BETWEEN MARKETS AND TREATIES

INTERNATIONAL LAW, AGENCY COSTS & THE THEORY OF THE FIRM

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Policymakers have identified three governance systems that encourage corporate compliance with international law: *public governance* (including international law), *stakeholder governance*, and *corporate governance*. Stakeholder governance is critical to ensuring that international law norms (public governance) influences corporate governance. For example, stakeholder activism by NGOs, consumers, employees, multi-stakeholder initiatives (MSIs) and others have been critical in incentivizing corporate managers to improve their policies and practices on a range of issues governed by international law, such as climate change, armed conflict, human rights and access to medicine. But familiar problems impede the success of stakeholder enforcement of international law: agency costs and collective action problems. Management scholars have identified how the dispersion of stakeholders and free-rider problems have replicated many of the challenges of monitoring the firm from the shareholder context.

This Article applies the economic theory of the firm to the phenomena of stakeholder monitoring and enforcement of corporate compliance with international law. *Descriptively*, it identifies both a problem and solution to stakeholder "rational apathy": Stakeholders are rationally apathetic because they confront high per capita information, coordination and conflict costs but low per capita benefits. But a process of sequential stakeholder enforcement can lower these costs associated with subsequent stages. It 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. Critically, international law enforcement offers stakeholders economies of scale by converting particularized wrongdoing into violations of global norms. Normatively, this Article draws upon comparative institutional analysis to identify when stakeholder enforcement is a preferable institution for enforcing international law against corporations. It argues that institutional choice depends on three objectives of international law enforcement: *deterrence*, *punishment* and *reparations*. It concludes that stakeholder enforcement may be valuable for deterring future violations of international law but has limited effect for punishment or offering reparations.

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Table of Contents

INTRODUCTION

Does international law work?

There is reason for skepticism. While many critics focus on the ways that countries violate international law, there is no denying international law's limited influence over transnational corporations and other business enterprises. Many corporations are accused of violating international law's most sacred norms, such as the prohibition against torture, extrajudicial killings, war crimes, forced displacement, crimes against humanity and genocide. For example, in December 2023, Amnesty International released a report warning that many venture capital funds may be failing to protect human rights when they invest in generative AI companies.[1] Amnesty reported on the human rights practices of a dozen of the largest VC firms and start up accelerators with at least one Generative AI investment, finding that only one firm stated that it conducted human rights due diligence as part of its investment decisions.[2]

This is not an isolated example. While "ESG" has received a lot of attention from corporate boardrooms, corporate managers have failed to recognize the important relationship between ESG concerns and international law: We can frame most "ESG failures" as a failure of a corporation to comply with international law. When corporations fail to deliver on the "E dimension," they are likely violating international law norms established under the Paris Climate Agreement or Convention on Biodiversity.[3] When a corporation fails to live up to the "S" dimension, it may because it fails to pay its employees a living wage, discriminates against one or more of them or otherwise interferes with their ability to organize – conduct that runs afoul of the International Labor Organizations' Declaration on Fundamental Principles and Rights at Work.[4] When it denies access to health for low-income populations, it risks violating the Universal Declaration of Human Rights and core international human rights agreements, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and Convention on the Rights of Persons with Disabilities (CRPD).[5] The root of

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1 Amnesty International, SILICON SHADOWS: VENTURE CAPITAL, HUMAN RIGHTS AND THE LACK OF DUE DILIGENCE (2023).

2 *Id.* at 22.

3 *The Convention on Biological Diversity*, CONVENTION ON BIOLOGICAL DIVERSITY.

4 International Labour Organizations, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP (2022).

5 United Nations Office of the High Commissioner for Human Rights, INTERNATIONAL STANDARDS ON THE RIGHT TO PHYSICAL AND MENTAL HEALTH, SPECIAL RAPPORTEUR ON THE RIGHT TO HEALTH, https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health.

these and other corporate harms is the same: a corporate failure to comply with international law.

