematically more likely to decrease repression.”¹⁶⁴ From this, she argues that the approaches advocated by constructivist or process-oriented theorists, acting alone, are unlikely to improve human rights practices.¹⁶⁵ Again, what matters are hard sanctions.

Consider another example. The protection of human rights is a subset of a broader issue, namely the enforcement of international law and

¹⁵⁹ Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’ L ORG. 593 (2005) [hereinafter Hafner-Burton, *Trading Human Rights*].

¹⁶⁰ *Id.* at 594 (noting that preferential trade agreements “frequently regulate spheres of social governance that increasingly include human rights standards”).

¹⁶¹ *Id.* at 594 n.8.

¹⁶² *Id.*

¹⁶³ *Id.* at 615 (“repression” measures the incidence of “murder, torture, or other cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges; disappearance or clandestine detention; and other flagrant violations of the right to life, liberty, and the security of the person”).

¹⁶⁴ *Id.* at 619. Professor Hafner-Burton’s findings are consistent with the theoretical predictions of Professors Downs and Jones, who argued that states have multiple reputations, and that different reputations exert differing influence on states. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S113 (2002).

¹⁶⁵ Hafner-Burton, *Trading Human Rights*, *supra* note 159, at 623 (arguing that “there are strong theoretical reasons to be skeptical that persuasion, alone, is likely to be effective much of the time”).

norms more generally. Although there are important differences between the enforcement of human rights norms and other international obligations and norms,¹⁶⁶ careful consideration of international law generally can illuminate some of the problems of enforcing human rights. The European Union is the most coherent and well-functioning international regime, and the ways that its laws and norms are enforced shows the ways that different approaches can complement each other. As it has evolved, the EU system has created a multilayered system to enhance compliance with laws and norms that moves from cooperative to coercive.¹⁶⁷ It starts with specific measures to help states understand the behavioral expectations and develop their capacity to conform their behavior to the EU's requirements. These measures include allowing new member states additional time to modify non-conforming practices, financial support to help states make the necessary changes, and providing authoritative guidelines so that EU policies are explicit and contextual.¹⁶⁸ This approach is consistent with the constructivist and process schools that emphasize the centrality of interaction, information, and capacity development in the adoption of new behavioral norms. Though it starts with education and capacity building, the EU's approach builds toward more coercive measures. It includes programs to gather extensive information about state practices, which operates both to signal to states that their behavior is relevant and observed, and to lay the groundwork for more coercive enforcement mechanisms.¹⁶⁹ Finally, the EU has well-developed legal procedures that can result in substantial penalties for non-complying states.¹⁷⁰

One limitation of a study of the EU's enforcement mechanisms is that it examines compliance with specific directions, not deeper changes in attitudes. Recall that one of the claims of constructivist scholars is that interaction will eventually lead to preference changes, not merely to changes in behavior. Considered in this way, the European story is more complicated. One natural experiment comes from the changes in Eastern European states in the 1990s. As Eastern Europe broke free from Soviet domination, states began to comply with international human rights norms

¹⁶⁶ See Goodman & Jinks, *How to Influence States*, *supra* note 47.

¹⁶⁷ See Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT'L ORG. 609, 632 (2002) (arguing that the EU "reaches a high degree of effectiveness in combating violations by combining instruments of coercive enforcement with mechanisms of managerial problem solving").

¹⁶⁸ See *id.* at 615 (describing a variety of EU programs to educate member states).

¹⁶⁹ See *id.* at 615-616 (describing EU monitoring programs).

¹⁷⁰ See *id.* at 619 (describing penalties for non-compliance).

at different rates.¹⁷¹ The EU and NATO signaled to these states that they might be permitted to join under certain conditions.¹⁷² States with liberal political systems made these changes before they were offered EU or NATO membership.¹⁷³ For other countries, with less liberal political systems, human rights practices improved somewhat in the period before they were aware of the benefits that might come from joining the EU or NATO, but full compliance with international norms came only when the states were offered specific, material incentives in the form of EU or NATO membership.¹⁷⁴

