CORPORATE GOVERNANCE & INTERNATIONAL LAW

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Stakeholder activism by nongovernmental organizations (NGOs), consumers, employees, and others can incentivize corporate managers to comply with international law on climate change, armed conflict, human rights, and access to medicine, among other issues. As such, stakeholder enforcement of international law has two distinct audiences: the corporation that is persuaded to change and fellow stakeholders who are persuaded to act. But familiar difficulties with collective action impede the success of stakeholder enforcement of international law. These challenges can compromise the ability of shareholders to monitor corporations; these same problems similarly jeopardize the ability of stakeholders to monitor corporate compliance with international agreements, principles, and other institutions.

This Article synthesizes the insights of corporate governance with the challenges of international law. Descriptively, it identifies both a problem and solution: stakeholders are rationally apathetic because they confront high per capita costs (information, coordination, and conflict) of enforcing international law but receive low per capita benefits from such enforcement. But this Article explains how sequential stakeholder activism provides changes to these cost-benefit analyses: actions by one group—such as consumers, employees, suppliers, financial institutions, or the media—can lower detection, verification, and transmission costs while increasing the benefits each stakeholder receives from enforcement by socializing stakeholders to share preferences, thereby reducing conflict and coordination costs. Critically, international law converts particularized company wrongdoing into violations of global norms—thereby offering economies of scale to stakeholders who want to enforce international law. Enforcement is a chain reaction.

Normatively, this Article addresses the implications of stakeholder enforcement for how lawyers and scholars imagine the international legal order. It answers two questions exposed by the phenomenon of stakeholder enforcement: (1) Is it "enforcement"? and (2) When is it preferable to courts or political processes? It answers the first question by adopting an interdisciplinary approach to contextualize stakeholder enforcement against traditional international law enforcement practiced by courts and intergovernmental political processes. Despite their differences in form, all three approaches qualify as enforcement because they increase enforcement's benefits while lowering its associated costs. This Article answers the second question by using comparative institutional analysis to explore how well the three enforcement strategies achieve the following functions: deterrence, punishment, and reparations. This Article concludes that stakeholder enforcement is especially valuable for deterrence but has limited value for punishment and almost no value for reparations to victims.

INTRODUCTION

Does international law work?

It's a fair question: Many corporations and other business enterprises are accused of violating international law's most sacred norms.[1] One explanation for their poor corporate compliance is poor enforcement: the international legal

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1. *See, e.g.*, AMNESTY INT'L, SILICON SHADOWS: VENTURE CAPITAL, HUMAN RIGHTS, AND THE LACK OF DUE DILIGENCE 6–7 (2023), https://www.amnestyusa.org/wp-content/uploads/2024/01/Amnesty-VCGenAi-Report-RevisedText.pdf [https://perma.cc/U9UX-N7DV] (reporting on the human rights practices of a dozen of the largest venture-capital firms and start-up accelerators with at least one Generative AI investment and finding that only one firm stated that it conducted human rights due diligence as part of its investment decisions); BUS. & HUM. RTS. RES. CTR., BOILING POINT: STRENGTHENING CORPORATE ACCOUNTABILITY IN THE TEA INDUSTRY 3 (2023), https://media.business-humanrights.org/media/documents/2023_tea_report_2205.pdf [https://perma.cc/YJE6-V4MV].

order inadequately sanctions them for violating its rules and recommendations.[2] Consider the three options for punishing corporations, deterring repetition, and providing remedies to their victims: *courts*, *governments*, and *markets*.

Courts may hold corporations accountable for violating international law. Amal Clooney filed a lawsuit against French company LaFarge alleging that the latter "conspired to provide material and funds to support ISIS terrorist campaigns" against Yazidi populations.[3] Corporations and their executives may also confront criminal prosecution for their involvement in human rights abuses. In January 2024, France's highest appeals court upheld charges against LaFarge for complicity in crimes against humanity.[4] In Sweden, prosecutors brought charges against a chairman and former CEO of Lundin Energy "for complicity in war crimes carried out by the Sudanese army and allied militia in southern Sudan from 1999 to 2003."[5] In September 2023, both of these executives went to trial over these charges.[6]

Governments can also deter corporations from committing international law violations. For example, in the United States, the "Uyghur Forced Labor Prevention Act (UFLPA) establishes a rebuttable presumption that the importation of any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China, or produced by certain entities, is prohibited by Section 307 of the Tariff Act of 1930 and that such goods, wares, articles, and merchandise are not entitled to entry to the United States."[7]

But there is a third option: *markets*. Corporations that violate international law may be punished in the marketplace. Consumers may boycott the corporation; employees may refuse to work for it; shareholders may refuse to invest; and so forth.[8] Each of these individuals and organizations has the potential to nudge corporations towards international law compliance using

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2. Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 190–91 (2006).

3. Sabrina Souza & Zoe Sottile, *Amal Clooney Is Representing Over 400 Plaintiffs in Lawsuit Seeking 'Accountability for Genocide Against Yazidis*,' CNN (Dec. 17, 2023, 5:36 PM), https://www.cnn.com/2023/12/17/us/amal-clooney-isis-yazidi-genocide-lawsuit/index.html [https://perma.cc/6PVY-UT6D].

4. Tassilo Hummel, *Lafarge Can Be Charged with 'Complicity in Crimes Against Humanity', French Court Says*, REUTERS (Jan. 16, 2024, 8:58 AM), https://www.reuters.com/business/lafarge-can-be-charged-with-complicity-crimes-against-humanity-over-syria-plant-2024-01-16/ [https://perma.cc/9XG7-UZJ4].

5. *Sweden Charges Lundin Energy Executives with Complicity in Sudan War Crimes*, REUTERS (Nov. 11, 2021, 11:21 AM), https://www.reuters.com/world/africa/sweden-charges-lundin-energy-executives-complicity-sudan-war-crimes-2021-11-11 [https://perma.cc/75J6-KZ77].

6. Anna Ringstrom, *Former Oil Firm Executives Go on Trial in Sweden over Sudan War Crimes*, REUTERS (Sept. 5, 2023, 2:42 PM), https://www.reuters.com/world/africa/sudan-war-crime-trial-ex-oil-firm-executives-starts-sweden-2023-09-05/ [https://perma.cc/M9HW-YZMN].

7. *Uyghur Forced Labor Prevention Act Statistics*, U.S. CUSTOMS AND BORDER PROT. (Aug. 28, 2024), https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics [https://perma.cc/P2HX-6ZVR].

8. *See, e.g.*, Kishanthi Parella, *Enforcing International Law Against Corporations*, 65 HARV. INT'L L.J. 283 (2024).

methods that do not involve a courtroom: Consumers boycott companies that refused to exit Russia after the latter invaded Ukraine.[9] Investors demand review of how companies align their practices with international law.[10] Employees refuse to support their companies' government contracts on issues ranging from detention facilities to artificial intelligence.[11] Sometimes these tactics work; other times, they fail fabulously.[12]

One of the biggest challenges with market enforcement is that the many must be motivated to act; one person's actions are rarely sufficient.[13] But the odds that one person will act depends on their predictions of what *others* will do.[14] If successful enforcement depends on the many, then a sole individual or organization may not act unless assured that others will similarly enforce; otherwise, enforcement is unlikely to prove successful, and no one wants to embark on a fool's errand, especially if it is costly in time and resources.

These are not new challenges—for either corporate governance[15] or international law.[16] Each discipline has struggled with monitoring and enforcement challenges exacerbated by collective-action problems.[17] Consider their history within corporate governance: the separation of ownership and control fueled concerns over managerial opportunism, on the one hand, and investor apathy, on the other.[18] Dispersed investors confronted the prospects

9. *See, e.g.*, Elisha Fieldstadt, *Papa John's Faces Backlash After U.S. Franchisee Refuses to Close 190 Russia Stores*, NBC NEWS (Mar. 16, 2022, 9:16 AM), https://www.nbcnews.com/news/world/papa-johns-faces-backlash-american-russia-franchisee-refuses-close-190-rcna20255 [https://perma.cc/Q3NQ-M96N].

10. *See* Stephen Neukam, *Starbucks Shareholders Back Independent Review of Company's Labor Practices*, THE HILL (Mar. 29, 2023, 8:23 PM), https://thehill.com/business/3925041-starbucks-shareholders-back-independent-review-of-companys-labor-practices/ [https://perma.cc/ZK4E-G6PE].

11. *See* Sheera Frenkel, *Microsoft Employees Protest Work with ICE, as Tech Industry Mobilizes over Immigration*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html [https://perma.cc/6D94-PC8K]; Tom Simonite, *3 Years After the Project Maven Uproar, Google Cozies to the Pentagon*, WIRED (Nov. 18, 2021, 7:00 AM), https://www.wired.com/story/3-years-maven-uproar-google-warms-pentagon/ [https://perma.cc/CD98-2SCC].

12. *See* Melody Bomgardner, *How Much Do Boycotts Affect a Company's Bottom Line?*, KELLOGG SCH. OF MGMT. (Jan. 1, 2023), https://insight.kellogg.northwestern.edu/article/company-boycott-buycott-impact [https://perma.cc/P4WR-TLBQ].

13. *See generally* Katharina Holzinger, *The Problems of Collective Action: A New Approach*, (Max Planck Inst. for Rsch. on Collective Goods, Working Paper No. 2003/02, 2003), https://www.econstor.eu/bitstream/10419/85085/1/2003-02_online.pdf [https://perma.cc/76AW-F5JP].

14. *See, e.g.*, Gillian K. Hadfield & Barry R. Weingast, *Law Without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 J.L. & CTS. 3, 9 (2013) [hereinafter Hadfield & Weingast, *Law Without the State*]; Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of a Legal Order*, 4 J. LEGAL ANALYSIS 471, 474–75 (2012) [hereinafter Hadfield & Weingast, *What Is Law?*]; RICHARD MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 61 (2015).

15. *See, e.g.*, Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 527–28 (1990).

16. *See, e.g.*, JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 13–16, 132–35 (2008).

17. *See* Black, *supra* note 15, at 527–28; TRACHTMAN, *supra* note 16, at 13–16.

18. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (discussing potential for managerial opportunism absent effective monitoring by investors); Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267, 276 (1988) (same); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON.

of low per capita benefits but high per capita costs, thereby favoring a position of "rational apathy."[19] Even motivated investors confront coordination and conflict issues if they want to challenge management.[20] While the role of large institutional investors addresses many of these challenges,[21] it is worth revisiting this history in order to understand the current challenges that stakeholders experience when monitoring corporate compliance with international law.

After all, shareholders are not the only ones who encounter collective-action problems. Corporate stakeholders similarly grapple with collective-action challenges when they seek to influence management's choices regarding people and the planet.[22] *Who are stakeholders?* These include individuals and groups who affect the success of a corporation and, in turn, are affected by that corporation.[23] Familiar examples include not only shareholders but also consumers, employees, suppliers, and local communities, among others. Even stakeholders who care about corporate compliance with international law confront collective-action problems because they are also a dispersed group

301, 304 (1983) (same); Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 91–93 (2017) (discussing investors' rational apathy); Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 61–66 (2016) (same); *see also* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1014 (2013) ("According to [the radical] version of shareholder primacy, therefore, the key problem for corporate law is to minimize agency costs so as to maximize shareholder wealth."); Dorothy S. Lund, *Public Primacy in Corporate Law*, 47 SEATTLE U. L. REV. 365, 374–75 (explaining how agency theory influenced developments that enshrine shareholder primacy, such as monitoring as a core function of boards of directors; strengthening shareholder voting; limitations on management's ability to resist takeovers and proxy fights; and equity-based executive compensation).

19. Black, *supra* note 15, at 527–28.

20. *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 784 (2017); Manuel A. Utset, *Disciplining Managers: Shareholder Cooperation in the Shadow of Shareholder Competition*, 44 EMORY L.J. 71, 86 (1995).

21. Bebchuk, Cohen & Hirst, *supra* note 18, at 93 ("Institutional investors therefore provide constraints on agency problems in their portfolio companies that dispersed shareholders in Berle–Means corporations were unable to accomplish."). *But see id.* at 90 ("We identify several drivers of agency problems that afflict the decisions of investment managers of either passive index funds, active mutual funds, or both. First, such investment managers generally capture only a small fraction of the benefits that results from their stewardship activities while bearing the full cost of such activities. Further, competition with other investment managers is typically insufficient to eliminate these agency problems. Finally, investment managers may be further influenced by private incentives, such as their interest in obtaining business from corporations, that encourage them to side excessively with managers of corporations. We show that index funds have especially poor incentives to engage in stewardship activities that could improve governance and increase value.").

22. *See* Charles W.L. Hill & Thomas M. Jones, *Stakeholder-Agency Theory*, 29 J. MGMT. STUD. 131, 137–38 (1992) ("Satisfying employee claims for higher wages, consumer claims for greater quality and/or lower prices, supplier claims for higher prices and more stable ordering patterns, and the claims of local communities and the general public for lower pollution and an enhanced quality of life, all involve the use of resources that might otherwise be invested by managers in maximizing the growth rate of the firm.").

23. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25 (1984); *see also* Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013 (2013); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE. J. ON REG. 499, 511–17 (2020); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1426 (2020); Flore Bridoux & J.W. Stoelhorst, *Stakeholder Theory, Strategy, and Organization: Past, Present, and Future*, 20 STRATEGIC ORG. 797, 798 (2022).

that confronts coordination and conflict costs and the challenge of low per capita benefits but high per capita costs.[24]

This Article examines these parallel collective-action challenges and makes two important contributions to the fields of corporate law and international law. First, it explains how stakeholder enforcement occurs in a sequential process in which a preceding stage lowers the information, coordination, and conflict costs associated with subsequent stages.[25] The Article identifies four types of stakeholder enforcement—*predicative*, *amplification*, *facilitative*, and *direct*—and explains how each lowers detection, verification, and transmission costs and increases the benefits each stakeholder receives from enforcement by socializing stakeholders to share preferences, thereby reducing conflict and coordination costs.[26] *Predicative enforcement* lowers the costs of enforcement for another stakeholder in their engagement with a corporation.[27] *Facilitative enforcement* occurs when a stakeholder chooses not to interfere with the stakeholder enforcement performed by other stakeholders, thereby removing potential impediments to enforcement.[28] *Amplification enforcement* describes stakeholder activism that magnifies the stakeholder activism of others; a classic example is media coverage of consumer boycotts or investor campaigns challenging corporate conduct.[29] Finally, *direct enforcement* is the most familiar and is performed by stakeholders who engage directly with a corporation.[30]

Critically, international law converts particularized wrongdoing into violations of global norms.[31] This conversion offers economies of scale to stakeholders who can use the information and expertise they gain in engagement with one corporation in a subsequent engagement with another.[32] This repurposing of skills and knowledge prevents the initial stakeholder engagement with the corporation from becoming a "transaction-specific asset";[33] instead, it makes the engagement usable and valuable information that can be utilized in engagements with other corporations.[34] Such economies of scale increase the benefits of enforcement because stakeholders gain something of value from each engagement; reduce their need to ensure a victory in each engagement, thereby encouraging them to take on harder "wins"; and lower the

24. *See, e.g.*, Flore Bridoux & J.W. Stoelhorst, *Stakeholder Governance: Solving the Collective Action Problems in Joint Value Creation*, 47 ACAD. MGMT. REV. 214, 216 (2022) ("In team production situations, stakeholders are vulnerable to others pursuing their individual, short-term interests by free riding on the team effort, and this can make stakeholders reluctant to cooperate in order to avoid being exploited." (citations omitted)).

25. *See infra* Section I.D.

26. *See infra* Section I.D.

27. *See infra* Section I.D.

28. *See infra* Section I.D.

29. *See infra* Section I.D.

30. *See infra* Section I.D.

31. *See infra* Section II.D.

32. *See infra* Section II.D.

33. *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 59, 62 (1996).