When a corporation violates international law, there are three options for punishing it, deterring its repetition and providing remedies to its victims: *courts*, *governments*, and *markets*. *Courts* may hold corporations accountable for violating international law. For example, 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.[6] Over the years, many corporations have similarly been sued in U.S. courts over their conduct abroad. Corporations and their executives may also confront criminal prosecution for their involvement in human rights abuses. For example, in January 2024, France's highest appeals court upheld charges against LaFarge for complicity in crimes against humanity.[7] In Sweden, prosecutors brought charges against 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."[8] In September 2023, both of the executives went to trial over these charges.[9]

Legislation 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."[10]

But there is a third option: *markets*. Corporations that violate international law may suffer a market sanction in response. Consumers may boycott the corporation (*products markets, services markets*); employees may refuse to work for it (*labor markets*); shareholders may refuse to invest (*equity markets*); and so forth. Each of these individuals and organizations has the potential to nudge corporations towards international law using methods that do not involve a courtroom: consumers boycott companies that refused to exit Russia after the latter invaded Ukraine; investors demand disclosures of how companies are aligning their practices with the Paris Climate Agreement; employees refuse to support their companies' contracts with defense agencies. Sometimes these tactics work; other times, they fail fabulously.

One of the biggest challenges with market enforcement is that the many must be motivated to act; one person's actions are rarely sufficient. But the

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6 Sabrina Souza & Zoe Sottile, *Amal Clooney is representing over 400 plaintiffs in lawsuit seeking 'accountability for genocide against Yazidis*,' CNN (Dec. 17, 2023).

7 Tassilo Hummel, *Lafarge can be charged with 'complicity in crimes against humanity', French court says*, REUTERS (Jan. 16, 2024).

8 *Sweden charges Lundin Energy executives with complicity in Sudan war crimes*, REUTERS (Nov. 11, 2021).

9 Anna Ringstrom, *Former oil firm executives go on trial in Sweden over Sudan war crimes*, REUTERS (Sept. 5, 2023).

10 U.S. Customs & Border Protection, Uyghur Forced Labor Prevention Act Statistics, https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics.

odds that the one person will act depends on their predictions on what others will do.[11] 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 or international law. Each discipline has struggled with monitoring and enforcement challenges exacerbated by collection action problems. Consider its 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.[12] Dispersed investors confronted the prospects of low per capita benefits but high per capita costs, thereby favoring a position of "rational apathy."[13] Even motivated investors confronted the costs of coordination and conflict if they wanted to challenge management.[14] While corporate governance has adapted to address many of these concerns, scholars identify its continuing prevalence.[15]

But shareholder agency costs are not the only ones that impede the governance of corporations. Management scholars have identified "stakeholder agency costs" that arise when corporate managers do not operate a firm in accordance with the preferences of its shareholders: "Stakeholder-agency theory postulates that other stakeholder groups also place claims on the firm that, if satisfied, reduce the amount of resources that management can channel towards the pursuit of growth through diversification."[16] The agency relationship arises because "[s]atisfying 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."[17] While stakeholders are not principals, they exchange

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11 *See, e.g.*, Gillian Hadfield & Barry Weingast, *Law without the State: legal attributes and the coordination of decentralized collective punishment*, 1 J. LAW & COURT 3, 9 (2013); Gillian K. Hadfield & Barry Weingast, *What is Law? A Coordination Model of the Characteristics of a Legal Order*, 4 J. LEGAL ANALYSIS 1, 4 (2012); Richard McAdams, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 61 (2015).

12 Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); Henry Hansmann, *Ownership of the Firm*, 4 J. L., ECON. & ORG. 267, 275 (1988); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L & ECON. 301, 304 (1983).

13 Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 527-28 (1990).

14 Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law & 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).

15 Kobi Kastiel and Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 61-66 (2016).

16 Charles W. L. Hill & Thomas M. Jones, *Stakeholder-Agency Theory* 29 J. MGMT. STUD. 131, 137 (1992).

17 *Id.* at 138.

critical resources with the firm (talent, raw materials, revenue, etc)[18] and have increasingly asserted their preferences, even threatening to withhold those resources if those preferences are not met. Managers run the risk of harming the interests of these stakeholders and the firm if they continue to operate the latter out of alignment with these preferences. But even if stakeholders have preferences concerning corporate compliance with international law, they are rationally apathetic because they are also a dispersed group that confronts both coordination and conflict costs and the challenge of low per capita benefits and high per capita costs.[19]

This Article applies the economic theory of the firm from corporate governance to the phenomena of stakeholder monitoring and enforcement of corporate compliance with international law. 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. It 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. Critically, international law enforcement offers stakeholders economies of scale by converting particularized wrongdoing into violations of global norms. This conversion offers economies of scale to stakeholders who can use the information and expertise they gain in engagement with one firm in an engagement with another. This prevents such information from becoming a "transaction-specific asset"[20] and, instead, usable and valuable information that can be re-used in an engagement with another firm, thereby lowering the stakeholder's risk preference for any particular engagement.[21]

In short, 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. 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.