For rationalists, two factors would likely dominate any explanation of why the EU system functions effectively. First, states have strong economic incentives to enter and remain in the EU. This is particularly true for new member states such as Croatia or Poland, whose economies are emerging from decades of mismanagement and are looking for ways to improve their economic fortunes. Second, states regularly decline to comply with EU mandates, even after the extensive investments the EU makes to educate and develop the capacity of its members. Constructivists would tell the story differently, emphasizing the almost perfect record of eventual compliance with the mandates of the EU, and the broad-based domestic support in member states for EU policies. What the constructivist explanation leaves out is any consideration of signaling. One hypothesis to explain why some states changed their practices sooner than others is that the early-adopters wished to signal to the EU that they should be considered first for EU membership. This is a plausible motivation for at least two reasons. First, all states knew that EU membership would bring economic benefits; the sooner a state joined the EU, the sooner its economic situation would improve. Second, there were good reasons to believe that there would be benefits from being in the first group of new members. For example, there were a finite number of new jobs in Western Europe that could be filled by migrants from the East, and there was no guarantee that the West's enthusiasm for supporting states in the East would not wane.

2. *Efficient Signals and Reputations*

A second important conclusion from Professor Hathaway's study

¹⁷¹ See Frank Schimmelfennig, *Strategic Calculation and International Socialization: Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe*, 59 INT'L ORG. 827, 827-828 (2005).

¹⁷² See *id.* at 841.

¹⁷³ See *id.* at 842.

¹⁷⁴ See *id.* at 842-843.

is that conventional theories fail to consider the possibility that states ratify and comply with treaties “because they benefit from what ratification says to others.”¹⁷⁵ That is, that treaties “play both instrumental and expressive roles.”¹⁷⁶ In addition, Professor Hathaway argues that the ratification of human rights treaties is essentially a costless signal.¹⁷⁷ Professor Hathaway’s argument that states ratify treaties and shape their behavior as a way to provide signals to other states will ring familiar to norms scholars. Indeed there is a rich norms literature examining these issues. Although there is no agreement among norms scholars about the precise relationship between signals and compliance with norms, most agree that the desire to signal to others is one reason that individuals comply with norms. For example, Eric Posner argues that a person is likely to comply with norms to signal to others that she is a reliable partner for a future interaction.¹⁷⁸ Richard McAdams argues that individuals comply with norms to signal to others that they are worthy of esteem.¹⁷⁹ Regarding the expressive function of law, Cass Sunstein, among others, has theorized that states can affect the power of norms through the implementation of complementary or contradictory laws or policies.¹⁸⁰

Although Professor Hathaway’s study is not without flaws,¹⁸¹ it provides some support for at least two inferences. First, state behavior relating to the promotion and protection of human rights sends important signals to other states. Second, states can be expected to seek the most efficient signal they can. This means that when states can send a relatively inexpensive signal—like ratifying a treaty—in the hope of reaping a significant benefit, they will do so. It is important to understand the importance of signaling. In their extensive critique of Professor Hathaway’s analysis, Goodman and Jinks identify two problems with Hathaway’s assumptions regarding the costs and affects of treaty

¹⁷⁵ Hathaway, *supra* note 151, at 2002.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2006 (arguing that because there is often little, if any, enforcement of human rights treaties, states can obtain the signaling benefits of ratification without paying the costs of actually changing their practices).

¹⁷⁸ See ERIC POSNER, *LAW AND SOCIAL NORMS* 11-35 (2000).

¹⁷⁹ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

¹⁸⁰ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

¹⁸¹ See, e.g., Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’ L L. 171, 172 (2003) (identifying “(1) defects in Hathaway’s research design; (2) structural deficiencies in her theoretical model; and (3) troubling implications of her policy analysis”).