34. *See infra* Section II.D.

information costs of the next engagement that also involves a violation of similar international law norms.[35]

Stakeholder activism provides the incentives for more stakeholder activism. This is because the actions of one group of stakeholders may create legal, reputational, operational, and regulatory risks to the corporation that motivate *other* stakeholders to act in order to address these risks.[36] In this way, stakeholder enforcement by one individual or organization can change the willingness of other stakeholders to enforce by highlighting the benefits of enforcing a rule or highlighting the risks that occur when a rule is transgressed.[37]

For example, when shareholders engage companies on their human rights, climate change, or labor practices, they often highlight the ways that poor performance on these issues can expose the company to litigation, regulatory, operational, and reputational risks.[38] Consider a recent investor proposal that was submitted to Tesla requesting that its board "issue a report describing if and how Tesla plans to eradicate child labor and forced labor from its supply chain by 2025 and introduce more supply-chain transparency."[39] The investors justified this request by referencing the reputational, regulatory, and financial risks that poor human rights practices can pose for Tesla.[40] For example, they referenced media reports on child labor in the auto supply chains, the passage of the Uyghur Forced Labor Prevention Act, and a Senate Finance Committee inquiry into whether Tesla and other auto makers are using forced labor from China's Xinjiang region in their supply chains.[41] These different groups and developments provided the incentives for shareholders to submit this proposal or to support it. Certainly, some shareholders may be motivated to engage Tesla because of their commitment to human rights. However, other shareholders may need other incentives to support such a proposal, and the actions of other groups—such as the news media and Senate committees—provide those incentives to act by highlighting the benefits of enforcement for addressing the reputational, regulatory, and financial risks that Tesla's human rights practices may create.

Stakeholder enforcement solves one puzzle of international law but creates another: if stakeholder enforcement is a part of the international legal order,

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35. *See* Black, *supra* note 15, at 580.

36. *See infra* Section I.D.

37. *See infra* Section I.D.

38. *See infra* Section I.D.

39. *Tesla's Shareholders Call to Prevent Child Labor and Forced Labor in Supply Chains*, AS YOU SOW (May 2, 2023), https://www.asyousow.org/press-releases/2023/5/2/tesla-shareholders-child-forced-labor-supply-chain [https://perma.cc/2AM7-MSBX].

40. Resolution, *Tesla Inc: Child and Forced Labor in Supply Chains*, AS YOU SOW (Feb. 21, 2023), https://www.asyousow.org/resolutions/2022/02/15-tesla-floor-resolution [https://perma.cc/S7BZ-VKEV].

41. *See id.*; *see also* Yuka Hayashi, *Tesla, GM Among Car Makers Facing Senate Inquiry into Possible Links to Uyghur Forced Labor*, WALL ST. J. (Dec. 22, 2022, 3:36 PM), https://www.wsj.com/articles/tesla-gm-among-car-makers-facing-senate-inquiry-into-possible-links-to-uyghur-forced-labor-11671722563 [https://perma.cc/7SQS-2LVV].

when is it a preferable enforcement option over courts or intergovernmental processes? This Article's second contribution is to provide guidance on when it is appropriate to rely on stakeholder enforcement of international law. It draws upon comparative institutional analysis to argue that the choice of institution depends on three objectives of international law enforcement: *deterrence*, *punishment*, and *reparations*.[42] This Article explains that stakeholder enforcement excels in some enforcement functions but suffers in others.[43] Specifically, it may be particularly valuable in deterring future violations of international law by enlisting a range of corporate stakeholders who persuade corporate actors to make organizational changes that would make such violations less likely.[44] However, it has limited effect in punishing corporate actors for such violations.[45] There is limited evidence that markets punish corporations for committing human rights violations.[46] Even if so, this punishment is borne by the larger organization and not necessarily the individual executives who facilitated or even ordered these violations.[47] That is why traditional international law enforcement—performed by state actors—may be preferable for punishment, as evidenced by the current prosecutions of corporate executives by Swedish authorities for violating international law.[48] Stakeholder enforcement is particularly weak regarding reparations because it generally does not offer rehabilitation, compensation, satisfaction, or restitution.[49] However, stakeholder mechanisms may be better suited to offer guarantees of nonrepetition compared to other alternatives for enforcement.[50]

This Article proceeds as follows: Part I draws upon the work of Professor John Ruggie to discuss three governance systems that apply to corporations: *public governance* (including international law), *stakeholder governance*, and *corporate governance*. It explains that the likelihood that the first will influence the third depends on the quality of the second: stakeholder governance. But stakeholder governance is plagued by collective-action problems. Part I introduces the history of these challenges within corporate governance before applying the analysis to stakeholder governance. It concludes by explaining the significance of sequential stakeholder activism for overcoming coordination challenges in the enforcement of international law. Part II contextualizes stakeholder mechanisms within the broader international law scholarship on international law enforcement by explaining how these share common functions with

42. *See infra* Part III.
43. *See infra* Part III.
44. *See infra* Section III.B.
45. *See infra* Section III.C.
46. *See infra* Section III.C.
47. *See infra* Section III.C.
48. *See infra* Section III.C.
49. *See infra* Section III.D.
50. *See infra* Section III.D.

traditional enforcement strategies. Specifically, despite the differences in form, stakeholder mechanisms, adjudicative strategies, and intergovernmental processes share common functions of raising the benefits of decentralized enforcement of international law while reducing the information costs associated with it, such as detection, monitoring, and transmission. Part III concludes with a comparative institutional analysis of these enforcement strategies to identify which strategy may be superior for deterrence, punishment, and reparations. It argues that stakeholder mechanisms are especially valuable for deterrence but have limited value for punishment and almost no value for reparations to victims.

I. MONITORING CORPORATIONS: SHAREHOLDERS, STAKEHOLDERS, & COLLECTIVE-ACTION PROBLEMS

This Part explains that the collective-action problems that impede *shareholder* monitoring of corporations similarly compromise *stakeholder* monitoring to ensure that corporations comply with international law. Section I.A introduces the three governance systems that collectively apply international law norms to corporations—public governance, stakeholder governance, and corporate governance. It explains that the likelihood that public governance (including international law) will influence corporate governance depends on the quality of stakeholder engagement. Sections I.B and I.C highlight the collective-action problems that render external monitoring ineffective, such as rational apathy, information costs, and the challenges of coordination and conflict. Section I.D explains how sequential stakeholder enforcement helps to alleviate many collective-action problems that stakeholders would otherwise confront.

A. Governing Corporations: Public Governance, Stakeholder Governance, and Corporate Governance

Corporations frequently engage in conduct that imposes harm on people and the planet. For example, in 2023, Amnesty International released a report documenting the ways that migrant workers at Amazon's Saudi Arabia fulfillment centers suffer from a range of labor violations, including long shifts, unsanitary working conditions, wage theft, and interference with alternative employment.[51] What laws and norms deter Amazon and other companies from such conduct and punish these same violations?

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51. AMNESTY INT'L, 'DON'T WORRY, IT'S A BRANCH OF AMAZON': EXPLOITATION OF MIGRANT WORKERS CONTRACTED TO AMAZON IN SAUDI ARABIA 5–8 (2023), https://cdn.amnesty.at/media/11250/amnesty-report_saudi-arabien_dont-worry-its-a-branch-of-amazon_exploitation-of-migrant-workers_oktober-2023.pdf [https://perma.cc/MNY8-N4CG].

Professor John Ruggie[52] identified three governance systems that apply to the conduct of businesses on the international stage: *public governance*, *civil or stakeholder governance*, and *corporate governance*.[53] *Public governance* consists of laws and regulations at both the domestic and international levels.[54] *Civil or stakeholder governance* "involve[s] stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms, such as advocacy campaigns, lawsuits, and other forms of pressure."[55] It often refers to activism performed by a corporation's stakeholders, such as consumers, employees, shareholders, regulators, nongovernmental organizations (NGOs), and media.[56] *Corporate governance* refers to the rules and practices that govern the ways that a corporation is directed and managed.[57]

These three governance systems are interdependent; each relies on the others for effective global regulation of transnational corporations.[58] The first governance system is not enough. International law supplies sufficient norms prohibiting the types of conduct that Amazon is accused of undertaking in Saudi Arabia and other places.[59] For example, the United Nations Guiding Principles on Business and Human Rights identifies the responsibility of business enterprises to respect internationally recognized human rights norms and requires that they "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur."[60] Similarly, the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work prohibits all forms of forced or

52. The late Professor John Ruggie was the former Special Representative of the United Nations Secretary-General on human rights and transnational corporations and other business enterprises. *Memory of Professor John G. Ruggie*, UNITED NATIONS (Sept. 21, 2021), https://www.ohchr.org/en/statements/2021/09/memory-professor-john-g-ruggie-tribute-un-working-group-business-and-human [https://perma.cc/GE8C-A6JT].

53. John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* 12 (John F. Kennedy Sch. of Gov't, Working Paper No. RWP17-030, 2017), https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights [https://perma.cc/5852-DZL8]. I would like to thank John F. Sherman III for his insightful guidance on Ruggie's framework and its applicability to the issues analyzed above.

54. *Id.*

55. *Id.*

56. *See* John Gerard Ruggie, *Reconstituting the Global Public Domain — Issues, Actors, and Practices*, 10 EUR. J. INT'L RELS. 499, 519 (2004) ("I define the new global public domain as an institutionalized arena of discourse, contestation, and action organized around the production of global public goods. It is constituted by interactions among non-state actors as well as states. It permits the direct expression and pursuit of a variety of human interests, not merely those mediated (filtered, interpreted, promoted) by states. It 'exists' in transnational non-territorial spatial formations, and is anchored in norms and expectations as well as institutional networks and circuits within, across, and beyond states.").

57. *See, e.g.*, BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 3 (2016) (identifying the responsibilities of the board and senior management).

58. *See* Ruggie, *supra* note 53, at 15–16.

59. *See id.* at 12.

60. U.N. HUM. RTS. OFF. HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, 14 (2011).

compulsory labor.[61] But, as demonstrated by Amazon, the fact that we have international law on these issues is not enough to ensure that corporations comply.[62]

Instead, compliance is best assured through corporate governance that determines whether a corporation will comply with the norms that international law supplies.[63] Amazon has no shortage of policies and procedures addressing forced labor in its supply chains. For example, Amazon's board of directors has a committee that oversees labor and human rights issues: the charter of its Nominating and Corporate Governance Committee states that its purpose includes "oversee[ing] and monitor[ing] the Company's policies and initiatives relating to corporate social responsibility, including human rights and ethical business practices."[64] Amazon claims that its Global Human Rights Principles are informed by the UN Guiding Principles on Business and Human Rights and supports the ILO Declaration on Fundamental Principles and Rights at Work.[65] Its Supply Chain Standards prohibit suppliers from using forced labor or restricting the ability of workers to leave or terminate their employment.[66] The Supply Chain Standards also state that workers should not have to pay any fees as a condition of receiving or continuing employment and that suppliers are responsible for ensuring that third-party agents comply with these standards.[67] Finally, Amazon's Supplier Standards highlight that "[s]uppliers should pay particular attention to the risks of exploitation that both domestic and foreign migrant workers face."[68] Amazon therefore boasts many of the classic hallmarks of corporate governance over these issues. The problem is that its corporate governance is not working, as demonstrated by Amnesty

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61. Int'l Lab. Org. [ILO], ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK at 9 (2022).

62. *See, e.g.,* AMNESTY INT'L, *supra* note 51, at 20.

63. *See, e.g.*, Geoffrey P. Miller, *The Compliance Function: An Overview* 1–2 (N.Y. Univ. L. and Econ. Working Paper No. 14-36, 2014), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Compliance%20Functiion%20an%20Overview.Miller.pdf [https://perma.cc/2R6K-FT6S]; Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 WIS. L. REV. 1367 (2022) (explaining how corporate-enterprise law enables corporations to underperform on environmental and social goals and proposing a framework to address these challenges).

64. *Investor Relations, Nominating and Corporate Governance Committee*, AMAZON, https://ir.aboutamazon.com/corporate-governance/documents-and-charters/nominating-and-corporate-governance-committee/default.aspx [https://perma.cc/RG2C-G8UU]. Shareholders have argued that Amazon's board oversight is inefficient and that it should create a Public Policy Committee to oversee human rights. AMAZON, PROXY STATEMENT 70 (2023), https://s2.q4cdn.com/299287126/files/doc_financials/2023/ar/Amazon-2023-Proxy-Statement.pdf [https://perma.cc/78KD-THJ8].

65. *Amazon Global Human Rights Principles*, AMAZON, https://sustainability.aboutamazon.com/human-rights/principles [https://perma.cc/QQ29-MVPD].

66. AMAZON, SUPPLY CHAIN STANDARDS 5–6 (2023) https://sustainability.aboutamazon.com/content/dam/sustainability-marketing-site/pdfs/assessments-certifications-and-guides/amazon-supplier-manual-english.pdf [https://perma.cc/3L2K-5J4X].

67. *Id.*

68. *Id.* at 6.

International's report accusing Amazon of violating these same policies and practices.[69]

This gap between international law and corporate governance is bridged by the intermediate governance system: *stakeholder governance*. It is this governance system that provides the incentives, sanctions, and even knowledge that corporate managers need in order to follow international law but that the international legal system often fails to provide.[70] As such, it is an important channel by which international law is effectively incorporated within corporate governance. For example, Amnesty International's report shone an unwelcome light on Amazon's practices that informed consumers, employees, investors, and the media of Amazon's failure to abide by international law norms and its own standards.[71] Shareholders submitted a proposal to Amazon requesting a human rights assessment to determine how well Amazon adheres to its own human rights policies and commitments to international law standards, especially concerning labor rights and freedom of association.[72] Such a human rights assessment could evaluate the effectiveness of Amazon's current corporate governance over human rights and identify opportunities for improvement.[73] While this proposal ultimately failed to win shareholder support,[74] this example highlights how the second governance system—stakeholder governance—is fueled by actors such as Amnesty International, news media, and individual shareholders who make international law effective within corporate governance.

But stakeholder governance has its own challenges: Stakeholders may not care to learn about if and how a corporation violates international law. Even if they know, they may not care to do anything about it. Motivated stakeholders may confront another problem—they may have insufficient power to persuade corporate management to change policies and practices. They may be tempted to ally with others, but they cannot identify similarly motivated stakeholders; the stakeholders cannot agree on what it is they want management to do differently; or stakeholders do not trust each other sufficiently to cooperate. These are all challenges with the external monitoring of corporations that

69. AMNESTY INT'L, *supra* note 51, at 5–8.

70. *See* Ruggie, *supra* note 56, at 12–14.

71. *See* AMNESTY INT'L, *supra* note 51, at 5–8.

72. AMAZON, PROXY STATEMENT, *supra* note 64, at 61–62.

73. *See id.* at 61 ("For years, Amazon has faced overwhelming negative media coverage in the US and internationally accusing the company of interfering with workers' exercise of their rights through anti-unionization tactics including allegations of intimidation, retaliation and surveillance . . . . The apparent misalignment between Amazon's commitment and its reported conduct represents reputational and operational risks and may negatively impact Amazon's long-term performance. . . . An independent assessment would help investors assess Amazon's adherence to its human rights commitments." (footnotes omitted)).

74. Clara Hudson, *Amazon Shareholders Reject Union Rights, Climate Proposals*, BLOOMBERG L. (May 24, 2023), https://www.bloomberglaw.com/bloomberglawnews/esg/X9VQLVVG000000?bna_news_filter=esg [https://perma.cc/HM2W-DP72].

renders stakeholder governance unlikely or unsuccessful—thereby decreasing the odds that the public governance system will permeate into corporate governance.[75]

B. Collective-Action Problems: Shareholders

The challenges of stakeholder monitoring are not new; instead, collective-action problems are familiar challenges within corporate governance. For example, economic analyses of the firm highlighted the problems of agency costs and the difficulties of collective action to address them.[76] Professors Michael C. Jensen and William H. Meckling define "an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent."[77] This very delegation gives rise to the problem that the agent may not act in the best interests of the principal: the agent may steal, shirk, or otherwise act in ways that are harmful to the interests of the principal.[78]

Scholarship on corporate governance highlights distinct collective-action problems that could impede the quality of shareholder monitoring of corporate management: rational apathy, coordination challenges, and "principal costs."[79] Large institutional investors may mitigate many of these challenges,[80] but it is worth examining this literature to identify insights that may help to diagnose collective-action problems in stakeholder monitoring of corporations.

The first challenge is the rational apathy that arises when each investor owns a small fraction of the corporation's shares and so receives a small fraction of the benefits of monitoring; however, they must expend significant resources to engage in such monitoring.[81] The benefits are small and diffusely distributed, but the costs may be large and concentrated.[82]

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75. *See* Black, *supra* note 15, at 527–28 (discussing challenge of shareholder apathy); Hansmann, *supra* note 18, at 278 (discussing challenge of coordination); Parella, *supra* note 8, at 296–302 (discussing challenge of achieving influence).

76. Millon, *supra* note 18, at 1018 ("The key feature of radical shareholder primacy is its description of the relation between shareholders and management in terms of agency. Corporate management acts as the agent of a principal, which collectively is the company's shareholders. This means that management's job is to act on behalf of the shareholders, using its managerial authority to advance their interests. No such agency relation exists as to the corporation's other stakeholders, such as employees, creditors, suppliers, and customers.").