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. Consider a recent investor proposal that was submitted to Tesla requesting that its board "issue a report describing if and

18 Jeffrey Pfeffer and Gerald R. Salanick, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE APPROACH 43 (1978).

19 *See, e.g.*, Flore Bridoux & J.W. Stoelhorst, *Stakeholder Governance: Solving the Collective Action Problems in Joint Value Creation*, 47ACAD. 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.").

20 Oliver E. Williamson, THE MECHANISMS OF GOVERNANCE 59 (1996).

21 Black, *supra* note ___ at 580.

how Tesla plans to eradicate child labor and forced labor from its supply chain by 2025 and introduce more supply chain transparency."[22] The investors justified this request by referencing the reputational, regulatory and financial risks that poor human rights practices can pose for Tesla.[23] 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.[24] 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 enforcement but creates another: if stakeholder enforcement is a part of the international legal order, when is it a preferable enforcement option over courts or political processes? This Article draws upon comparative institutional analysis to argue that the choice of institution depends on three objectives of international law enforcement: *deterrence*, *punishment* and *reparations*. This Article explains that stakeholder enforcement excels in some enforcement functions but suffers in others. 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. However, it has limited effect in punishing corporate actors for such violations. There is limited evidence that that markets punish corporations for committing human rights violations, for example. Even if so, this punishment is borne by the larger organization and not necessarily the individual executives who facilitated or even ordered these violations. 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 and French authorities for violations of international law. Stakeholder enforcement is particularly weak regarding reparations because they generally do not offer rehabilitation, compensation, satisfaction, or restitution. However, stakeholder mechanisms may be better suited to offer guarantees of non-repetition compared to other alternatives for enforcement.

This Article proceeds as follows: Section I draws upon the work of Professor John Ruggie to discuss three governance systems that apply to

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22 As You Sow, Press Release, Tesla's Shareholders Call to Prevent Child Labor and Forced Labor in Supply Chains (May 2, 2023).

23 *Id.*

24 *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).

corporations: *public governance* (including international law), *stakeholder governance* and *corporate governance*. It explains that the likelihood that first will influence the third depends on the quality of the second: stakeholder governance. But stakeholder governance is plagued by agency costs that are exacerbated by rational apathy and collective action issues. This section introduces the history of these challenges within corporate governance before applying the analysis to stakeholder governance. It concludes by explaining the significance of stakeholder agency costs for the enforcement of international law. Section II contextualizes stakeholder mechanisms within the broader international law scholarship on international law enforcement by explaining how these share common functions with 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. It 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 & THE PROBLEM OF AGENCY COSTS

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.[25] What laws and norms deter Amazon and other companies from such conduct and punish these same violations?

Professor John Ruggie,[26] identified three governance systems that apply to the conduct of businesses on the international stage: *public governance*, *civil or stakeholder governance*, and *corporate governance*.[27] *Public governance* consists of laws and

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25 Amnesty International, 'DON'T WORRY, IT'S A BRANCH OF AMAZON': EXPLOITATION OF MIGRANT WORKERS CONTRACTED TO AMAZON ON SAUDI ARABIA 5-8 (2023).

26 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. https://www.ohchr.org/en/statements/2021/09/memory-professor-john-g-ruggie-tribute-un-working-group-business-and-human

27 John Gerard Ruggie, THE SOCIAL CONSTRUCTION OF THE UN GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS 12 (Aug. 2017). 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.

regulations at both the domestic and international levels.[28] *Civil or stakeholder governance* "involve[es] stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms, such as advocacy campaigns, lawsuits and other forms of pressure."[29] In contrast, *corporate governance* concerns the relationship between corporate managers (directors and officers) and shareholders.

These are three governance systems that depend on each for the effective global regulation of transnational corporations. 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. For example, the United Nations Guiding Principles on Business and Human Rights states that business enterprises have a responsibility to respect internationally recognized human rights norms and requires that business enterprises "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur"[30] and "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[31] The ILO Declaration on Fundamental Principles and Rights at Work prohibits all forms of forced or compulsory labor.[32] But, as demonstrated in the Amazon example, the fact that we have international law norms on these issues is not enough to ensure that corporations comply with such norms.