ratification. First, they argue that treaty ratification is not costless. This is almost correct, but they provide no evidence that treaty ratification is costly. Even if ratification is not costless, it is surely is not expensive.¹⁸² Second, and much more important, they argue that, if ratification is costless, then surely states and other international actors will quickly come to “understand that ratification is meaningless” and will not “reward ratifying states for the very act of ratification.”¹⁸³ But states are, in fact, rewarded for acts that are as relatively costless as ratification. Consider the Africa Growth and Opportunity Act, a U.S. statute that, among other things, grants preferential trade treatment to agricultural and manufactured goods from certain states in Africa.¹⁸⁴ The statute restricts its benefits to states that protect a core group of human rights. To determine which states are eligible for the benefits, the U.S. State Department conducts an evaluation of state human rights practices, and one of the most important considerations is whether the potential beneficiary has ratified international human rights treaties or enacted domestic legislation to protect human rights.¹⁸⁵ These acts are not costless, but they are much less costly than engaging in the wholesale reformation of human rights practices. They are precisely the kinds of signals that Professor Hathaway describes, and they come with tangible benefits. Thus, one inference to draw from Professor Hathaway’s study, flawed as it may be, is that signals and rewards ought to be priced more accurately. States should not receive rich rewards for inexpensive signals.

These conclusions—that states strategically employ signals, that specific requirements matter, and that hard standards are more effective than soft—are certainly not uncontested. Econometric analysis is an imperfect tool to test the many variables that can contribute to human rights practices on the ground. One reason for this is that there are an almost infinite number of concepts that can be tested, and a large number of indicators of those concepts.¹⁸⁶ Thus it is not uncommon for scholars to examine the same question and arrive at different answers because they

¹⁸² *Id.* at 179-180.

¹⁸³ *Id.*

¹⁸⁴ African Growth and Opportunity Act, 19 U.S.C. 3701-3741 (2004).

¹⁸⁵ 19 U.S.C. 3702 & 3703 (2004).

¹⁸⁶ See, e.g., Emilie M. Hafner-Burton, *Right or Robust? The Sensitive Nature of Repression to Globalization*, 42 J. PEACE RESEARCH 679, 687 (2005) [hereinafter Hafner-Burton, *Right or Robust?*] (arguing that one problem with empirical analyses of subjects such as globalization is that scholars “use different indicators to make contradictory substantive claims about the same concepts” and the scores used to “quantify [the] indicators are often measuring different empirical facts”).

use different indicators as proxies for the same concept.¹⁸⁷ This is perhaps an unsolvable problem, but one way to mitigate its effects is to attempt to aggregate studies, or the variables used in the various models, to derive more definite conclusions. One broad-based attempt to do this found robust support for two conclusions that are consistent with the inferences I have drawn. First, there is support for the inference that increased economic interaction between states “may encourage a variety of different governments to support better human rights practices.”¹⁸⁸ Second, there is “strong evidence to show that export-led economies with a high degree of export flows may be more likely to repress human rights.”¹⁸⁹

CONCLUSION

Are there ways that reputational sanctions can play a stronger role in international law? I conclude by proposing two mechanisms by which to put my theory into practice. Because the primary goal of this Article is to address holes in the theory underlying compliance and behavior, I sketch my proposed mechanism briefly, with an eye toward demonstrating that they are consistent with the theory and plausible given current realities. First, if reputational sanctions matter more than ever, the international community should develop mechanisms to systematize the creation of reputations and the implications of having a particular reputation. One current example of this comes from credit rating agency ratings of states and firms. These ratings, based on known criteria, are a formal guide to reputations that can, under the right circumstances, have material effects on states. I propose to integrate human rights concerns—which are not adequately represented now—more fully and explicitly into these ratings. Second, I argue that the reputation market is likely to work best when all actors compete under the same rules. To help reduce the gap between the regulatory regimes facing firms working under different regulatory regimes, I propose to harness the increasing integration of financial markets by extending the reach of the Foreign Corrupt Practices Act and similar European laws that place limits on the behavior of firms.

Before presenting the possible mechanisms to operationalize my theory, it is important to provide an account of why such mechanisms might emerge. A useful illustration comes from the history of the Foreign

¹⁸⁷ In addition, as theoretical frameworks and methods of empirical analysis evolve in the scholarly community, purportedly objective, data-driven studies can reach different results. See generally Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT’ L ORG. 729 (1998) (providing a history of the study of international relations and international institutions).

¹⁸⁸ Hafner-Burton, *Right or Robust?*, *supra* note 186, at 695.