77. Jensen & Meckling, *supra* note 18, at 308.

78. *Id.*

79. *See, e.g.*, Black, *supra* note 15, at 527–28; Hansmann, *supra* note 18, at 278; Goshen & Squire, *supra* note 20, at 784.

80. Bebchuk, Cohen & Hirst, *supra* note 18, at 90–93.

81. Black, *supra* note 15 at 527–28; *see also* Kastiel & Nili, *supra* note 18, at 61–66 (finding that retail investors' apathy is significant and on the rise).

82. *See* Utset, *supra* note 20, at 86 (discussing the nature of collective goods and the risk of the free-riding problem).

A second challenge is that even motivated investors confront coordination issues that arise from the need to aggregate their preferences on a variety of issues.[83] These preferences may diverge significantly or negligibly based on the characteristics of each individual group member and their ideas on the corporation's optimal course of action.[84] When interests and ideas are highly heterogeneous, the group's members may confront significant costs in collective decision-making.[85] Even within a collective decision-making mechanism, "[b]ecause there is a strong incentive for individuals to form coalitions to shift benefits in their direction, efforts to form and break such coalitions may consume substantial effort."[86] Additionally, "subgroups of patrons with particular interests can often achieve disproportionate influence."[87]

A final challenge is the "principal costs" that are defined by Professors Zohar Goshen and Richard Squire as "costs attributable to the exercise of control by investors."[88] Principal costs come in two varieties that speak to different problems with principals exercising control: competence and conflict.[89] Principal competence costs "can result from a lack of information and expertise (which can be acquired, but at a cost), and also from person-specific cognitive shortcomings (which may not be correctable at any cost)."[90] In contrast, principal conflict costs arise from "investor self-seeking conduct."[91] For example, Professor Manuel Utset explains that shareholders may experience greater success in disciplining corporate managers if they cooperate, such as in a coalition.[92] But these coalitions have challenges with formation and continuance because of shareholder reluctance to share information with each other because of their competition in the marketplace; shareholder unwillingness to invest in information that is company specific due to fears of

83. *But see* Amelia Miazad, Investor Climate Alliances 11 (Feb. 23, 2024) (unpublished manuscript), https://ssrn.com/abstract=4580556 ("[B]y joining Climate Action 100+, investors gain stronger monitoring capabilities than they could achieve individually. Additionally, expanding the coalition with more investors theoretically enhances the benefits for each participant, as it reduces their monitoring burden and/or increases the amount of climate change information disclosed by companies." (footnote omitted)).

84. *See* Hansmann, *supra* note 18, at 278.

85. *Id.*

86. *Id.* at 279; *see also* Black, *supra* note 15, at 531 (discussing coordination challenges).

87. Hansmann, *supra* note 18, at 279.

88. Goshen & Squire, *supra* note 20, at 784.

89. *Id.*

90. *Id.* at 786; *id.* at 788 ("When principals exist as a group—as they do in a corporation with multiple shareholders—principal competence costs may be even higher. If investors exercise control rights jointly, then each will have to monitor the firm's operations and acquire the relevant expertise to make informed contributions to collective decisions. Such efforts are themselves competence costs, as their purpose is to avoid honest mistakes. Moreover, the efforts will largely be duplicative, as each investor will, with respect to any particular joint decision, seek to acquire the same expertise and information.").

91. *Id.* at 791, 795; *id.* at 804 ("Such costs would arise if the short-termers pressured management to run the firm in a way that temporarily boosted its stock prices but reduced its long-term value.").

92. *See* Utset, *supra* note 20, at 109–14.

defection by other coalition members; and the effects of managerial bargaining that can break down the coalition.[93]

C. Collective-Action Problems: Stakeholders

Collective-action problems also impede the ability of corporate stakeholders to monitor corporate management, thereby weakening the efficacy of the intermediate governance system—stakeholder governance. The foundation of this governance system is the relationships that a corporation maintains with multiple stakeholders, such as customers, employees, suppliers, and local communities—and shareholders.[94] The difference in stakeholder governance is the recognition that *all* of these stakeholders potentially possess resources that the corporation needs to survive: employees provide talent; customers provide revenue; suppliers provide raw materials and intermediate goods; and local communities provide (or withhold) the social license to operate.[95] All of these groups have interests and, likely, ideas on how the corporation should be run to serve those interests.[96]

However, collective-action problems impede the ability of stakeholders to monitor the decisions of corporate management on issues that may affect them.

First, there is the problem of the *rational apathy* of stakeholders: any given stakeholder must expend significant per capita costs to align management's actions with their interests, but they receive only a fraction of the benefits of such alignment.[97] For example, Corporation may decide to close the office at which Employee works in favor of opening a new one in another location. That decision may benefit Corporation overall but harm Employee. Employee may launch a successful campaign to keep the office open but would need to incur significant per capita costs to do so. The benefits of Corporation reversing its decision flow to Employee but also to all other employees at the office who may not have assisted Employee in challenging management's initial decision. Individual stakeholders may prove reluctant to take on the enormous costs of challenging this decision because of the scale and distribution of costs involved. What are these costs? The most immediate one is information: "[N]o one individual or entity may be able to finance the extensive information-gathering and analysis necessary to reduce significantly the information asymmetry between managers and stakeholders."[98]

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93. *Id.*; *see also* Miazad, *supra* note 83, at 13 (explaining the importance of communication for collaborative governance and that "[t]he concentration of capital and rise of financial intermediaries has made investor communication possible at scale").

94. *See* Parella, *supra* note 8, at 304–08.

95. *See id.*; *see also* Hillary Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 819 (2021).

96. *See* Parella, *supra* note 8, at 289–90.

97. *See* Black, *supra* note 15, at 527–28.

98. Hill & Jones, *supra* note 22, at 140.

Second, stakeholders confront the challenge of *coordination*: among a diffuse group of stakeholders, how do one or more organize collective action?[99] Some stakeholders create organizations that reduce the collective-action problems, such as labor unions, consumer groups, or climate-action groups.[100] For example, perhaps Employee is not alone in the fight and can count on the similar efforts of those who are in the same union. But the aggregate power of Employee's coworkers may be insufficient to change management's decisions. Instead, Employee would need to rely on the power of other stakeholders, such as investors. Consider a recent example highlighting the alliance between employees and investors as stakeholders of Starbucks. In 2023, Starbucks agreed to conduct a human rights impact assessment, including assessing its compliance with certain international labor-rights principles.[101] But this decision involved the efforts of at least two different stakeholder groups—Trillium Asset Management (investor) and Starbucks Workers United (representing baristas)—as well as the support of Glass Lewis and Institutional Shareholder Services (proxy advisors).[102] This example illustrates the importance of coordination not only *within* stakeholder groups, such as among employees, but also *across* stakeholder groups.

Third, stakeholders' efforts may be impeded by *conflict*.[103] It is not a given that all stakeholders share the same interests or goals.[104] For example, Employee may suffer harm if Corporation closes the office, but Corporation's decision benefits the prospective employees of the new office that will open. There is therefore a conflict within the same stakeholder group of employees. Similarly, the decision on closure may improve the financial performance of Corporation,

99. *See* Utset, *supra* note 20, at 106–07 (discussing shareholder-coalition issues such as need for leadership and effective communication among shareholders).

100. Professor Amelia Miazad has argued that "the portfolio-wide approach to addressing systemic risk provides strong incentives for investors to collaborate." Miazad, *supra* note 83, at 6; *see also* Hill & Jones, *supra* note 22, at 141–42; Jean-Pascal Gond & Valeria Piani, *Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative*, 52 BUS. & SOC'Y 64, 80 (2012) (discussing the issues that investors would need to coordinate in order to reach a common position on how to target companies on their human rights issues, such as "the number of corporations to target and to engage, the discursive framing of the human rights issues to be brought to the attention of managers, as well as the level of pressure to be brought to bear on corporations at various points in time").

101. Leslie Patton, *Starbucks Investors Vote in Favor of Worker-Rights Assessment*, BLOOMBERG L. (Mar. 29, 2023, 4:29 PM), https://news.bloomberglaw.com/esg/starbucks-investors-vote-in-favor-of-worker-rights-assessment [https://perma.cc/VK4K-596E].

102. *Id.*; Hilary Russ, *ISS Urges Starbucks Shareholders Back Review of Labor Policies*, REUTERS (Feb. 27, 2023, 3:30 PM), https://www.reuters.com/business/sustainable-business/iss-urges-starbucks-shareholders-back-review-labor-policies-2023-02-27/ [https://perma.cc/LQS3-XCJH] ("Proxy adviser Institutional Shareholder Services Inc (ISS) on Monday recommended that Starbucks shareholders back a proposal for an outside examination of the coffee chain's labor policies in light of its response to union organizing at hundreds of U.S. cafes.").

103. *See* Bridoux & Stoelhorst, *supra* note 24, at 223 (explaining that not all conflicts are destructive and "may arise from different interpretations of rules among stakeholders that are otherwise disposed to cooperate, because rules are always ambiguous to some degree" (citations omitted)).

104. *See* Hill & Jones, *supra* note 22, at 145.

thereby benefiting investors, or reduce the prices at which Corporation offers its goods and services in the market, thereby benefiting consumers. The result is that there is no easy answer on what it is that Corporation should do to protect stakeholder interests when those interests diverge. Stakeholders would need to expend costs to identify and reconcile their interests and, if not possible, to persuade others to join in efforts that may not benefit them directly.

Fourth, stakeholders may cope with *competence* limitations as they struggle to identify the best course of action that would protect their interests.[105] For example, a stakeholder may understand that a particular management decision is bad but may lack understanding on alternative choices or on how to persuade management to opt for the latter. Or the stakeholder could be wrong. They could lack the necessary information or expertise to understand the benefits that the decision brings to the stakeholder and the corporation.

D. International Law Enforcement & Stakeholder Collective-Action Problems

The stakeholder collective-action problems described above compromise the likelihood and effectiveness of stakeholder enforcement of international law.[106] To summarize: international law provides an abundance of norms that, if followed, mitigate the harms that a corporation poses to the planet and its population. The problem is that these international law norms are insufficiently integrated into the policies and practices of corporations to prevent the international law violation *ex ante* or to address such violations *ex post*.[107] Stakeholders—such as consumers, employees, suppliers, local communities, regulators, and investors—can incentivize corporate managers to align their decisions with international law.[108] But the problems that plagued shareholder monitoring also plague stakeholder efforts to monitor corporate compliance with international law.[109]

Consider a simple hypothetical: Connie Consumer suspects that her favored coffee brand, Corbin's Coffee, is sourcing coffee beans from suppliers who use forced labor in violation of the United Nations Guiding Principles on Business and Human Rights and other international law norms. Connie also suspects that Corbin's Coffee interferes with the ability of its baristas to organize, which violates the ILO Declaration on Fundamental Principles and Rights at Work.

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105. *See* Bridoux & Stoelhorst, *supra* note 24, at 227–28.

106. *See* Black, *supra* note 15, at 527–28; Utset, *supra* note 20, at 106–07; Bridoux & Stoelhorst, *supra* note 24, at 223, 227–28.

107. *See* Parella, *supra* note 8, at 283.

108. *See id.* at 323–29.

109. *See* Black, *supra* note 15, at 527–28; Utset, *supra* note 20, at 106–07; Bridoux & Stoelhorst, *supra* note 24, at 214, 223, 227–28.

While she suspects much, she knows little. Connie would need to expend a significant amount of resources to learn if her suspicions are true, including investigating Corbin's Coffee's suppliers in over six countries by interviewing workers, reviewing documents, analyzing financial statements, learning international guidelines on labor rights, and comparing practices with peer companies. Connie is not going to do any of that. Connie is rationally apathetic because her per capita costs of gathering information are very high. In contrast, her per capita benefits are less than her costs. Connie may obtain a great deal of satisfaction if she can successfully learn the truth, force Corbin's Coffee to admit it, and change their practices for the better. But the benefits of these corporate changes flow to the workers in the supply chain, baristas at Corbin's Coffee's stores, and other consumers who may share the same views as Connie. But Connie only receives a share of these benefits while she has incurred all of the costs.

Even if Connie is motivated to act, she confronts conflict, coordination, and competence costs. While Corbin's Coffee may violate international law norms, such violations may be the reason that it offers the coffee at a price lower than its competitors. This low price may be in the interests of other consumers who may object to efforts to raise the prices they pay for their cup of coffee. These conflicting preferences among consumers raise coordination challenges when Connie needs to rely on their efforts to force Corbin's Coffee to change its ways. Connie has limited leverage over Corbin's Coffee; her threat to discontinue purchases is hardly frightening when Corbin's Coffee sells to thousands of other consumers.[110] Connie may threaten to organize a consumer boycott, but conflicting preferences may render such a threat unlikely when some consumers may prefer lower prices no matter the reason for those prices. She may also need the leverage of other stakeholders, such as investors, who likely exercise greater influence over Corbin's Coffee. But these stakeholders may not share Connie's concerns and may instead prioritize the financial consequences of Corbin's Coffee's violations of international law, such as its financial performance. Finally, Connie may not know how to address the problem of international law violations. Specifically, she may be mistaken in her assessment of the violation or incompetent to pose an alternative strategy that the management of Corbin's Coffee can adopt. So, unfortunately, Connie may do nothing to change Corbin's Coffee's practices.

But these stakeholder problems are not insurmountable. Instead, stakeholders can lower the costs of subsequent stakeholder action and reduce

110. *See* Hill & Jones, *supra* note 22, at 149 ("Diffusion of stakeholder power makes co-ordination between individual stakeholders more problematic and costly, thereby reducing the ability of stakeholders to act collectively. In turn, this limits the effectiveness of voice and exit as enforcement mechanisms. It is more difficult for stakeholders to establish a credible threat when power is diffused among many individuals and collective action is difficult to achieve.").

the collective-action problems that they otherwise encounter.[111] International law enforcement by stakeholders comes in four distinct varieties: *predicative enforcement*, *facilitative enforcement*, *direct enforcement*, and *amplification*.[112]

Stakeholders engage in *predicative enforcement* by lowering the information costs of enforcement for another stakeholder. A classic type of predicative enforcement is performed by government actors through legislation and regulation.[113] For example, the California Transparency in Supply Chains Act requires that many companies publicly disclose their human rights due diligence practices on their websites.[114] Consumers like Connie can learn of the practices of companies like Corbin's Coffee without undertaking individual investigations and information-gathering.[115] Predicative enforcement lowers the per capita costs that Connie would otherwise confront and renders it that much more likely that Connie may act.[116] Similarly, organizations like Know the Chain and the Corporate Human Rights Benchmark collect, aggregate, and compare information about the human rights practices of many large companies.[117] Connie can reduce her per capita information-gathering costs by consulting the rankings and scorecards produced by these organizations.[118]

Facilitative enforcement is exhibited by restraint and occurs when a stakeholder avoids interfering with enforcement performed by other stakeholders. For example, a consumer-rights group may focus on ensuring that consumers receive the best quality and price for the goods and services they purchase.[119] Connie's campaign may threaten to raise prices and therefore provoke the consumer group into action. Their decision not to interfere with Connie's efforts plays an important role in ensuring the ultimate success of Connie's efforts.

Direct enforcement is performed by the stakeholder who engages directly with Corbin's Coffee. This is unlikely to be Connie, who lacks the resources to prove sufficiently important to management that they would listen to her concerns.[120] However, that reticence may change if Connie is able to coordinate with others by launching a social media campaign to boycott Corbin's Coffee with the popular hashtag #CrushCorbin'sCoffee.[121] But Connie may have greater

111. *See* Parella, *supra* note 8, at 327.

112. *See id.* at 323–29.

113. Hill & Jones, *supra* note 22, at 140.

114. CAL. CIV. CODE § 1714.43 (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

115. *See id.*

116. *See* Parella, *supra* note 8, at 323–26.

117. *2022–2023 Benchmark*, KNOW THE CHAIN, https://knowthechain.org/benchmark/ [https://perma.cc/CY6U-QPYF]; *2023 Corporate Human Rights Benchmark,* WORLD BENCHMARKING ALL. (Nov. 20, 2023), https://www.worldbenchmarkingalliance.org/ publication/chrb/ [https://perma.cc/78FW-EWX5].

118. *See id.*

119. *See* Parella, *supra* note 8, at 326–29.

120. *See id.* at 329.