Instead, compliance is best assured through corporate governance that determines if a corporation will comply with the norms that public governance supplies.[33] Amazon has no shortage of policies and procedures addressing forced labor in its supply chains. For example, 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."[34] 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.[35] Its Supply Chain

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28 *Id.*

29 *Id.*

30 United Nations OHCHR, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, Principles 11-12.

31 *Id.*, Principle 13.

32 International Labour Organization, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (2022), Principle 2(c).

33 *See, e.g.*, Geoffrey P. Miller, THE COMPLIANCE FUNCTION: AN OVERVIEW (2014),New York University Law and Economics Working Papers. 393. https://lsr.nellco.org/nyu_lewp/393.

34 Amazon, Investor Relations, Nominating and Corporate Governance Committee, https://ir.aboutamazon.com/corporate-governance/documents-and-charters/nominating-and-corporate-governance-committee/default.aspx.

35 Amazon, AMAZON GLOBAL HUMAN RIGHTS PRINCIPLES, https://sustainability.aboutamazon.com/human-rights/principles.

Standards prohibit suppliers from using forced labor or restricting the ability of workers to leave or terminate their employment.[36] It also states 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.[37] Finally, Amazon's Supplier Standards highlight that "Suppliers should pay particular attention to the risks of exploitation that both domestic and foreign migrant workers face."[38] In their report, Amnesty International accused Amazon of violating these and other standards.[39]

This gap between international law and corporate governance is bridged by the intermediate governance system: *stakeholder governance*. It is this governance system that often provides the incentives, sanctions and even knowledge that the international legal system fails to provide to corporate managers to follow its decrees. 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. 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.[40] Such a human rights assessment could evaluate the effectiveness of Amazon's current corporate governance over human rights and identify opportunities for improvement. While this proposal ultimately failed to win shareholder support, 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. A motivated stakeholder 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 to 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 renders stakeholder governance unlikely or unsuccessful – thereby decreasing the odds that the public governance system will permeate into corporate governance.

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36 Amazon, SUPPLY CHAIN STANDARDS 5-6 (2023).

37 *Id.*

38 *Id.*

39 Amnesty International, *supra* note ___ at 5-8.

40 Amazon, PROXY STATEMENT 61-62 (2023).

B. The Shareholder Agency Problem

The challenges of stakeholder monitoring are not new; instead, they are familiar problems within corporate governance. At the heart of the economic theory of the firm, we find the problem of agency costs that arise from the separation of ownership and control within modern corporations: 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."[41] 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.[42] In response, the principal may expend resources to make sure that the agent refrains from those activities ("monitoring costs")[43] or may demand that the agent expend resources to assure the agent that it will not behave in those ways ("bonding costs").[44] But these strategies are not perfect; the result is that there is some divergence between the agent's performance and the best interests of the principal ("residual loss").[45] The sum of these challenges are described as "agency costs."[46]

Corporate organization is replete with agency costs because most public corporations are owned by diffuse shareholders but managed by corporate executives who may also have incentives to steal, shirk or otherwise operate the corporation in ways that are injurious to the interests of its shareholders. Monitoring is particularly challenging within the modern corporation because of three challenges: rational apathy among shareholders, coordination challenges and "principal costs." The rational apathy problem arises because each investor owns a small fraction of the corporation's shares – so receives a small fraction of the benefits of monitoring – but must expend significant resources to engage in such monitoring.[47] The benefits are small and diffusely distributed but the costs may be large and concentrated.[48] This combination of low per capita benefits versus high per capita costs renders it unlikely that investors will engage in monitoring of corporate management.[49]

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41 Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

42 *Id.*

43 *See* Henry Hansmann, *Ownership of the Firm*, 4 J. L., ECON. & ORG. 267, 275 (1988)("If a given class of patrons is to exercise effective control over the management of a firm, they must incur the costs of (1) becoming informed about the operations of the firm, (2) communicating among themselves for the purpose of exchanging information and making decisions, and (3) bringing their decisions to bear on the firm's management.").

44 Jensen & Meckling, *supra* note ___ at 308.

45 *Id.*

46 *Id.*

47 Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Mich. L. Rev. 520, 527-28 (1990).