¹⁸⁹ *Id.*

Corrupt Practices Act and the subsequent spread of norms and laws against corruption. The FCPA was passed in 1977, largely in response to a series of corporate bribery scandals.¹⁹⁰ The FCPA prohibits the payment of bribes to foreign officials by companies that list securities in the United States.¹⁹¹ One effect of the new statute was to put U.S. businesses at a competitive disadvantage against firms that faced no such prohibition.¹⁹² Faced with these competitive pressures, and because they saw that there was almost no chance of repealing the FCPA,¹⁹³ U.S. firms responded by seeking to have the same restrictions placed on their competitors. Corporate interests worked with the State Department as it negotiated with the Organization for Economic Cooperation and Development to create rules that would impose the same restrictions on European firms.¹⁹⁴

¹⁹⁰The House of Representatives, in H.R. Report No. 95-640, pt. 4 (1977), noted as follows:

More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of \$300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries. The abuses disclosed run the gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharge certain ministerial [sic] or clerical duties. Sectors of industry typically involved are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals.

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public.

¹⁹¹ Foreign Corrupt Practices Act, 15 U.S.C. 78dd (1977).

¹⁹² Another response was to create two new affirmative defenses in the statute to give businesses more discretion in dealing with foreign governments. See S. Rep. No. 105-277, at 2 (1998); see also Jennifer Dawn Taylor, *AMBIGUITIES IN THE FOREIGN CORRUPT PRACTICES ACT: UNNECESSARY COSTS OF FIGHTING CORRUPTION?* 61 LA. L. REV. 861, 867 (2001) (describing the disadvantages faced by U.S. corporations).

¹⁹³ See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141, S161-S162 (2002) (arguing that because the FCPA was “a unilateral initiative resulting from an upsurge in values around the Watergate scandal” and corporate scandals, “campaigns to repeal or weaken the FCPA met with little success”).

¹⁹⁴ This is, of course, an abbreviated telling of a much more complex and interesting story. For a fuller version, see *id.* at S161-176.

Eventually the OECD adopted a tough anti-bribery convention.¹⁹⁵ This episode is an example of what some economists refer to as “raising rivals’ costs,” a strategy employed to gain a strategic advantage by making it more expensive for rivals to operate.¹⁹⁶ Such a strategy can include monopolizing a raw material that a rival needs to produce its product or attempts to create a strong brand identity that makes it difficult for rivals to enter the field.¹⁹⁷ Another strategy is the one employed in the FCPA example—lobbying regulators to impose costly or burdensome rules on rivals.¹⁹⁸

Just as U.S. firms struggled to level the playing field after the passage of the FCPA, so too are firms today seeking the imposition of regulations on their competitors. Consider the case of China and Chinese firms, which are by far the most energetic new player in the area of economic development in the developing world. These firms are not subject to the same restrictions on unethical conduct as Western firms (such as the FCPA) and sell many of their products in a market in which consumers are not able (or inclined) to pressure firms to behave ethically. These firms are also not subject to the same reputational pressures as Western firms. China’s investments in Sudan make this point. China has invested heavily in oil fields in Darfur.¹⁹⁹ One reason that China has been able to do this is that it faces very little competition there from Western firms because they cannot, for fear of reputational sanctions, work there. Therefore, so long as the conflict remains a barrier to its rivals’ entry into Darfur, China has no economic motivation to end the conflict there. Assuming that the constraints facing Western firms are not likely to disappear, for Western firms the best outcome would be for Chinese firms

¹⁹⁵ See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD WORKING GROUP ON BRIBERY: ANNUAL REPORT 7 (2006) (describing anti-bribery convention and its requirements).

¹⁹⁶ See Steven C. Salop & David T. Scheffman, *Raising Rivals’ Costs*, 73 AMERICAN ECONOMIC REVIEW 267, 267 (1983) (arguing that “a firm can induce its rivals to exit the industry by raising their costs”).

¹⁹⁷ See, e.g., Abigail McWilliams, et al., *Raising Rivals’ Costs Through Political Strategy: An Extension of Resource-Based Theory*, 39 J. MGMT. STUD. 707, 709 (2002) (noting that firms can “monopoliz[e] a resource that is necessary to competitors” or “use differentiation to secure a unique reputation and public recognition as a high status firm”).