121. *See id.* at 305.

success if she can convince shareholders of Corbin's Coffee to join her campaign and submit shareholder proposals demanding that Corbin's Coffee disclose information that Connie does not have and could not obtain at reasonably low cost.[122] Shareholders are empowered to submit proposals under Rule 14a-8, and many have used this mechanism to demand information on whether a company has a human rights policy, the effectiveness of such policies, and the state of implementation.[123] Should Connie find a shareholder ally, that ally can engage directly with Corbin's Coffee through the shareholder process or other interactions.

Finally, *amplification enforcement* describes stakeholder activism that magnifies the stakeholder activism of others. For example, a shareholder may reference Connie's social media boycott in its shareholder proposal to Corbin's Coffee, thereby amplifying the effects of Connie's activism.[124] Or a news media outlet may feature Connie's campaign, the stakeholder's campaign, or both in an effort to publicize their actions and the underlying concerns.[125]

All of these stakeholder enforcement strategies—predicative, facilitative, direct, and amplification—can assuage the rational apathy of stakeholders and reduce the conflict, coordination, and competence costs they confront if they wish to act collectively.[126] Predicative enforcement lowers the information costs that any one stakeholder needs to expend to identify and verify international law violations. Amplified enforcement reduces coordination costs by broadly publicizing the violations and the efforts to stop them. And one or more of these efforts can socialize stakeholders to prioritize certain norms and values that can align their interests and reduce the risk of conflicting preferences. In all of these ways, stakeholders create the conditions for subsequent stakeholder enforcement by others.

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122. *See id.* at 329–32.

123. *See* HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2023, at 56, 59, 63, 75, 82–86 (2023), https://www.proxypreview.org/2023/report [https://perma.cc/K7G7-UG5G] (listing shareholder proposals submitted to Walmart, Alphabet, Wells Fargo, and Coca-Cola, among others, that request information ranging from policy disclosures to reports on human rights policy implementation and risk assessments).

124. *See* Patrick Coffee, *Brands Face Growing Pressure from Activist Shareholders over LGBTQ Marketing,* WALL ST. J. (May 9, 2024, 6:00 AM), https://www.wsj.com/articles/brands-face-growing-pressure-from-activist-shareholders-over-lgbtq-marketing-ea789aa1 [https://perma.cc/NR9L-CHAX]; BLACKROCK, OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS 2 (2021), https://www.wlrk.com/docs/blk-commentary-engagement-on-human-rights.pdf [https://perma.cc/GZ44-ZVSM].

125. *See, e.g.*, Emily Flitter, *Ruger Shareholders Vote for a Study of Gunmaker's Impact on Human Rights*, N.Y. TIMES (June 1, 2022), https://www.nytimes.com/2022/06/01/business/ruger-shareholders-vote.html [https://perma.cc/WA2A-VKZR].

126. *See* Parella, *supra* note 8, at 323–29.

II. BUT IS IT "ENFORCEMENT"?

Upon being presented with the reality of stakeholder mechanisms in Part I, a critic may respond that each is individually interesting but they collectively fail to qualify as enforcement. This Part argues that these stakeholder mechanisms qualify as enforcement because they perform comparable institutional functions as more familiar international law enforcement mechanisms, such as the International Court of Justice, or institutional arrangements created by international agreements. All three of these mechanisms—courts, treaties, and stakeholders—reduce the information costs associated with decentralized enforcement while increasing its benefits. Section II.A explains the information functions of enforcement strategies while Sections II.B–II.D explain how courts, treaty processes, and stakeholder mechanisms increase benefits while lowering costs of enforcement.

A. The Information Functions of Courts, Governments, and Markets

In many communities—whether small and close-knit or global and anonymous—violations of law are punished by the many instead of the few.[127] The punishment that the collective may impose varies from "criticism, social ostracism, commercial boycott, reputational degradation, and physical retaliation."[128] One may wonder why communities prefer this form of decentralized enforcement—practiced by the collective—as opposed to centralized enforcement, imposed by a court or king or elected assembly.

Sometimes it is not much of a choice. It is no coincidence that much of the scholarship on decentralized enforcement focuses on contexts characterized by the absence of highly developed courts and state authorities.[129] On other occasions, however, individuals and communities choose to "opt out" of the legal system even when one is available.[130] This diversity of situations suggests that decentralized enforcement is not limited to ancient Athens,[131] medieval guilds,[132] or eleventh-century traders.[133] Instead, the need for it arises in many

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127. *See* Hadfield & Weingast, *What Is Law?*, *supra* note 14, at 472.

128. Hadfield & Weingast, *Law Without the State*, *supra* note 14, at 5.

129. *See, e.g.*, Lisa Bernstein, *Contract Governance in Small-World Networks: The Case of the Maghribi Traders*, 113 NW. U. L. REV. 1009 (2019).

130. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992).

131. *See* Frederica Carugati, Gillian K. Hadfield & Barry Weingast, *Building Legal Order in Ancient Athens*, 7 J. LEGAL ANALYSIS 291, 308 (2015).

132. *See* Avner Greif, Paul Milgrom & Barry Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 19 (1990).

133. *See* Bernstein, *supra* note 129, at 1022–23; Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 526 (1993).

contexts, including the twenty-first-century international legal order that shares many of the characteristics of these pre-modern communities. The chief characteristic of the twenty-first-century international legal order is that it also lacks a centralized enforcement mechanism that enforces the decrees of the world's courts or assemblies.[134] It too is dependent upon decentralized enforcement.[135]

But decentralized enforcement has its own problems.[136] Chief among these challenges is incentives: decentralized enforcement relies on the choices of individual actors to contribute to the enforcement effort.[137] As with most things, these incentives are shaped by calculations of costs and benefits of such action. The costs are considerable. In order to sanction someone (or something), an individual or organization needs to answer a few questions[138]: Who should I sanction? What norm did they violate? Do I agree that violation of that norm is wrongful? What authority or source said that they violated the norm? Is that source correct? These are all costs that relate to the challenge of detecting, obtaining, analyzing, and verifying information before one actor can sanction another.[139] When these costs are high, individuals may choose not to participate.[140] By relying on the aggregate effect of dozens, hundreds, or thousands of individuals, decentralized enforcement only works if each of them believes that it is in their interest to sanction a norm's violators.

But costs are only half of an individual's ledger. Individuals may still choose to sanction—despite the information costs involved—if such sanctioning brings benefits to them. These benefits include satisfying individual preference for a world in which the transgressed norm does not suffer similar violations in the future.[141] For benefits to accrue, there must be some convergence between individual and collective judgments of wrongdoing[142] and some assurance that,

134. *See* Kenneth W. Abbott & Duncan Snidal, *Taking Responsive Regulation Transnational: Strategies for International Organizations*, 7 REGUL. & GOVERNANCE 95, 97 (2013) (arguing that transnational responsive regulation is developing on a decentralized level).

135. *See id.*

136. *See* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 15 (1998) ("Decentralized procedures do not address the problems of transaction costs and opportunism.").

137. *See id.*

138. ROY SHAPIRA, LAW AND REPUTATION: HOW THE LEGAL SYSTEM SHAPES BEHAVIOR BY PRODUCING INFORMATION 22 (2020) ("The fact that bad news broke—that an allegation of corporate misconduct became public—is a necessary, but not a sufficient, condition for meaningful reputational damage to occur. Several additional conditions have to hold: *diffusion*, *certification*, and *attribution*.").

139. *See* Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 BYU L. REV. 497, 511 (2018) ("The effectiveness of reputation and the mechanism by which it operates depend largely on two dimensions of information costs: the cost of producing credible and relevant information about traders, and the cost of transmitting that information to prospective counterparties.").

140. *See, e.g.*, Hadfield & Weingast, *What Is Law?*, *supra* note 14, at 474 ("The challenge of sustaining decentralized collective punishment is the challenge of coordinating individual decisions to participate in delivering costly penalties to those who engage in wrongful conduct.").

141. *See* Hadfield & Weingast, *Law Without the State*, *supra* note 14, at 9.

142. *See id.* at 8–10.

if one punishes, so too will others.[143] This belief also relies on information about the expected behavior of others that would allow the individual to predict the future benefits of punishing someone now.

It is this information function that unites the operations of courts, governments, and markets in situations dependent upon decentralized enforcement. Each of these is an institution that *increases the benefits* of decentralized enforcement or, conversely, *lowers the information costs* associated with it. Each can increase the benefits of decentralized enforcement by converting a community loss into a personal loss; individuals come to view the violation of a community norm as implicating their individual interests because the preservation of these norms is valuable to them.[144] This may not have always been true. When the norm emerged, there may have been a significant gap between individual preferences and the norm's content. But courts, governments, and stakeholder mechanisms can socialize individuals into valuing a particular norm, thereby convincing them to contribute to its preservation. Each of these three can also lower information costs associated with decentralized enforcement by forcing, collecting, aggregating, analyzing, evaluating, and publicizing information that individuals need to punish violations of a community or international rule.

The power of these institutions does not lie in their ability to punish such violations; transgressors are not dissuaded from future violations because of fear of what a court or government may do. Instead, these institutions provide information to one or more third parties who punish the transgressor. *These third parties supply the penalty for violating the norm; the courts, government processes, and stakeholder enforcement mechanisms simply share the information that enables these third parties to impose the sanction.* All of these institutions lower the information costs associated with sanctioning someone's violation of a norm, and, by lowering these costs, third parties can punish violations by threatening to withhold future transactions or respond in kind. It is their threat that can deter a would-be transgressor from violating the norm in the first place.

We can therefore expect that individuals will engage in decentralized enforcement when the information costs of enforcement are lower than the benefits that are expected to follow from such enforcement.[145] Information and enforcement go hand in hand.[146] When the former is absent (or costly), the latter is also likely absent.[147] Information is needed for decentralized

143. MCADAMS, *supra* note 14, at 61 ("[E]veryone comes to expect that everyone else (or enough to make it matter) will obey the executive's decree, the judge's order, or the legislature's mandate, including directives to sanction individuals for violating law. The legal actors have the power, by expression, to create self-fulfilling expectations that their demanded behavior will occur.").

144. *See* Cass. R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030 (1996).

145. *See id.* at 2030–31.

146. *See id.* at 2031–32.

147. *See id.*

enforcement, but its procurement should not be more costly than the expected benefits from enforcement.[148] Otherwise, the individual, country, or corporation that violates the relevant community's norms will go unpunished and undeterred, creating the risk that it—and those watching its conduct—will violate similar norms in the future.[149] The value of courts, governments, and stakeholders is that they can supply information at low cost to you, me, and others so that we feel confident in punishing those who violate our norms.[150] These institutions also socialize us to value certain norms so that their violation offends us, thereby motivating us to act when we may not otherwise.[151]

B. *International Adjudicative Processes: International & Domestic Courts*

Courts—whether domestic, regional, or international—can play important roles in the coordination of decentralized enforcement by either increasing the benefits of individual sanctioning activity or lowering the costs associated with it. This Section explains how adjudicative processes can lower information costs by rendering it easier to learn of wrongdoing by forcing information into the public or incentivizing its revelation; analyzing and presenting information that allows for attribution of blame; facilitating the transmission of information from the courts to the public; and creating spillover effects that incentivize third parties to punish violations. Courts also increase the benefits of enforcing international law by socializing a broad base of actors to value one or more international norms and to view its infraction as a problem in need of response.

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148. *See id.* at 2030.

149. *See id.* at 2032–33.

150. *See id.*

151. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312–13 (2012) ("Expressive theories posit that law, like other forms of expression, manifests states of mind, including beliefs, attitudes, and intentions. Law, therefore, has 'social meaning.' Such meaning derives not from the intent of the person making or enforcing the law, but rather from the ways in which relevant communities understand and interpret the law in light of existing social norms." (footnotes omitted)).

INSTITUTIONAL FUNCTION	ADJUDICATIVE PROCESS
Increases the benefits of decentralized enforcement	• Expressive effects • Spillover effects
Lowers detection costs	• Discovery
Lowers transmission costs	• "Information subsidies" to media
Lowers verification costs	• Court expertise • Penalties for fraudulent information

1. *Increase the Benefits of Enforcement*

Courts improve the private benefits of enforcement by socializing individuals and communities to value a particular norm and commit to its protection.[152] According to legal scholars, a court's expressive function can serve two purposes: *instrumental* and *intrinsic*.[153] The instrumental purpose aims to change social norms within a community about the desirability of certain conduct, values, or beliefs.[154] The second is less about changing social norms and more about making statements that are valuable in themselves.[155]

Both prosecutions and litigation can serve an instrumental function by changing prevalent norms with a community. For example, Professor Vijay M. Padmanabhan justifies the prosecution of terrorists on the basis of "norm internalization" within the community of defendants: "[T]rials of terrorists for violations of international law can strengthen the acceptance of the international legal prohibition on terrorism in communities where that norm is not well rooted[] . . . by inculcating within society a sense that these violations are morally unacceptable."[156] Professor Padmanabhan argues that trials are particularly effective at norm internalization when three conditions are satisfied: (a) "clear international criminal prohibition on the conduct in question and the cost of continued violations of the norm is high"; (b) "the prohibition in question is not deeply rooted in the personal or social morality of the community, creating a risk that this community will violate the norm"; and (c)

152. *Id.*

153. *See* Sunstein, *supra* note 144, at 2025–26; deGuzman, *supra* note 151, at 313 ("An expressivist's normative agenda therefore includes both crafting law to express valued social messages and employing law as a mechanism for altering social norms.").

154. *See* Sunstein, *supra* note 144, at 2026 ("Here there is a prediction about the facts: an appropriately framed law may influence social norms and push them in the right direction.").

155. *Id.* ("But sometimes people support a law, not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant 'statement' to be made. And sometimes law will have little or no effect on social norms." (footnote omitted)).

156. Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 430 (2009).

"there exists a population of potential defendants whose trials might produce narratives sufficient to deepen social commitment to the norm in question."[157]

Similarly, other scholars have recognized the importance of human rights litigation for providing a factual record of past atrocities so that present narratives can be challenged. In examining lawsuits filed by victims of World War II human rights abuses in Japanese courts, Professor Tim Webster argues that courts fulfill an important role of judicial narration of facts that may remain contested within societies:

> A court's depiction of historical events—indeed even calling them *facts*—may be particularly valuable in societies where denial of those very facts is prevalent. Judicial opinions, official records penned by neutral arbiters, lend weight to certain reconstructions of the past. . . . [T]he court's characterization of the harm visited upon the plaintiff . . . matters for the rule of law, the restoration of dignity, and the repair of relations between victim and perpetrator.[158]

International criminal prosecutions can serve important intrinsic expressive functions even when their capacity to serve other objectives—deterrence, retribution, rehabilitation—is in doubt.[159] Professor Meg deGuzman argues that the International Criminal Court (ICC) should select cases based on an expressive agenda to promote global norms in order to "stimulate a dialogic process through which norms are expressed, feedback is received, and, ideally, consensus builds over time."[160] The expressive objective is not privileged because of its relative importance over other objectives but as a response to the harsh reality of a resource-constrained institution that can only prosecute a few cases.[161] The reality of a limited case load means that few will be prosecuted and few deterred, thereby humbling both retributivist and deterrent aspirations.[162] But Professor deGuzman argues that ICC prosecutors can calibrate limited case prosecution for maximum effect by "effectively promot[ing] important moral norms with a small number of illustrative prosecutions."[163] Professor Mark

157. *Id.* at 431–32.

158. Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 58 VA. J. INT'L L. 161, 167 (2018); *see also id.* at 186–88 (describing political denials of Japanese government involvement in the perpetuation of forced labor and the human trafficking of women for the purpose of sexual exploitation).

159. deGuzman, *supra* note 151, at 301–12; *see also* Padmanabhan, *supra* note 156, at 427–28.

160. deGuzman, *supra* note 151, at 270.

161. *See* deGuzman, *supra* note 151, at 315 ("The ICC can inflict retribution on but a handful of perpetrators, and can provide only a minor disincentive to prospective criminals."); Padmanabhan, *supra* note 156, at 445 ("International war crimes trials have failed to consistently prosecute the most important defendants for the most important crimes, which include the possibility of imposing the most important sentences.").

162. *See* deGuzman, *supra* note 151, at 301 ("[I]n light of its resource constraints, the ICC is simply unable to make significant contributions to the other goals in most situations, whereas its stature as a global organization renders it particularly effective at global norm promulgation."); *see also* Padmanabhan, *supra* note 156, at 435 ("[M]ost free societies lack the resources or will to be able to adequately monitor individual behavior to ensure that all or even most transgressions are punished.").