48 *Id.*

49 Manuel A. Utset, *Disciplining Managers: Shareholder Cooperation in the Shadow of Shareholder Competition*, 44 EMORY L.J. 71, 86 (1995)(discussing the nature of collective goods and the risk of free-riding problem); *see also* Kobi Kastiel and Yaron Nili, *In Search of the "Absent" Shareholders:*

A second challenge is that even motivated investors confront coordination issues that arise from the need to aggregate preferences.[50] 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.[51] When interests and ideas are highly heterogeneous, the group's members may confront significant costs in collective decision making.[52] 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."[53] Additionally, "subgroups of patrons with particular interests can often achieve disproportionate influence."[54]

A final challenge are "principal costs" that are defined by Professors Zohar Goshen and Richard Squire as "costs attributable to the exercise of control by investors."[55] Principal costs come in two varieties that speak to different problems with principals exercising control: competence and conflict. 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)."[56] In the shareholder context, they explain:

> "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."[57]

In contrast, principal conflict costs arise from "investor self-seeking conduct" and includes issues such as collective action problems, rational apathy, hold-outs and varying time horizons, among other challenges.[58] For example, Professor Manuel Utset explains that shareholders may experience greater success in

A New Solution to Retail Investors' Apathy, 41 DEL. J. CORP. L. 55, 61-66 (2016)(finding that retail investors' apathy is significant and on the rise).

50 Hansmann, *supra* note __ at 278.

51 *Id.*

52 *Id.*

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

54 *Id.*

55 Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law & Governance*, 117 COLUM. L. REV. 767, 784 (2017).

56 *Id.* at 786.

57 *Id.* at 788.

58 *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.").

disciplining corporate managers if they cooperate, such as in a coalition.[59] But these coalitions have challenges with formation and continuance because shareholders are reluctant to share information with each other due to their competition in the marketplace; unwilling to invest in information that is company specific because of the threat of defection by other coalition members; and the prospect of managerial bargaining that can break down the coalition.[60]

All of these costs arise from ensuring that the agents operate the corporation in a way that is faithful to the interests of the principals. And corporate governance has adopted many tools to help manage these costs, which are beyond the scope of this analysis. Instead, this analysis focuses on the recognition by Professor Jensen and Meckling that agency costs arise in all situations – including the relationships between corporate managers and *non-shareholder* stakeholders.

C. The Stakeholder Agency Problem

Management scholars have identified a parallel "stakeholder agency" problem that explains why the intermediate governance system – stakeholder governance – may also fail to govern corporations. They identify that a corporation maintains relationships with multiple stakeholders, including but not limited to shareholders, such as customers, employees, suppliers, and local communities. Each of these stakeholders also possess resources that the corporation needs to survive, if not thrive: Employees provide talent; customers provide revenue; suppliers provide raw materials and intermediate goods; and local communities provide (or withhold) the social license to operate. All of these groups have interests and, likely, ideas how the corporation should be run to serve those interests. But corporate managers may have little incentive to do so, leading to the risk that the corporate managers actions will diverge from the interests of one or more of its stakeholders.

For example, Professors Charles Hill and Thomas Jones recognize that these stakeholders are not principals in the traditional sense but their welfare nonetheless triggers agency concerns because, under classic stakeholder theory, they effect and are themselves effected by the actions of the corporation.[61] For example, an employee at a factory (E) provides labor and talent in exchange for compensation from its corporation (C). The quality of E's performance affects the overall success of C; this is how a stakeholder, E, affects the success of the corporation. But C's choices also affects E's welfare: how much it chooses to pay E; the tasks it assigns E; decisions on E's performance and compensation; and the health and safety protections that it affords E. While some of these decisions benefit both the corporation and the employee, there are other choices that involve a trade-off. For example, C may decide to close the factory at which

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59 Utset, *supra* note ___ at 109-114.

60 *Id.*

61 *See* R. Edward Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984)

E works in favor of opening a new factory in another location. That decision may benefit C overall but harms E.

As explained by Professors Jones and Hill, "[t]he difference between the utility that stakeholders could achieve if management acted in stakeholders' best interests, and the utility that is achieved if management acts in its best interest, can be referred to as a *utility loss*."[62] This is comparable to the residual loss examined above that results from the divergence between a principal's interests and an agent's actions.[63] Here, too, monitoring and enforcement mechanisms can align the actions of corporate managers with those of interests but the monitoring challenges are substantial and include the following.