¹⁹⁸ See Sharon Oster, *The Strategic Use of Regulatory Investment by Industry Sub-Groups*, 20 ECON. INQUIRY 604, 606 (1982) (arguing that a firm may seek the imposition of such regulations so long as the regulations “differentially damage its rivals”).

¹⁹⁹ See Edmund Sanders, *Sudan Just Shrugs Off Sanctions*, L.A. TIMES, Aug. 18, 2007 (noting that Chinese investment in Sudanese oil projects has continued).

to face those same constraints. To be clear, I do not argue that this result is inevitable, just that there is a plausible public choice account of what the process might look like.

A. RATINGS AND AUDITS

One of the factors that makes doing business with and in foreign states so complicated is that there is no sovereign bankruptcy code. That is, there is no law that can compel a state to repay its obligations.²⁰⁰ And, although there might be ways to compel foreign firms to repay debts, there are substantial risks nonetheless. Information about the ability (and inclination) to honor agreements is thus critical to investment decisions.²⁰¹ Credit and country risk ratings are used by potential investors to appropriately price the risk that their investment will fail due to the failure of the host country to pay its debts, enforce agreements, or maintain adequate control of its territory. One of the important effects of credit ratings is that they provide an incentive for potential borrowers (and states seeking to attract investment) to behave in ways that will produce positive ratings. To the extent that credit ratings encourage firms and states to be credit-worthy, the ratings shape behavior. That they provide information directly relevant to investment decisions explains, at least in theory, part of the persistence of such ratings.²⁰² Another reason that credit ratings retain the power to shape behavior is that they are linked to regulations. A number of securities regulations depend on the ratings derived by private rating agencies, which, in effect grants “a private entity, rather than the regulator,” the power “to determine the substantive effect of legal rules.”²⁰³ Credit ratings thus affect behavior because they are a formal mechanism for assessing a potential business partner’s reputation and because they contribute to law enforcement decisions.

²⁰⁰ See Constatin Mellios & Eric Paget-Blanc, *Which Factors Determine Sovereign Credit Ratings?*, 12 EUR. J. FIN. 361, 361 (2006) (noting that the “sovereign debt market, unlike the corporate debt market, is characterized by the absence of a bankruptcy code. Thus, in the event of default, the lender does not have access to the obligor’s assets”).

²⁰¹ See *id.* (arguing that sovereign credit ratings “significantly influence the terms and the extent to which, in developing countries especially, public and private borrowers have access to international capital markets”).

²⁰² Whether ratings actually provide information that is not available publicly is an open question. For the view that credit ratings do not provide useful information, see Frank Partnoy, *The Paradox of Credit Ratings*, in RATINGS, RATING AGENCIES, AND THE GLOBAL FINANCIAL SYSTEM 65 (Richard M. Levich, et al, eds. 2002) (“there is overwhelming evidence that credit ratings are of scant informational value”).

²⁰³ Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L. Q. 619, 623 (1999).

I propose to harness similar ratings of human rights performance to shape the behavior of states and firms. There is no shortage of such ratings: there are ratings of everything from the quality of institutions to press freedom to the empowerment of women.²⁰⁴ The problem is to devise a mechanism give such ratings teeth. In this part, I present two possible approaches. The first would be for international financial institutions such as the International Bank for Reconstruction and Development (World Bank) or the Multilateral Investment Guarantee Agency (MIGA)²⁰⁵ to generate human rights ratings, which would then be used to help set the prices of the products offered by those institutions. The second approach would be similar to what exists now, in which a number of non-governmental organizations and other groups gather information about human rights practices and share it publicly. The incentive for firms and financial institutions to consider this information is related to the degree of importance that consumers and shareholders attach to the information.