163. deGuzman, *supra* note 151, at 315.

Drumbl explains that adjudication is well-suited for such purposes because "[t]rials can educate the public through the spectacle of theater."[164] Professor Drumbl writes:

> Adversarial legal process conveys considerable performativity, which is made all the more weighty by the reality that coincident with the closing act of the reading of the verdict comes the imposition on the antagonists of shame, sanction, and stigma through the issuance of sentence[,] . . . thereby serv[ing] a broader didactic purpose that meets the interests of history and memory.[165]

2. Decrease Information Costs of Enforcement

Courts are special when it comes to lowering the costs of information detection, attribution, and dissemination. First, they lower the costs of detecting violations because of their unique information-forcing powers that stem from their ability to compel parties to share information that they may prefer to keep hidden.[166] They also incentivize detection: litigation systems—by offering the prospects of damages awards and other remedies, plus lawyer's fees—motivate one or more individuals to seek the truth.[167] Second, courts can make it easier to identify wrongdoers and attribute blame. Professor Roy Shapira explains that courts convert otherwise complex factual and legal disputes into organized and accessible narratives that enable society to distinguish wrongdoers.[168] Third, courts lower information-transmission costs so that the public does not have to expend as many resources to learn what the court knows. Professor Shapira explains that legal filings and judicial opinions can serve as "information subsidies" to media sources that lower the costs of covering the story, thereby making it more likely that they will do so and that the public will learn of it.[169]

By decreasing these information costs, courts equip third-party individuals and organizations to punish wrongdoers, independent of any penalty that the court may impose. In the sovereign-debt context, Professor Sadie Blanchard explores the puzzling behavior of those who choose to use courts despite well-

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164. Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1195 (2007).

165. *Id.*; *see also* Padmanabhan, *supra* note 156, at 455 ("Successful norm internalization depends on sufficiently spectacular trials that dramatize the effect of international law violations, followed by serious punishment stigmatizing the atrocities.").

166. *See, e.g.*, Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020) ("By forcing parties to disclose large amounts of information, the discovery system deters harmful behavior, structures the regularized production of information within corporations, and, most importantly, shapes the primary behavior of regulated entities.").

167. *Id.* at 96–97.

168. SHAPIRA, *supra* note 138, at 40.

169. *Id.* at 41; *see also* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 487 (2004) ("Public interest litigators and organizations have come to view litigation as a vehicle for attracting the media. . . . Often, litigation attracts the media's attention in a way that nothing else does." (footnote omitted)); *see also* MCADAMS, *supra* note 14, at 194 (explaining that media sources are more likely to cover a press release if a lawsuit has been filed because lawsuits are more costly than regular press releases).

recognized shortcomings of the same, such as "their inability to provide adequate remedies, their tendency to apply disfavored rules and interpretive methods, their lack of commercial expertise, and their costliness."[170] Professor Blanchard explains that participants choose to litigate because courts possess "the power to provoke reactions by third parties that are costly for the debtor or its agents[,]"[171] and "revealing such information through the courts strengthens a creditor's leverage in settlement negotiations."[172] Courts produce spillover effects in which the adjudicative process reveals information that damages the image and reputation of the defendant in the eyes of those not before the court.[173] Professor Blanchard explains that in adjudicating a failure for a state to repay, courts may also reveal that state's propensity for another problem—corruption.[174] This revelation not only jeopardizes that state's ability to participate in sovereign-debt markets but may also have political, economic, and social consequences for its relationship with other states.[175] For example, "[a] holdout against the Republic of Congo leveraged discovery of corruption by the country's autocratic president, his family, and other top officials to obtain a settlement of its debt claim."[176]

The light that courts shine can also motivate states, corporations, and individuals to clean up their act before their private actions are made public. Professor Diego Zambrano argues that discovery creates significant positive spillover effects when the prospect of discovery incentivizes regulated entities to improve their practices, lest they suffer embarrassment (or additional regulatory scrutiny) from what discovery may reveal to the public.[177] This fear of exposure to third parties—such as consumers, investors, and regulators—can motivate corporate actors to improve internal policies and management

170. Blanchard, *supra* note 139, at 501.

171. *Id.* at 503.

172. *Id.*

173. *Id.* at 516 ("For the governments that make decisions about whether to repay creditors, spillover effects threaten three key fields beyond the sovereign debt market: foreign direct investment and international trade, international relations, and domestic politics."); *id.* at 554 ("The ability of courts to provide information relevant to actors in multiple social fields in which market participants operate increases their effectiveness as reputation intermediaries. So does the ability of courts to produce information that is central to the concerns of third parties, with the power to sanction or refuse to deal with a breaching party, where those third parties are not particularly concerned about the breach that forms the core of the dispute.").

174. *Id.* at 538–43.

175. *Id.* at 538 ("Third parties who have the power to sanction public officials might do so for reasons apart from the officials' decisions to breach duties owed to creditors. Creditors have pursued this strategy by using sovereign debt litigation to reveal corrupt activities by debtor state governments. . . . Corruption revelations might hurt a country's bond market position with sovereign bond investors, who look at both economic fundamentals and political risk.").

176. *Id.* at 539.

177. Zambrano, *supra* note 166, at 120–24.

systems so that they appear more presentable when discovery shines a light on otherwise-private corporate practices.[178]

C. Intergovernmental Political Processes: International Agreements

International agreements—entered into by state actors—also facilitate the decentralized enforcement of international law. Specifically, these agreements can lower detection costs through mandated self-reporting, regime data collection, and NGO monitoring; lower transmission costs through data exchanges and NGO data collection; and lower verification costs through on-site inspections and NGO verification.[179] International agreements also increase the incentives for states to engage in decentralized enforcement because of the benefits they offer. These agreements enable coordinated conduct between states that offer each other a range of benefits, such as economic or security cooperation. A state that violates these agreements may endanger the effectiveness of these agreements for those that did not transgress its rules. Therefore, it may be in the interests of the rule followers to punish the rule breakers to preserve the rules that the international agreements establish.

INSTITUTIONAL FUNCTION	**ADJUDICATIVE PROCESS**	**GOVERNMENT PROCESS**
Increases the benefits of decentralized enforcement	• Expressive effects • Spillover effects	• Coordination
Lowers detection costs	• Discovery	• Self-reporting • Regime data collection • NGO monitoring
Lowers transmission costs	• "Information subsidies" to media	• Data exchanges • NGO data collection
Lowers verification costs	• Court expertise • Penalties for fraudulent information	• On-site inspections • NGO verification

178. *Id.* Hillary Sale has identified a comparable phenomenon in mandatory disclosure, as opposed to discovery, when regulated entities improve practices that they know they will need to disclose. Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1050 (2019) ("Categories of required disclosures mean that an issuer with nothing to report in a particular category will stand out relative to its peers. To avoid that outcome, issuers implement systems to produce disclosures like those of their peers. Thus, the required disclosure of information results in substantive corporate decision[-]making and action by directors and management.").

179. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1886 (2002).

1. *Increase the Benefits of Enforcement*

Reputation has been identified as "the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation."[180] As Professor Andrew Guzman explains, "[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative[,]"[181] which permits "the state to enjoy long-term relationships with other cooperative states, provides a greater ability to make binding promises, and reduces the perceived need for monitoring and verification."[182] This hints at the important function that international law compliance offers to a state's interests, explaining why they make and keep international commitments: "A state's ability to signal its commitment more credibly through an international agreement, whether a treaty or other form of promise, increases welfare because it allows that state to enter into a broader range of potential agreements."[183]

But a country's willingness to enter into an agreement with another—and to keep those commitments—depends on whether its treaty partner(s) will do the same.[184] Many international issues present mixed-motive dilemmas where the parties are better off when they cooperate but there are strong incentives to defect.[185] This is certainly true in policy areas where states want to retain maximum sovereignty, such as national defense, economic policy, and climate change.[186] A state's willingness to restrict its sovereignty is dependent upon its

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180. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S95, S99 (2002) ("Because a defection in connection with any agreement will impose reputation costs that affect all current and future agreements, states are motivated to comply with their commitments even in circumstances where they would otherwise defect.").

181. *See* Guzman, *supra* note 179, at 1849.

182. *Id.* at 1849–50 ("On the other hand, failure to live up to one's commitments harms one's reputation and makes future commitments less credible. As a result, potential partners are less willing to offer concessions in exchange for a promised course of action." (footnote omitted)).

183. *Id.* at 1855.

184. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 150 (1995) ("Since widespread compliance is necessary to achieve the desired benefits, the likelihood that any party will comply is affected by the likelihood that others will comply."); *see* Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 114 (1998) ("Systems to promote negative responses such as sanctioning of noncompliant states or nonstate actors face extremely demanding informational requirements. If sanctions are likely, those engaged in undesirable behavior will have few incentives to supply accurate information themselves and strong incentives to prevent others from supplying such information. . . . The regime's rules will need to distinguish clearly between desirable and undesirable behavior, that is, between compliance or noncompliance, and information must be such that it allows such classification in the case at hand. Information collected must then be verified to minimize false accusations.").

185. Kenneth W. Abbott, *Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 3–4 (1993) ("In mixed-motive situations like these, information regarding the structure of the interaction, the incentives perceived by other states, and the compliance of others with their obligations will be crucial to international cooperation. Information on compliance is particularly important, both for itself and for the light it can shed on other issues. States will be reluctant to enter into agreements without clearly defined mechanisms for the ongoing production of reasonably timely and reliable information on these matters.").

186. *Id.* at 8, 18–20.

expectations of what cooperation will bring, which is itself dependent on whether its treaty partners comply with the agreement's terms.

But international agreements do not only produce information for the benefit of those parties who may assess whether it is still in their interest to keep participating. Instead, international law also produces information that is consumed by nonparties. In the global financial context, Professor Chris Brummer explains how soft law shapes the preferences of third parties: "International financial law can help shape the perceptions of investors, lenders and other relevant market participants as to the value of any particular kind of conduct. . . . [S]oft law can create conventions where none exist by creating expectations by market participants as to how others will or should act, and in the process help nudge investor preferences."[187]

2. *Decrease the Information Costs of Enforcement*

Information is vital for international cooperation. International agreements induce states to join *ex ante* by including information-sharing provisions that empower states to learn of each other's compliance.[188] These provisions reduce the risk that a state that joins the agreement may restrict its sovereignty when no one else does.[189] *Ex post*, these provisions discourage states from defecting because their noncompliance will be known.[190]

As explained by Professors Abram Chayes and Antonia Handler Chayes,

> A party disposed to comply needs reassurance. A party contemplating violation needs to be deterred. Transparency supplies both. The probability that conduct departing from treaty requirements will be discovered operates to reassure the first and to deter the second, and that probability increases with the transparency of the treaty regime.[191]

This is the reason that many international agreements contain information-sharing provisions that reveal how well or poorly a state is complying with the agreement's provisions.[192] They argue that "[r]eporting thus can be a kind of

187. Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 287 (2011) (footnote omitted).

188. *Id.* at 270.

189. CHAYES & CHAYES, *supra* note 184, at 150–51 (explaining that transparency encourages treaty compliance by facilitating coordination among actors; providing reassurance to a state that it is not the only one complying when others are not; and deterring states that may consider noncompliance); Abbott, *supra* note 185, at 15, 28–29; Mitchell, *supra* note 184, at 111 ("[T]ransparency facilitates coordinated action by regime supporters, reassures those concerned about being 'suckered' for complying, and provides the informational basis for treaty revision." (citation omitted)).

190. Abbott, *supra* note 185, at 15–17.

191. CHAYES & CHAYES, *supra* note 184, at 151.

192. *See, e.g.*, Xinyuan Dai, *Information Systems in Treaty Regimes*, 54 WORLD POL. 405, 412–17 (2002) (explaining that the extent of centralization of treaty information systems depends on two factors: (a) interest alignment between victims of noncompliance and states, and (b) availability of noncompliance victims as low-cost monitors); Abbott, *supra* note 185, at 28 (explaining that international agreements are more likely to

early warning system for substantive compliance problems"[193] because "[i]t identifies parties that have deficits in domestic capability and similar barriers to compliance"[194] and "turns up problems of ambiguity and interpretation."[195]

It is therefore not surprising that we witness many mandated information-sharing provisions in international agreements on issues where state sovereignty is particularly important, such as climate change and arms control. For example, transparency provisions are a key component of the Paris Climate Agreement because a state's willingness to restrict its own greenhouse-gas emissions will depend on the similar efforts of others.[196] Under the agreement, "[c]ountries must report their greenhouse gas inventories and progress towards their emissions reduction targets every two years[,]"[197] and "[t]hese national level reports will be subject to an independent 'technical expert review[,]'"[198] and "[c]ountries will then be subject to a 'multilateral examination' to consider progress toward their targets."[199]

Similarly, international legal scholars have highlighted the ways that information-sharing provisions are particularly prevalent in arms-control treaties.[200] In the New START Treaty, for example, Russia and the United States agreed to verifiable limits on strategic offensive arms, such as intercontinental ballistic missiles.[201] Unsurprisingly, the agreement provides for a variety of verification methods, including eighteen on-site inspections annually in both countries; biannual data exchanges in which "[e]ach country provides the other with a declaration of its deployed strategic delivery vehicles, launchers and warheads"; telemetric information; and strategic-delivery-vehicle and launcher notifications, among others.[202] The two countries also agreed to exchanging information on new missiles, basing locations of treaty-accountable missiles, and notifying strategic exercises in advance.[203]

In 2023, Russia stopped complying with its treaty obligations under the New START Treaty by refusing to allow inspections, denying U.S. requests to

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contain explicit verification methods when these methods will require special authorization or third-party monitoring or necessitate strict limits on permissible information gathering). *But see* Brummer, *supra* note 187, at 290 ("[T]he surveillance of compliance with international regulatory agreements is in many ways haphazard. Full scrutiny by international financial institutions is available for a relatively finite range of instruments.").

193. CHAYES & CHAYES, *supra* note 184, at 155.

194. *Id.*

195. *Id.*

196. *See* NAT'L RES. DEF. COUNCIL, THE PARIS AGREEMENT ON CLIMATE CHANGE 3 (2015), https://www.nrdc.org/sites/default/files/paris-climate-agreement-IB.pdf [https://perma.cc/PN3C-UNY4].

197. *Id.*

198. *Id.*

199. *Id.*

200. Abbott, *supra* note 185, at 30–53.

201. *New START Treaty*, U.S. DEP'T OF STATE, https://www.state.gov/new-start [https://perma.cc/SR7Y-BHPZ].

202. *Id.*

203. *Id.*

meet in the treaty's consultative body, and refusing to provide treaty-mandated notifications.[204] According to the U.S. Department of State, the U.S. responded with appropriate countermeasures, including withholding information data and notifications and "refraining from facilitating Russian inspections on U.S. territory."[205] Russia's noncompliance with the New START Treaty has implications for the future of international agreements between the two countries concerning arms control: in a joint statement, the chairmen of the Senate Foreign Relations Committee, Senate Armed Services Committee, and Senate Select Committee on Intelligence stated that while "[w]e have long supported strategic arms control with Russia[,] . . . compliance with New START treaty obligations will be critical to Senate consideration of any future strategic arms control treaty with Moscow."[206]

Finally, information sharing is also facilitated by the contributions of NGOs that monitor state compliance with international agreements.[207] According to Professors Chayes and Chayes, NGOs assist information sharing because they can offer "independent sources of information and data that can be used by the regime."[208] NGOs are also valuable because they can "help to check and verify party reporting"[209] and "provide the basic evaluation and assessment of party performance."[210] Finally, NGOs offer their own incentives for state compliance by threatening (or engaging in) public campaigns against states that do not abide by the agreement.[211] As Professor Xinyuan Dai explains, the International Whaling Commission relies on "the voluntary effort of wildlife groups to check and report on the comings and goings of whaling vessels."[212] In another example, Professor Dai identifies how women's-rights groups provide feedback to the Committee on the Elimination of Discrimination against Women, which is tasked with monitoring state compliance with the agreement.[213]

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204. Office of the Spokesperson, *Russian Noncompliance with and Invalid Suspension of the New START Treaty*, U.S. DEP'T OF STATE (June 1, 2023), https://www.state.gov/russian-noncompliance-with-and-invalid-suspension-of-the-new-start-treaty [https://perma.cc/37QK-EV7T]; *New START Treaty Aggregate Numbers of Strategic Offensive Arms*, U.S. DEP'T OF STATE (May 12, 2023), https://www.state.gov/new-start-treaty-aggregate-numbers-of-strategic-offensive-arms-5 [https://perma.cc/H9HC-2CZW].