Lender-Imposed Conditions. When MIGA and other financial institutions decide whether to support a project, they consider a great deal of information. This information is used in two ways—to make the threshold determination of whether to finance or insure the project, and to determine the price and conditions associated with MIGA or the World Bank's involvement.²⁰⁶ There is no formal role for consideration of human rights practices.²⁰⁷ Contrast this to the way that the Overseas Private Investment Corporation, a quasi-public corporation financed by the U.S. to support U.S. investments.²⁰⁸ OPIC explicitly considers human rights practices when it evaluates a project proposal.²⁰⁹ Consider another

²⁰⁴ For a comprehensive description of the wide range of human rights ratings and indicators, see Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062 (2001).

²⁰⁵ The International Bank for Reconstruction and Development and the Multilateral Investment Guarantee Agency are both part of the World Bank Group, which includes five related institutions. See World Bank Group Home Page, <http://www.worldbankgroup.org/>.

²⁰⁶ See MULTILATERAL INVESTMENT GUARANTEE AGENCY, OPERATIONAL REGULATIONS, Chapter 3, ¶¶ 3.04-3.18.

²⁰⁷ MIGA's assessment process includes an "environmental assessment of proposed projects," which can include consideration of some social issues, including, for example, whether local people are involuntarily resettled, for example. See *id.* at Annex B, ¶¶ 1 & 2.

²⁰⁸ See OVERSEAS PRIVATE INVESTMENT CORPORATION, 2006 ANNUAL REPORT 2-3, available at <http://www.opic.gov/pubs/handbooks/index.asp>.

²⁰⁹ See Overseas Private Investment Corporation, <http://www.opic.gov/doingbusiness/investment/workersrights/index.asp>, (describing

example. The Africa Growth and Opportunity Act (AGOA) is a statute that grants favorable terms of trade for goods made in certain countries in Africa.²¹⁰ Eligibility is determined by country, and human rights practices are an explicit component of the determination.²¹¹ There are, of course, problems with both the OPIC and AGOA processes, mainly stemming from the quality and type of information used to make eligibility determinations and the use of what appear to be political considerations in the processes.²¹² But the approach has a great deal of promise because it ties specific economic benefits to the creation and maintenance of a positive reputation.²¹³

Public Information & Reputations. By way of contrast, consider a second approach. On this model NGOs and others uncover and analyze a great deal of information about state and firm behavior, and attempt to share this information as broadly as possible. One of the benefits of this approach is that it is decentralized. The utility of the information is evaluated by those who receive it based, in part at least, on the reputation of the entity that gathered it. This avoids a potential problem that is beginning to plague the financial ratings agencies, namely the instantiation of inefficient raters. A primary weakness of this approach is its very informality. The subjects of the ratings play need not play a formal role in the process, and the ratings may be based on incomplete or plainly

OPIC policy regarding human rights).

²¹⁰ See African Growth and Opportunity Act, 19 U.S.C. 3701 et seq. (2006).

²¹¹ The statute provides that the President may “designate a sub-Saharan African country as ... eligible” if he determines that the country “has established, or is making continual progress toward establishing” a range of protections and reforms designed to support market economies and democratization. See 19 U.S.C. 3703 (a) (1). Regarding human rights specifically, the statute requires the President to certify that the country “does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities.” 19 U.S.C. 3703 (a)(3).

²¹² See, e.g., David Fuhr & Zachary Klughaupt, Note, *The IMF and AGOA: A Comparative Analysis of Conditionality*, 14 DUKE J. COMP. & INT’ L L. 125, 141-146 (2004) (comparing human rights practices of countries denied AGOA eligibility with those granted eligibility).

²¹³ Despite the information and political problems created by the bureaucratic nature of this approach, there may be a positive side effect as well. There is some evidence that financial ratings are sticky; that is, “in the absence of new information, the ratings remain virtually constant over time.” Nadeem Ul Haque, et al., *Rating the Raters of Country Creditworthiness*, FIN. & DEV., March 1997, at 10, 13. If firms and states know that their reputations will endure over time, they may have an even greater incentive to create a positive reputation. There is some risk, of course, that firms with good reputations will retain them even if their practices deteriorate.

inaccurate information. In this situation, consumers of the information may well dismiss it rather than attempt to sort the good from the bad. More important, firms and states have only weak incentives to attend to these rankings. Although there is some evidence that social audits or similar rankings can affect the behavior of states or firms, the absence of an explicit economic incentive renders most of these rankings powerless.