205. *Russian Noncompliance with and Invalid Suspension of the New START Treaty*, *supra* note 204.

206. *Menendez, Reed, Warner Statement on Russia's Failure to Comply with New Strategic Arms Reduction Treaty*, U.S. SENATE COMM. ON FOREIGN RELS. (Jan. 31, 2023), https://www.foreign.senate.gov/press/dem/release/menendez-reed-warner-statement-on-russias-failure-to-comply-with-new-strategic-arms-reduction-treaty [https://perma.cc/U6LY-44HH].

207. CHAYES & CHAYES, *supra* note 184, at 164.

208. *Id.* at 251.

209. *Id.*

210. *Id.*

211. *Id.*

212. Xinyuan Dai, *Orchestrating Monitoring: The Optimal Adaptation of International Organizations, in* INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS 142 (Kenneth W. Abbott, Philipp Genschel, Duncan Snidal & Bernhard Zangl eds., 2015).

213. *Id.*

D. *International Market Processes: Stakeholder Mechanisms*

Market processes through stakeholder mechanisms can increase the benefits of enforcement for other stakeholders and decrease their associated costs. It increases the benefits by offering economies of scale for enforcement: international law transforms corporate infractions into violations of universal norms. Predicative and amplification stakeholder enforcement lower the detection, transmission, and verification costs of enforcement, while the expressive effects of stakeholder enforcement can reduce overall coordination and conflict costs among stakeholders.

INSTITUTIONAL FUNCTION	ADJUDICATIVE PROCESS	GOVERNMENT PROCESS	GOVERNMENT PROCESS
Increases the benefits of decentralized enforcement	• Expressive effects • Spillover effects	• Coordination	• Economies of scale
Lowers detection costs	• Discovery	• Self-reporting • Regime data collection • NGO monitoring	• NGO reports • Disclosure laws • Rankings
Lowers transmission costs	• "Information subsidies" to media	• Data exchanges • NGO data collection	• Media
Lowers verification costs	• Court expertise • Penalties for fraudulent information	• On-site inspections • NGO verification	• Mandated disclosures

1. *Increase the Benefits of Enforcement*

An important benefit of stakeholder enforcement is that it converts otherwise company-specific information gathering into generalizable knowledge that stakeholders can use in their engagements with other corporations. As discussed in Section I.D, stakeholder enforcement of international law depends on the relative costs and benefits of such enforcement. Imagine that an investor plans to engage a specific corporation, such as Tesla, on its human rights due diligence practices in its supply chain. That investor would need to expend significant resources to learn and understand both the legal and social norms that govern corporate human rights due diligence practices; collect information on Tesla's current practices; and formulate recommendations on what it wants Tesla to do differently. As

discussed below, sequential stakeholder enforcement may reduce these costs that the investor would otherwise incur.

However, even a reduction of costs does not eliminate them. An investor incurs some level of cost to engage Tesla. Those costs are justified if the investor expects to prevail so that expected benefits exceed costs, but such engagements could prove an uphill battle. Tesla may not change. These costs are justified if the gains from engagement change the human rights due diligence practices of *other companies* that want to avoid similar engagements with the investor. This is why it is important that a corporation—in engaging in harmful conduct—violated a norm of *international law*. The international law nature of these practices provides a generalizable standard that is not unique to Tesla but also applies to Apple, Nike, and others. The payoffs change for the investor when they—or other stakeholders—can expect peer corporations to change in response to the investor's engagement with Tesla.[214]

These spillover payoffs change the willingness of the investor or other stakeholders to enforce international law. The investor may initially prove reluctant to invest the time and resources to enforce international law norms on Tesla because the investor does not expect to win. That calculation of costs and benefits changes if the investor anticipates spillover effects on Apple, Nike, and others that may reform to avoid similar scrutiny. The benefits of stakeholder enforcement are not limited to Tesla; changes by peer companies compensate for failures with Tesla, thereby motivating the same investor to enforce international law against Tesla even when they are not assured of a victory.[215]

International law also offers economies of scale for investors—and other stakeholders—who want to engage companies on their environmental and social practices. By offering a global standard, international law allows an investor to use much of the same information from its engagement with Tesla in its engagement with other companies. Consider the opposite: The information that the investor gathers in its engagement with Tesla becomes a transaction-specific investment when its only value is in improving Tesla's conduct but has limited utility concerning any other company's conduct.[216] But by offering economies of scale, international law ensures that the information

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214. Black, *supra* note 15, at 582 ("A proponent may wage a more vigorous campaign at company *A* than would be cost-justified looking at *A* in isolation, because of the campaign's deterrent value. Also, a proponent who makes proposals at companies *A* through *Y* may not offer one at company *Z* because the marginal gain is negative given that *Z* will already be partially deterred by the proposals made at *A* through *Y*.").

215. *See* Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2024 (2014) ("[P]revailing on a matter of 'principle' may nevertheless have implications for the future. For one, it can demonstrate the activist's ability (or the activists' abilities) to mobilize shareholder support, garner votes, and obtain public support.").

216. *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 59 (1996) ("Asset specificity has reference to the degree to which an asset can be redeployed to alternative uses and by alternative users without sacrifice of productive value.").

gained can be reused and thereby reduces the costs associated with the next fight.

Professor Bernard Black warned that investors are more likely to engage corporate management on issues that offer economies of scale: "An institution that owns stakes in a number of companies enjoys economies of scale when it presses common issues at those companies. . . . Thus, shareholder voice holds more promise for process and structural issues than for company-specific concerns."[217] What is true for individual investors is also true for consumer groups, NGOs, university groups, religious organizations, and others who seek to externally monitor the compliance of corporations with international law. *International law converts the idiosyncratic and individual infractions of particular corporations into violations of a common and shared set of universal norms*. It provides a common language with which to identify wrongs and shame corporations so that an individual stakeholder does not need to learn a new vocabulary for every corporate misconduct.[218]

2. *Decrease the Costs of Enforcement*

As discussed in Section I.D, different stakeholder enforcement strategies can lower the information costs of stakeholder enforcement performed by others.

Predicative enforcement and amplification enforcement are particularly well-suited to reducing the information costs incurred by other stakeholders when they enforce international law. An easy example of predicative enforcement is a government actor that mandates that a particular industry disclose corporate information that would otherwise prove difficult for the public to obtain.[219] In the human rights context, many jurisdictions have required that companies disclose their human rights due diligence policies and practices relating to modern slavery and human-trafficking risks in their global supply chains.[220] For example, the California Transparency in Supply Chains Act requires that covered companies disclose their efforts on verification, audits, certification, internal accountability, and training related to slavery and human trafficking.[221] Critically, the Act does not require that any company

217. Black, *supra* note 15, at 524; *see also id.* at 580 ("A proponent who offers the same proposal at a number of companies will face a lower proposal preparation cost per company. . . . This reduces the proponent's per-company solicitation cost. Scale economies can lead an institution to offer more proposals, and promote them more vigorously, than an individual who owns the same percentage stake in a single company.").

218. *See* Gond & Piani, *supra* note 100, at 80, 93–94 (describing the institutional functions provided by the Principles for Responsible Investment (PRI) on overcoming investor collection problems concerning corporate compliance with human rights and labor norms).

219. *See, e.g.*, CAL. CIV. CODE § 1714.43 (West, Westlaw through Ch. 1002 of 2024 Reg. Sess.).

220. *See, e.g.*, *id.*

221. *Id.*

actually make any of these efforts but only that they disclose what they do or do not do.[222] The incentive for these companies to engage in human rights due diligence depends on what corporate stakeholders do with the information that companies disclose. As such, the law lowers the information costs to the public of learning about the human rights practices of Apple, Netflix, Walmart, and other large companies.

Without this law, it may prove very challenging for an individual consumer or investor to acquire this information. But the transparency law forces companies to share this information, which consumers may use to organize boycotts; investors may rely on to submit proposals demanding additional disclosures from companies; employees may use to engage in walkouts or open letters to their employers; media may use in investigative reports; and NGOs may rely upon in filing lawsuits against companies. The disclosure law did not do any of these things but did decrease the information costs associated with one or more of these activities. Similarly, amplification enforcement performed by the media can lower the information transmission costs associated with a stakeholder publicizing their findings or, alternatively, another stakeholder learning about the same.

Other stakeholders lower coordination costs by providing guidance on what stakeholders should expect of corporations. The Universal Declaration of Human Rights and core international human rights agreements recognize access to health as a human right.[223] But what do these international agreements mean for the responsibility of corporations regarding the right to health? The Special Rapporteur on the right to health provided corporate governance guidelines for pharmaceutical companies regarding access to medicines.[224] This guidance provided by the Special Rapporteur lowered the coordination costs of stakeholders by providing clarity on what it means for a corporation to comply with the right to health.

Another stakeholder initiative further improved stakeholder enforceability of the right to health by lowering the detection costs of identifying which corporations comply with these international law norms (and which do not). The Access to Medicines Index (ATMI) incorporates many of the Special Rapporteur's recommendations in its methodology for evaluating the access-to-medicines practices of the pharmaceutical sector.[225] ATMI "evaluates and

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222. *See generally id.*

223. *International Standards on the Right to Physical and Mental Health, Special Rapporteur on the Right to Health*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health [https://perma.cc/D8HL-W9FB].

224. Lisa Forman & Jillian C. Kohler, *Annex: Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines*, *in* ACCESS TO MEDICINES AS A HUMAN RIGHT: IMPLICATIONS FOR PHARMACEUTICAL INDUSTRY RESPONSIBILITY 197, 202 (Lisa Forman & Jillian C. Kohler eds., 2012).

225. *See* ACCESS TO MED. FOUND., METHODOLOGY FOR THE 2024 ACCESS TO MEDICINE INDEX 23–25 (2024), https://accesstomedicinefoundation.org/resource/the-methodology-for-the-2024-access-to-medicine-index [https://perma.cc/QUC3-GADP] (explaining governance indicators GA1-GA5).

compares 20 of the world's largest research-based pharmaceutical companies according to their efforts to improve access to [medicine] in low- and middle-income countries."[226] These rankings inform stakeholders about how well a corporation is complying with international law norms on the right to health. In the absence of the Special Rapporteur's guidance and the ATMI, stakeholders would need to expend significant resources to learn what these international law guidelines mean for corporate conduct and to identify leaders and laggards in the industry. The predicative enforcement performed by the Special Rapporteur and the ATMI decreases the coordination costs of both identifying appropriate norms for corporations and gathering information on corporate compliance with these norms.

Finally, each of these stakeholder enforcement strategies has its own expressive function.[227] When the Special Rapporteur articulates global norms, those pronouncements have expressive value.[228] The same is true of the industry rankings produced by the ATMI.[229] These statements, comparisons, analyses, and reports alloy with the expressive value of information produced by international courts and intergovernmental organizations regarding the same.[230] Collectively, their expressive value can motivate corporate managers to internalize norms regarding their expected conduct.[231] The expressive function of this information also influences the expectations of stakeholders regarding corporate conduct, thereby lowering both coordination costs and conflict costs. In the absence of such guidance, stakeholders may have very different ideas about what corporations should do to improve global access to health, for example. Overcoming these differences may be challenging, thereby reducing the odds of coordination. However, the expressive value of predicative stakeholder enforcement socializes other stakeholders on the appropriate norms of corporate conduct.

III. WHEN IS ONE INSTITUTION BETTER THAN ANOTHER?

As discussed above, there are several options for the enforcement of international law: *adjudicative processes* (international and domestic courts), *political processes* (international agreements), and *market processes* (stakeholder mechanisms). But the breadth of enforcement options begs the question: which one is better? The answer depends on the question: for what purpose? In order to choose between institutions, it is important to identify the goals that will

226. *Id.* at 5.

227. *See generally* Sunstein, *supra* note 144 and accompanying text.

228. *See* ACCESS TO MED. FOUND., *supra* note 225.

229. *Id.*

230. *See supra* notes 219–22 and accompanying text.

231. *See supra* notes 225–26 and accompanying text.

serve as the metric for success.[232] In some contexts, it may be efficiency, while in others it may be distributive fairness.[233] This Part identifies three goals of international law enforcement: *deterrence*, *punishment*, and *reparations*.[234] It concludes that stakeholder mechanisms are particularly well-suited to deterring international law violations by the same or similar corporations because of the various actors that can incentivize a corporation to change its practices before a crisis occurs. However, stakeholder mechanisms are poorly suited for punishing corporations or providing reparations for victims.

A. Comparative Institutional Analysis

This Section draws heavily from the framework developed by Professor Neil Komesar to evaluate how well international political processes, adjudicative processes, and market processes perform in effectuating three goals of the enforcement of international law: deterrence, punishment, and compensation.[235]

Professor Komesar's approach is distinguishable by the warnings that it provides to those whose ambition it is to make pronouncements on institutional choice: to say that one of these is better than the other at doing some particular thing. The first warning is to avoid single-institutional analyses. In *Imperfect Alternatives*, Professor Komesar chastises those who fail to compare institutions when recommending a particular choice—courts or markets—to address a particular dispute over legal rights:

> The correct question is whether, in any given setting, the market is better or worse than its available alternatives or the political process is better or worse than its available alternatives. Whether, in the abstract, either the market or the political process is good or bad at something is irrelevant.[236]

For example, Professor Komesar argues that the danger of single institutionalism often arises, albeit not exclusively, when scholars and judges evaluate the appropriateness of judicial intervention based on how well or

232. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (Univ. of Chicago Press 1994) ("[I]nstitutional performance and, therefore, institutional choice can not be assessed except against the bench mark of some social goal or set of goals."); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of International Investment Law*, 112 AM. J. INT'L L. 361, 368–75 (2018) (arguing that three goals of investor-state dispute settlement are fairness, resource allocation efficiency, and peace).

233. *See* KOMESAR, *supra* note 232, at 5.

234. *See, e.g.*, Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1246 (2022) (listing the four goals of Alien Tort Statute litigation to include monetary awards and restitution to individuals and groups, as well as normative goals, such as affirmation of rights, exposure of wrongdoing, holding perpetrators accountable, and prevention of future harm).

235. KOMESAR, *supra* note 232.

236. *Id.* at 6.

poorly the market functions at allocating resources efficiently.[237] The problem is that the intervention is justified by examining only one institution—the market—and calibrating judicial intervention to compensate for the market's perceived failures. What is not asked is whether the institution that comes to the rescue—here, courts—can perform those functions any better than markets in those situations when markets fail.[238] And the same could be asked of single-institutional analysis that does the reverse: calibrating market institutional responses to perceived failures of the courts. These are single-institutional analyses because the normative recommendations do not follow from an assessment of whether the institution that comes to the rescue is any better suited to the purpose than the institution that is in need of rescue.

This impulse towards single institutionalism follows from not heeding Professor Komesar's third warning that "[m]ost existing theories of law and public policy focus attention on social goals and values."[239] Such social goals could include resource allocation efficiency, social justice, protection of property rights, distributive fairness, etc. These social goals are integral to why we create, maintain, and even destroy institutions. According to Professor Komesar, there are appropriate and inappropriate ways to use them in comparative institutional analysis.[240] They are particularly valuable in evaluating institutions normatively: "[I]nstitutional performance and, therefore, institutional choice can not be assessed except against the bench mark of some social goal or set of goals."[241] But the danger is that "[e]mbedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgement, often unarticulated, that the goal in question is best carried out by a particular institution."[242] A common social goal can be consistent with a range of different institutions that each purport to deliver justice, allocate efficiently, or represent fairness. The goal alone cannot tell us very much about what happens on the ground. Instead, "[i]t is institutional choice that connects goals with their legal or public policy results."[243]

The final warning is perhaps the most humbling: "[I]nstitutions move together. When one institution is at its best or worst, the alternative institutions

237. *Id.* at 20–21.

238. *Id.* at 21 ("Again we have the peculiar outcome that a greater role for the judiciary is based solely on variation in the characteristics of the market with no explicit consideration of variation in the ability of the judiciary.").

239. *Id.* at 4.

240. *Id.* at 5, 14–27.

241. *Id.* at 5.

242. *Id.*

243. *Id.* This warning is related to Professor Komesar's overall caution against "the tendency to romanticize institutions": "[H]owever superior one institution may appear to another, the 'superior' institution has its Achilles heels and the 'inferior' institution has some formidable strengths that might correct for the weaknesses of the superior institution." William N. Eskridge, *Expanding* Chevron's *Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 428, 432 (2013).

are often at their best or worst."[244] This insight suggests that when we point to a particular institutional failure—whether in courts, governments, or markets—"the same factors that change the ability of one institution across two situations very often change the ability of its alternative (or alternatives) in the same direction."[245] The insight is that when a particular institution is at its weakest and most vulnerable, other institutions may also prove disappointing. This does not preclude substitution; it simply cautions against aggressive criticism or false hope.

B. Deterrence—High Value of Stakeholder Enforcement

How does one deter a corporation from violating international law? The easy answer is regulation, whether at the international or domestic level. But regulation has some built-in challenges relating to incentives, participation, and influence. As Professor Komesar explains, participation in institutional decision-making depends on both the costs and benefits of such participation.[246] When there are low per capita benefits of participation across a broad swath of actors, we could expect to see the collective-action problem stymie any efforts by these actors to advocate for change.[247]

In the international law context, the global population may benefit from transnational corporations complying with international law. However, the per capita benefits to each global citizen may be quite small unless they know for certain that they would be in danger if that international law norm was violated. But *ex ante*—prior to an international law violation—most people will not know whether they will be harmed by a corporation's violation of international law. This results in low motivation to advocate for change domestically or to pressure governments to introduce transnational regulation.

Of course, this calculation changes dramatically when individuals or communities are aware of the risks that corporate violations pose to them or others. It is therefore not surprising that the governments that proposed a treaty on business and human rights included Ecuador,[248] which was locked in a long and infamous legal battle with Chevron over the latter's accountability for environmental contamination.[249] Similarly, scholars have attributed the French

244. KOMESAR, *supra* note 232, at 23.

245. *Id.*

246. *Id.* at 72.

247. *Id.* at 71–72.

248. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014); *see* Sara Randazzo, *Litigation Without End: Chevron Battles on in 28-Year-old Ecuador Lawsuit*, WALL ST. J. (May 2, 2021), https://www.wsj.com/articles/litigation-without-end-chevron-battles-on-in-28-year-old-ecuador-lawsuit-11619975500 [https://perma.cc/E5TY-A9JX].

249. Randazzo, *supra* note 248 ("Aspects of it have been heard by some 100 judges in 36 courts in seven countries. By Chevron's estimate, it has cost the company nearly $1 billion, including 1.5 million hours of its staff, advisers' and attorneys' time.").

Duty of Vigilance Law to the collapse of Rana Plaza in Bangladesh and the loss of over 1,100 lives.[250] These events transformed the speculative and unknown into the specific and concrete so that dispersed populations know the risks that continued international law violations pose to them or others. This knowledge alters the per capita benefits that states and their populations derive from participation.

In contrast, transnational corporations are fewer, with higher per capita benefits from participation. While the specifics of the regulation may be unknown *ex ante*, corporate managers may be on notice that *any* regulation—at the international or domestic level—is going to impose costs on them. Therefore, they are highly motivated to participate in institutional decision-making. One may hope that they face barriers to entry that restrict their participation, such as outright bans on their participation.[251] However, as Professor Melissa Durkee identifies, corporate actors are able to circumvent many rules that would otherwise ban their influence over international lawmaking by creating or directing nonprofit actors that, in turn, advise international officials.[252] In another example, Professors Sergio Puig and Greg Shaffer explain how tobacco companies used the dispute-resolution provisions available in investor-state dispute settlements to discourage or punish states that had imposed tobacco controls in their jurisdictions.[253]

250. Polly Botsford, *Corporate Responsibility: 'Vigilant' French Law Puts Duty of Care on Companies*, INT'L BAR ASS'N, https://www.ibanet.org/article/1324A0D4-268F-40D1-AD30-F863BA212D39 [https://perma.cc/AGQ8-FQ3V] ("The French law has been pushed along by the MP Dominique Potier who was prompted to act by a major disaster in a garment factory in Bangladesh, which was believed to have supplied a number of Western companies with clothing for Western markets. The factory, the Savar in Rana Plaza, dramatically collapsed in 2013 resulting in over 1,000 deaths.").

251. *See, e.g.*, WORLD HEALTH ORGANIZATION [WHO], GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 3 (Jan. 1, 2013) ("[I]n setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."). The working draft of a legally binding instrument on business and human rights includes a similar provision. U.N. Human Rights Council, OEIGWG Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises 9 (Aug. 17, 2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf [https://perma.cc/8GMN-4BB6] ("In setting and implementing their public policies and legislation with respect to the implementation of this (Legally Binding Instrument), States Parties shall act in a transparent manner and protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character.").

252. Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229 (2016) ("Astroturf activism [is a] phenomenon whereby business entities gain access to international lawmakers through front groups that obscure the identity of the profit-seeking enterprise that is really the relevant actor. This happens most starkly when business organizations capture an existing NGO or form their own NGO with nonprofit status and a mission statement that obscures the company's true interests. It also happens when powerful businesses capture trade associations that purport to speak on behalf of a wider range of actors in a particular industry." (footnote omitted)).

253. Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-Out*, 16 YALE J. HEALTH POL'Y L. & ETHICS 327, 329 (2016) ("[T]obacco companies are strategically using international litigation, such as ISDS, to challenge tobacco control measures around the world, including bans of flavored

The failures of political processes may recommend judicial ones. Litigation and prosecutions are instigated *ex post* when the victims of harms are known; therefore, the per capita stakes of participation (in the judicial process) are higher because the affected population is no longer dispersed and unknown but concentrated and identifiable. Victims, or those acting on their behalf, are incentivized to bring a lawsuit or prosecution to prevent the recurrence of harm to the same or similar victims. The problem is that victims face few prospects for successful litigation in the United States and, perhaps, globally. Professors Judith Schrempf-Stirling and Florian Wettstein explain that "[s]ince the 1980s, more than 120 foreign direct liability cases have been filed worldwide against MNCs for their alleged complicity in human rights abuses[,]"[254] but "[n]o corporation has been found guilty and most human rights litigation cases were dismissed."[255] Moreover, "[l]ess than a handful of cases were settled."[256]

But Professors Schrempf-Stirling and Wettstein explain that human rights litigation can create deterrent effects even when the plaintiffs do not win in court: "[A]fter ExxonMobil and Chevron were sued for their complicity in human rights violations in Indonesia and Nigeria, respectively, both corporations started introducing human rights policies and other CSR measures during or shortly after the legal proceedings."[257] They explain that these are not isolated incidents; instead, in a study of fifty-five human rights litigation cases (involving forty corporations), Professors Schrempf-Stirling and Wettstein find that defendant corporations adopted various human rights due diligence steps, such as adopting a human rights policy, introducing human rights training, performing human rights audits, and joining a multi-stakeholder initiative or soft-law institution.[258] Moreover, these deterrent effects are magnified across industries as peer companies—not targeted for litigation—adopt similar policies and practices as part of broader socialization practices or self-defensive strategies against similar scrutiny.[259] These effects illustrate how litigation changes corporate behavior outside the courtroom and can introduce corporate changes that may prevent a future violation of international law. Unfortunately,

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cigarettes; marketing and advertising restrictions; labeling requirements of health risks; import and export taxes; price, import, and export controls; and brand registration recognition.").

254. Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545, 548 (2017).

255. *Id.*

256. *Id.* (citations omitted); *see also* Ewell, Hathaway & Nohle, *supra* note 234, at 1250 ("[S]ince the first ATS case was decided in 1793, only twenty-five cases have resulted in monetary judgments that were not subsequently overturned. . . . Importantly, however, only six out of these twenty-five awards appear to have been collected, and only partially, typically because defendants lacked financial resources.").

257. Schrempf-Stirling & Wettstein, *supra* note 254, at 548.

258. *See, e.g.*, *id.* at 549 ("More than two-thirds of our sample introduced specific human rights policies and corporate statements shortly after their lawsuits were filed. . . . 68 % of companies sued for human rights violations have issued public documents addressing human rights compared to an overall percentage of 7%.").

259. *Id.* at 558.

these effects wane when the prospect of litigation wanes. The U.S. Supreme Court cases of *Kiobel v. Royal Dutch Petroleum*,[260] *Jesner v. Arab Bank*,[261] and *Nestlé USA, Inc. v. Doe*[262] restrict the ability to hold corporations liable under the Alien Tort Statute for the violation of international law committed abroad.[263] It is therefore difficult to predict the deterrent effect of human rights litigation going forward.

Market processes through stakeholder mechanisms may succeed where these other institutions fail. Stakeholder mechanisms do not rely on broad-based support as frequently needed in regulation. Instead, they rely on a chain reaction of events in which each stakeholder's action facilitates or predicates another. The result is that the per capita benefits grow with each stage of stakeholder engagement. For example, a corporation's violation of international child labor norms may not result in an immediate sanction because the victims may lack leverage over the corporation; those who do, such as investors, may not suffer sufficiently negative effects to motivate them to exercise the leverage they possess. The investors' per capita benefits from enforcement may be quite low. But these per capita benefits change if another stakeholder engages in conduct that implicates the interests of investors, such as an NGO campaign against the corporation or a poor ranking in a reputed benchmark. Those actions raise the per capita benefits of investor enforcement because the international law violation now implicates reputational costs associated with the NGO campaign or benchmarking ranking. Therefore, stakeholder mechanisms change the incentives for participation even for international law violations that may otherwise suffer from the collective-action problem.

Stakeholder mechanisms are particularly valuable for deterrence because they can help to institutionalize corporations to comply with international law. Many corporate violations of international law arise because of business decisions made regarding supply-chain management, corporate governance, and business models.[264] These practices need to change in order to ensure that corporations do not repeat their violations or commit new ones. It is unclear whether political or judicial processes can target these business practices effectively. Mandatory reporting laws attempt to shine a light on corporate compliance practices by drawing a link between monitoring, auditing, training, and incidents of human trafficking and modern slavery in supply chains.[265]

260. 569 U.S. 108 (2013).

261. 138 S. Ct. 1386 (2018).

262. 141 S. Ct. 1931 (2021).

263. *But see* Nevsun Res. Ltd. v. Araya, [2020] S.C.R. 166 (Can.).

264. *See generally* JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES (2012) (reviewing more than forty cases of alleged corporate involvement in human rights abuses and how these mechanisms operate in practice).

265. *See* Joel Lange, Gavin Proudley, Andrew Sawchenko & Andrew Wallis, *The Rise of Modern Slavery & Its Place in Corporate Compliance*, DOW JONES (Dec. 6, 2023), https://www.dowjones.com/professional/risk/resources/risk-blog/the-rise-of-modern-slavery-and-its-place-in-corporate-compliance [https://perma.cc/

While these are encouraging signs, these efforts suffer from the problem of universality: by identifying best practices for a broad swath of companies, they risk neglecting contributing factors particular to an industry or specific organization. The contract terms that contribute to human rights violations for a garment retailer are going to differ from those that lead to human rights violations for a tech company or a life-sciences corporation. This variation makes it difficult to draw causal connections between contract design and international law violations with any meaningful specificity when the corporate audience is large and varied. The risk is that the regulation captures the causal factors for some but not all; this means that some companies can comply at a lower cost than others and there is little probability that these will not violate international law in the future.

Stakeholder mechanisms address this challenge by offering specific, bespoke recommendations to particular companies or industries. Many stakeholder mechanisms provide analyses at the company or industry level, thereby identifying the particular contributing factors for violations and the companies that are leaders and laggards.[266] This allows them to develop recommendations for contract design, corporate governance, and business model, among others, that are suited to preventing violations in the future. The value of stakeholder mechanisms is that they compensate for a well-recognized failure in international law. The former often aims at universality to improve its perceived legitimacy and support. But it is challenging for universal norms to regulate corporations directly, especially when they were often developed to constrain state conduct. While states also vary in size, resources, and population, the diversity of corporations challenges a one-size-fits-all approach to preventing corporate violations of international law. International law norms provide the foundation that is built upon by stakeholders who transform these universal norms into specific guidance for companies that can be incorporated into corporate policies and practices.[267]

685U-ZL7P] (discussing the use of "modern slavery" in every single country through businesses and situations of forced labor).

266. *See generally* Dorotheé Baumann-Pauly, Justine Nolan, Auret van Heerden & Michael Samway, *Industry-Specific Multi-Stakeholder Initiatives that Govern Corporate Human Rights Standards: Legitimacy Assessments of the Fair Labor Association and the Global Network Initiative*, 143 J. BUS. ETHICS 771 (2017) (describing the ability of multi-stakeholder initiatives to set human rights standards and reviewing two cases of successful multi-stakeholder initiatives).

267. Tricia Olsen, Kathleen Rehbein & Michelle Westermann-Behaylo, *Human Rights in the Oil and Gas Industry: When Are Policies and Practices Enough to Prevent Abuse?*, 61 BUS. & SOC'Y 1512, 1542 (2022) (finding that "firms that have human rights policies over the long-term *and* have high marks of preparedness are more likely to avoid gross human rights abuses in opaque environments").

C. *Punishment—Intermediate Value of Stakeholder Enforcement*

Another objective of international law enforcement is punishment of those who violate international law.[268] This objective is challenging when the responsible parties include both individual (executives) and collective (corporations) actors, raising questions over who should be punished and how. But this is not an impossible task because similar issues have arisen over individual and state responsibility for violations committed by state actors.[269] The possibilities include both monetary and nonmonetary penalties against either or both.[270] In the corporate context, individual executives and corporations can be punished through criminal prosecutions, monetary fines, seizure of goods, and stock-market decreases.[271] These penalties are imposed by courts, governments, and markets. Stakeholder mechanisms do not perform particularly well in punishing corporate defendants for violating international law; however, the alternative institutions, courts and governments, are not much better.[272]

Very few victims of corporate human rights violations receive a monetary award.[273] In one study, scholars conclude that only twenty-five cases resulted in monetary judgments under the Alien Tort Statute after it was introduced in 1793.[274] The awards have a collective value of almost $70 billion but most of that amount represents a judgment in a specific case.[275] More importantly, "only six out of these twenty-five awards appear to have been collected, and only partially, typically because defendants lacked financial resources."[276] There have been very few cases that resulted in a monetary judgment against a corporate defendant.[277] But even if a court was willing to impose a monetary penalty, how much is sufficient to punish a corporation for violating international law? Professor Veronica Root Martinez argues that "private firms of today are all

268. *See* KOMESAR, *supra* note 232.

269. *See supra* notes 252–53 and accompanying text.

270. *See infra* notes 273–85 and accompanying text.

271. *See infra* notes 279–92 and accompanying text.

272. *See infra* notes 293–98 and accompanying text.

273. Ewell, Hathaway & Nohle, *supra* note 234, at 1250 ("[T]he ATS has not been a success story from the perspective of individual material benefits.").

274. *Id.* (excluding cases that were overturned).

275. *Id.*

276. *Id.*

277. *Id.* at 1268 (describing Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355 (S.D. Fla. 2008)). The court found that the major corporations involved had significantly profited from forced labor. *Licea*, 584 F. Supp. 2d at 1366. Laborers were held in captivity, where their passports were taken from them. *Id.* at 1360–61. The court believed that disgorgement was proper and that significant punitive damages were proper to act as a deterrent and to reflect international revulsion against forced labor and international human trafficking. *Id.* at 1366; *see also* Shayak Sarkar, Essays on Development, Finance, and International Law 7 (Ph.D. dissertation, Harvard University) (on file with author) ("As of 2014, there have been two judgments and thirteen settlements against business entities, and six settlement sums that have entered the public domain total about $80 million.").

too willing to pay monetary fines as a consequence for failing to prevent and detect misconduct."[278] As an example, she explains that "[a]s part of the company's 2012 deferred prosecution agreement alone, HSBC agreed to pay $1.92 billion in fines, yet the company has continued to engage in various forms of misconduct and, as a result, has been subjected to additional penalties in the form of high fines."[279]

If billion-dollar fines cannot discourage future misconduct, then perhaps it is worth exploring the other types of penalties that may change behavior.

Some countries have imposed or contemplated criminal penalties against corporations and their officers for violating international law. In France, Syrian employees and two NGOs filed a criminal complaint against Lafarge, the cement company, for alleged abuses by its subsidiary, Lafarge Cement Syria, during the Syrian civil war that they allege constituted complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, deliberate endangerment of people's lives, and forced labor.[280] In 2018, French investigative judges indicted Lafarge for crimes against humanity; several senior executives and its current chief executive officer were separately charged under other offenses.[281] In 2022, the Investigative Chamber of the Paris Court of Appeals reinstated the charge of complicity in crimes against humanity against Lafarge, which had been dismissed by a Paris appeals court in 2019.[282]

In Sweden, prosecutors charged the former chief executive officer and former chairman of a Swedish oil exploration and production company "for securing the company's operations in Sudan through their alleged complicity in war crimes . . . 20 years ago."[283] According to the *Associated Press*, the "two executives are accused of involvement in the Sudanese government's military campaign to clear an area in southern Sudan for oil production."[284] Swedish prosecutors "also filed a claim to confiscate 1.39 billion crowns ($161.7 million) from Lundin Energy, corresponding to the profit the company made from the

278. Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1040 (2017).