2. *Minimum Contacts and the Foreign Corrupt Practices Act*

The Foreign Corrupt Practices Act, enacted in 1977, prohibits the bribery of foreign officials by U.S. corporations and their agents.²¹⁴ In the wake of the Watergate scandal, Congress ordered the SEC to investigate whether corporations had attempted to illegally influence U.S. elections.²¹⁵ As its investigation progressed, the SEC discovered that U.S. corporations had engaged in widespread bribery of foreign officials,²¹⁶ and the FCPA was the eventual legislative response.²¹⁷ Since its enactment, “U.S. business executives have complained that enforced honesty was leaving them at a competitive disadvantage” compared with their foreign counterparts, who were not subject to the same rules.²¹⁸ Although the evidence on this issue is mixed,²¹⁹ there does appear to be evidence that bribe paying firms are more successful than non-bribe paying firms when they bid for contracts.²²⁰ To combat this, Congress has amended the FCPA, and the U.S. pushed its allies to adopt similar bans on bribery.²²¹

²¹⁴ See 15 U.S.C. 78dd-1(a).

²¹⁵ See Wesley Cragg & William Woof, *The U.S. Foreign Corrupt Practices Act: A Study of Its Effectiveness*, 107 BUS. & SOC'Y REV. 98, 103-109 (2002) (describing the series of political and commercial bribery scandals that led to the adoption of the FCPA).

²¹⁶ See Jack G. Kaikati, et al., *The Price of International Business Morality: Twenty Years Under the Foreign Corrupt Practices Act*, 26 J. BUS. ETHICS 213, 213 (2000) (noting that the SEC discovered that more than “400 corporations, including 117 of the top Fortune 500 admitted to making more than \$300 million questionable or illegal payments”).

²¹⁷ See Oren Gleich & Ryan Woodward, *Foreign Corrupt Practices Act*, 42 AM. CRIM. L. REV. 545, 546 n. 2 (2005) (“Congress passed the FCPA to restore public confidence in the business community after a series of bribery scandals tarnished corporate America’s image at home and abroad”).

²¹⁸ Kaikati, et al., *supra* note 216, at 216.

²¹⁹ See, e.g., *id.* at 216-217 (summarizing evidence regarding the economic impact of the FCPA).

²²⁰ For example, then-U.S. Trade Representative Mickey Kantor stated that between April 1994 and May 1995, “the U.S. Government learned of almost 100 cases in which bribes undercut U.S. firms’ ability to win contracts valued at \$45 billion.” See Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, THE N.Y. TIMES, April 12, 1996, at A16.

²²¹ See Kaikati, et al. *supra* note 216, at 214-215 (2000) (describing amendments to

In addition, the U.S. has worked within the Organization for Economic Cooperation and Development to push the adoption of an anti-bribery convention which now has 36 signatories, including most industrialized countries.²²²

The effect of the FCPA is that U.S. and foreign firms are competing for the same resources and markets, but doing so with different cost structures and incentives. One effect of anti-corruption legislation is to set prices associated with various business practices. This is, of course, a rough effect, but is important nonetheless. For example, by using criminal sanctions to enforce a prohibition on bribery, the FCPA creates an incentive for firms to avoid doing business in areas in which they might expect to be solicited for bribes, and to engage in close internal monitoring to ensure that all employees comply with the statute. Because many foreign firms do not face these incentives, it is less expensive for them to do business in some locations than it would be for a U.S. firm. To equalize this, the scope of the FCPA might be extended to cover all corporations that use the U.S. market in any way—whether by issuing shares in the U.S., thereby using U.S. capital markets, or by selling products in the U.S., thereby using U.S. consumer markets. This simple change would help to ensure that global firms compete under the same conditions.

the original FCPA). *See also* Gleich & Woodward, *supra* note 217, at 564-568 (describing various international efforts to create and enforce legal prohibitions on bribery).

²²² *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT WORKING GROUP ON BRIBERY, ANNUAL REPORT 2006 (describing the scope, requirements, and enforcement of the OECD anti-bribery convention).