279. *Id.* (footnote omitted). Interestingly, Root proposes that corporate actors may change their behavior if they are subjected to nonmonetary penalties, such as official findings of guilt, governmental access to internal firm operations, and appointment of a trustee or monitor. *Id.* at 1040–45. It is interesting to consider whether the imposition of similar nonmonetary penalties may change the behavior of recidivist firms that violate international law.

280. Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html#:~:text=French%20company%20to%20face%20charges,to%20keep%20operating%20in%20Syria [https://perma.cc/LL3L-447K].

281. *Id.*

282. Press Release, Charges Confirmed Against Lafarge for Complicity in Crimes Against Humanity in Syria, Sherpa & Eur. Ctr. for Const. & Hum. Rts. (May 18, 2022) (on file with author).

283. *Trial Starts in Sweden of 2 Oil Executives Accused of Complicity in War Crimes in Sudan*, ASSOCIATED PRESS (Sept. 5, 2023, 10:19 AM), https://apnews.com/article/sweden-sudan-oil-trial-lundin-dcd1e1291c3609608db69c9918578e08 [https://perma.cc/RSN6-YN6D].

284. *Id.*

sale of the Sudan business in 2003."[285] The case went to trial in 2023.[286] While both cases made international news, it is too soon to say whether they signal a broader phenomenon of imposing criminal liability on corporate executives and entities that violate international law. Instead, the strength of that signal depends on the ultimate conclusion of these two cases.

Stakeholder mechanisms can also punish corporations through market sanctions, such as stock-price decreases, but their effects are mixed. There is some suggestion that corporations, under certain conditions, may experience these market penalties for violating international law. In one study, researchers examined the stock prices of publicly traded firms publicly associated in the assassination of environmental activists in the natural resource sector.[287] The study found that "[f]ollowing assassinations, we estimate significant negative abnormal returns for firms associated with these events."[288] According to the researchers, "disclosure of information on human rights violations impacts markets—and these impacts are meaningful. For companies named in assassination news, the median 10-day cumulative loss in market capitalization is over 100 million USD."[289] The study also found that "institutional investors that follow event-based trading strategies—such as hedge-funds—divest in mining companies after assassination events."[290]

In other contexts, companies have similarly experienced dramatic stock-price drops following publicity linking them to human rights violations. For example, Tahoe Resources saw its stock price drop from around $27 in 2014 to below $4 by 2019.[291] During this period, Tahoe faced global scrutiny for the actions of its private security providers in Guatemala. It was sued by seven Guatemalan men in British Columbia, a Canadian province, for injuries suffered when Tahoe's security personnel opened fire on them at close range during a

285. *Sweden Charges Lundin Energy Executives with Complicity in Sudan War Crimes*, REUTERS (Nov. 11, 2021, 11:21 AM), https://www.reuters.com/world/africa/sweden-charges-lundin-energy-executives-complicity-sudan-war-crimes-2021-11-11/ [https://perma.cc/F66M-R54D].

286. Anna Ringstrom, *Former Oil Firm Executives Go on Trial in Sweden over Sudan War Crimes*, REUTERS (Sept. 5, 2023, 2:42 PM), https://www.reuters.com/world/africa/sudan-war-crime-trial-ex-oil-firm-executives-starts-sweden-2023-09-05/ [https://perma.cc/VKP6-64QV].

287. David Kreitmeir, Nathan Lane & Paul A. Raschky, The Value of Names—Civil Society, Information, and Governing Multinationals on the Global Periphery 2–3 (Feb. 28, 2021) (unpublished manuscript) (on file with author).

288. *Id.*; *see also id.* at 29 ("[W]e compile a new database on 354 assassinations and extrajudicial killings of activists and link them to the publicly listed mining companies implicated in the events. We then combine this data with daily stock market returns of those companies and use event study methodology to estimate the effect of the killings on the abnormal daily returns of companies' stocks.").

289. *Id.* at 3.

290. *Id.* at 4.

291. Gabriel Friedman, *Days Before Merger, Complaints Filed Asking for Investigation of Pan American and Tahoe Resources*, FIN. POST (Jan. 3, 2019), https://financialpost.com/commodities/mining/days-before-merger-complaints-filed-asking-for-investigation-of-pan-american-and-tahoe-resources [https://perma.cc/4QS4-79Y2].

protest against the company's mining activities.[292] The plaintiffs "allege that Tahoe expressly or implicitly authorized the use of excessive force by Mr. Rotondo and security personnel against the plaintiffs or was negligent in failing to prevent the use of excessive force against the plaintiffs."[293]

But it is important to recall that the alleged conduct occurred in 2013, after which Tahoe's stock price continued to rise to its peak in 2014.[294] While it subsequently dropped, the immediate cause of its stock-price drop was the order of the Guatemalan court that suspended its mine license because of concerns over informed consent.[295] Critics argued that Tahoe's mining license was granted without proper environmental assessments and informed consent by the indigenous populations.[296] In 2017, Guatemala's Supreme Court suspended Tahoe's license for the Escobal mine; in 2018, Guatemala's highest court, the Constitutional Court, confirmed the suspension and ordered the Ministry of Energy and Mines to perform an immediate consultation with the local indigenous communities.[297] Shortly after its license was suspended in 2017, "the stock price declined from a close of $8.27 per share of Tahoe stock on July 5, 2017, to a close of $5.56 per share on July 6, 2017, a drop of approximately 33%."[298] It is therefore difficult to argue that Tahoe's violation of international law alone had an immediate effect on its stock price.[299]

292. *See* Notice of Civil Claim, García v. Tahoe Res. Inc., 2015 BCSC 2045 (Can.); Garcia v. Tahoe Res. Inc., 2017 BCCA 39 (Can.).

293. *García*, 2015 BCSC 2045, ¶ 7.

294. Friedman, *supra* note 291.

295. Maxx Chatsko, *Here's Why Tahoe Resources Stock Fell as Much as 22.1% Today*, MOTLEY FOOL (Aug. 25, 2017, 2:45 PM), https://www.fool.com/investing/2017/08/25/heres-why-tahoe-resources-fell-as-much-as-221-toda.aspx [https://perma.cc/DS97-J6TP].

296. The Guatemalan Constitutional Court ruled that the Ministro de Energía y Minas (Ministry of Energy and Mines or MEM) failed to exhaust the consultation process required by the Indigenous and Tribal Peoples Convention, 1989 (Convention 169) of the International Labor Organization when they granted the license. The consultation process required MEM to speak with and consult the indigenous peoples living in the area before granting the mining license. Resolucìn, 588-2018 (Guat. Const. Ct. 2018).

297. Cecilia Jamasmie, *Tahoe's Escobal Mine License to Remain Suspended—Guatemalan Court*, MINING.COM (Sept. 4, 2018, 4:02 AM), https://www.mining.com/tahoes-escobal-mine-licence-remain-suspended-guatemalan-court/ [https://perma.cc/HC5P-8G7V]; Cecilia Jamasmie, *Tahoe Resources Forced to Halt Escobal Mine in Guatemala*, MINING.COM (July 6, 2017, 3:57 AM), https://www.mining.com/tahoe-resources-forced-halt-escobal-mine-guatemala/ [https://perma.cc/7GKL-7WYW].

298. Kessler Topaz Meltzer & Check, LLP, *Shareholder Class Action Filed Against Tahoe Resources, Inc. Securities - (TAHO; THO)*, CISION PR NEWSWIRE (July 12, 2017, 10:00 AM), https://www.prnewswire.com/news-releases/shareholder-class-action-filed-against-tahoe-resources-inc-securities—taho-tho-300486512.html [https://perma.cc/9K64-HL6V]; Chatsko, *supra* note 295.

299. Similarly, a study found that corporations do not suffer a stock-price drop after violating international law. *See* Sarkar, *supra* note 277, at 7, 20 (finding that ATS litigation against corporate defendants did not lead to meaningful changes in their stock price because they are less likely to be information-revealing (because the underlying events are known) or liability-triggering (because of uncertain liability under ATS)).

D. *Reparations—Low Value of Stakeholder Enforcement*

A victim of a corporate human rights abuse may require a combination of remedies to address the harm they suffered.[300] According to commentary to Principle 25 of the United Nations Guiding Principles on Business & Human Rights, "[r]emedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of nonrepetition."[301] These various types of specific remedies fall within categories familiar under international law: *restitution, financial compensation, rehabilitation, satisfaction, and guarantees of nonrepetition*.[302]

The purpose of restitution is "whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred"[303] and can include "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."[304] In contrast, "[c]ompensation should be provided for any economically assessable damage," such as physical or mental harm; lost opportunities, "including employment, education and social benefits"; "[m]aterial damages and loss of earnings, including loss of earning potential"; moral damage; and "[c]osts required for legal or expert assistance, medicine and medical services, and psychological and social services."[305] Rehabilitation

300. U.N. Open-Ended Intergovernmental Working Group, Updated Draft Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, ¶ 4.2(c) (July 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [https://perma.cc/P3MC-RVSP] (discussing effective remedies for victims such as such as "restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration").

301. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights*, 27, U.N. Doc. HR/PUB/11/04 (2011).

302. *See, e.g.*, G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ ¶ 19–23 (Dec. 16, 2005); Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 23 (1996); U.N. Secretary-General, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* ¶ 42, Working Grp. on the Issue of Hum. Rts. and Transnat'l Corps. and Other Bus. Enters., Report on Access to Effective Remedy for Business-Related Human Rights Abuses, U.N. Doc. A/72/162 (July 18, 2017) (describing the concept of "full reparation" articulated by the Inter-American Court of Human Rights).

303. G.A. Res. 60/147, *supra* note 302, ¶ 19.

304. *Id.*; U.N. Doc. A/72.162, *supra* note 302, ¶ 43 ("The aim of restitutionary remedies is to avoid unjust enrichment and restore the affected rights holders to the original position before the abuses occurred.").

305. G.A. Res. 60/147, *supra* note 302, ¶ 20 (emphasis omitted); *see also* Pasqualucci, *supra* note 302, at 32 ("The term 'moral damages' in international law and in civil law systems generally equates with damages

includes "medical and psychological care as well as legal and social services."[306] Satisfaction is associated with many remedies, including "public disclosure of the truth, an apology or acknowledgement of wrongdoing, the prosecution and punishment of the individual violators, and the implementation of measures to prevent a recurrence of the violation."[307] Finally guarantees of nonrepetition can include "[s]trengthening the independence of the judiciary" and "[e]nsuring effective civilian control of military and security forces[,]" among others.[308]

The variety of remedies recognizes that those harmed by corporate human rights violations may pursue both monetary and nonmonetary objectives. According to scholars, "ATS plaintiffs have been motivated to pursue litigation precisely to have their dignity restored, to expose the wrong committed against them, and to hold the perpetrators accountable."[309] They explain that judgments can still have a significant normative impact (even without monetary remedies) because these decisions affirm a legal norm, thereby potentially protecting third parties from similar violations in the future.[310] These decisions can also incentivize corporate defendants and peer companies to change their internal policies and practices because of the publicity surrounding these cases and the subsequent policy prioritization on corporate accountability.[311]

The UN Working Group on Business & Human Rights also recognizes the need for a variety of remedies because of the different but important functions they fulfill. Effective remedies should combine "preventive, redressive and deterrent elements."[312] While remedies should redress the harms that the victim suffered, remedies should also ensure that the same or similar corporate actors refrain from committing similar violations in the future.[313] One type of remedy acting alone is unlikely to achieve all these ends. The UN Working Group also emphasizes the importance of ensuring that "rights holders should be central to the entire remedy process."[314] This is ensured through key principles such as requiring that "remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders"; effectiveness of remedies "should be determined with reference to the needs of rights holders seeking justice"; "a range of remedies should be available to rights holders affected by business-related human rights abuses"; and "all mechanisms should

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for emotional distress and, in the appropriate case, with damages for the loss of society, comfort, and protection under common law.").

306. G.A. Res. 60/147, *supra* note 302, ¶ 21.

307. Pasqualucci, *supra* note 302, at 24.

308. G.A. Res. 60/147, *supra* note 302, ¶ 23.

309. Ewell, Hathaway & Nohle, *supra* note 234, at 1253.

310. *Id.* at 1261.

311. *Id.* at 1268–73.

312. G.A. Res. 60/147, *supra* note 302, ¶ 40.

313. *Id.*

314. *Id.* ¶ 19.

be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms."[315]

Stakeholder mechanisms are particularly weak when it comes to providing reparations because, as discussed, they generally do not offer rehabilitation, compensation, satisfaction, or restitution. But stakeholder mechanisms offer one unique advantage: guarantees of nonrepetition. Stakeholder mechanisms can lead companies to revise their internal policies and alter their practices so as to reduce the likelihood of similar violations in the future. In the absence of judicial order or regulation, stakeholders can provide comparable incentives for corporate managers to change policies, educate the board of directors, evaluate business partnerships, and seek out collaborations with civil society. For example, a poor performance on the Access to Medicine Index may motivate corporate managers to reform the governance features that were responsible for the poor rankings score. Similarly, many investors request information about corporate policies and board oversight when they engage corporations on their compliance with international law.[316]

Stakeholder mechanisms also have the advantage of offering bespoke recommendations to corporations based on sector, size, and potential human rights impacts. Many internationally recognized guarantees of nonrepetition envision a state perpetrator of human rights because of the emphasis placed on improving public institutions and oversight.[317] These recommendations do not translate well to a business audience. Stakeholder mechanisms fill that gap by identifying and advocating for the types of organizational changes needed to ensure nonrepetition by a specific corporation.

Overall, however, stakeholder mechanisms fail at the overriding objective of ensuring that rights holders are central to the remedial process. Even the stakeholder processes that lead to organizational changes may marginalize the voices of those most affected by past violations. The question is whether stakeholders reliably, effectively, and genuinely consult with rights holders before engaging with corporations (or fellow stakeholders) on a particular organizational change. If not, this is an important area in which stakeholder groups can improve the effectiveness of their own actions by ensuring that they are attentive to the needs of rights holders.

CONCLUSION

This Article offers two contributions to the study of corporate governance and international law. First, it explains that the international law compliance of corporations is dependent upon stakeholders who make international law

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315. *Id.* ¶¶ 20–21.

316. *See supra* notes 112–25 and accompanying text.

317. G.A. Res. 147, *supra* note 302, ¶ 23.

norms applicable to corporate governance, including board governance and internal policies and practices. But the strength of this component of the international legal order—stakeholder governance—is hampered by a historical problem within corporate governance: collective action. The effectiveness of stakeholder enforcement is compromised by collective-action problems such as rational apathy, stakeholder conflict, and coordination issues. This Article explains that many of these costs are reduced through sequential stakeholder enforcement in which a preceding phase reduces the costs associated with subsequent stages. Sequential stakeholder enforcement can address many collective-action problems and improve the likelihood that management will conform corporate governance with international law norms.

Second, this Article offers a comparative institutional analysis of when stakeholder enforcement is the preferable option to enforce international law against corporations. The familiar options are courts and intergovernmental processes, and their familiarity disproportionately guides domestic and international policymakers when developing solutions to corporate misconduct. This is wrong. There is a third option that has developed alongside the other two but is often overlooked as a regulatory solution to international law's enforcement challenge. While multi-stakeholder initiatives and industry codes of conduct have proliferated, this Article takes a systematic look at how these efforts compare to enforcement functions in the international legal order. It explains that these qualify as a type of international law enforcement because they share common characteristics of enforcement practiced by courts and intergovernmental organizations. All three approaches increase the benefits of decentralized enforcement of international law while lowering the information costs required to perform it, such as detection, monitoring, and transmission costs. But their similarities do not recommend each for the different objectives of enforcement. Instead, this Article argues that stakeholder mechanisms are especially valuable for deterrence but have limited value for punishment and almost no value for reparations to victims. That is why it is important that stakeholder mechanisms do not substitute for more traditional forms of enforcement but instead serve as one set of mechanisms that pivot corporate actors towards compliance with international law.