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 only receive a fraction of the benefits of such alignment. For example, E may launch a successful campaign to keep the factory open but would need to incur significant per capita costs to do so and the benefits of that corporate decision flow to E and all other employees at the factory who may not have aided E. More broadly, an individual stakeholder may be reluctant to take on the enormous costs of addressing utility losses because of the scale and distribution of costs involved. What are these costs? The most immediate one is information:

> "Diffusion refers to a situation where a stakeholder group contains many individuals or entities, no one of which has command over a significant proportion of the group's total resources. In such circumstances, *ceteris paribus*, no 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. In turn, this gives managers greater discretionary control over the use to which the firm's resources are put, increasing the residual loss that stakeholders have to bear."[64]

The second challenge is one of *coordination*: among a diffuse group of stakeholders, how do one or more organize collective action?[65] Some stakeholder groups have created organizations that reduce the collective action problems, such as labor unions or consumer groups.[66] For example, perhaps E is not alone in the fight and can count on the similar efforts of those who are in the same union. But perhaps the aggregate power of E's co-workers is

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62 Hill and Jones, *supra* note ___ at

63 Jensen & Meckling, *supra* note ___ at 308.

64 Hill and Jones, *supra* note ___ at 140.

65 Utset, *supra* note ___ at 106-107 (discussing shareholder coalition issues such as need for leadership and effective communication among shareholders).

66 Hill and Jones, *supra* note ___ at 141-142. *See also* Jean-Pascal Gond & Valeria Piani, *Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative*, 52 BUS. & SOCIETY 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.").

insufficient to change management's decisions. Instead, E would need to rely on the power of other stakeholders, such as investors. Consider a recent example highlighting the alliance between employee and investor 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. But this decision involved the efforts of at least three different stakeholder groups: Trilliam Asset Management (investor); Glass Lewis and Institutional Shareholder Services (proxy advisors); and Starbucks Workers United (representing baristas).[67] This example illustrates the importance of coordination not only within stakeholder groups, such as employees, but also across stakeholders.

The third challenge arises from the second: conflict.[68] It is not a given that all stakeholders share the same interests or goals.[69] For example, E may be harmed if C closes the factory but this decision is beneficial for the prospective employees of the second factory that is set to open. There is therefore a conflict within the same stakeholder group of employees. Similarly, the decision on closure may improve the financial performance of C, thereby benefiting investors, or reduce the prices at which C 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 a corporation should do to protect stakeholder interests because those interests diverge. Therefore, 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.

A fourth challenge arises from competence limitations as stakeholders struggle to identify the best course of action that would protect their interests. For example, a stakeholder may understand that a particular management decision is bad for it but it may lack understanding on alternative choices or 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. All of these are costs that reduce the likelihood or effectiveness of stakeholder monitoring of a corporation to ensure that managers align corporate decisions with stakeholders' interests.

D. International Law Enforcement & the Stakeholder Agency Problem

The stakeholder agency costs described above compromise the likelihood and quality of stakeholder enforcement of international law. To summarize: International law provides an abundance of norms that should mitigate the

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67 *Id.*

68 Flore Bridoux & J.W. Stoelhorst, *Stakeholder Governance: Solving the Collective Action Problems in Joint Value Creation*, 47ACAD. MGMT. REV. 214, 223 (2022)(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.").

69 Hill and Jones, *supra* note ___ at 145.

harms that a corporation poses to the planet and its population. But 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 address such violations *ex post*. Stakeholders – such as consumers, employees, suppliers, local communities, regulators and investors – can inform and incentivize corporate managers to align their decisions with international law. But the problems that plague stakeholder monitoring generally also plague efforts of stakeholders to externally monitor the international law compliance of corporations.

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 also interferes with the ability of its baristas to organize, which violates the ILO Declaration on Fundamental Principles and Rights at Work. 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 doing 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 customers 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. So, she does nothing and continues to sip her coffee.

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 customers who may object to efforts to raise the prices they pay for their cup of joe. These conflicting preferences among consumers may raise coordination challenges when Connie needs to rely on the efforts of others 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 customers.[70] Connie may threaten to organize a consumer boycott but conflicting preferences may render such a threat unlikely when some customers may prefer lower prices no matter the reason for those prices. She may also need the leverage of other stakeholders, such as investors, who may

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[70] Hill and Jones, *supra* note ___ 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.").

exercise greater influence over Corbin's Coffee. But these stakeholders may not share Connie's concerns and may instead prioritize the consequences of Corbin's Coffee's violations of international law, such as 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.

But these stakeholder agency problems are not insurmountable. Instead, stakeholders can lower the costs of subsequent stakeholder action. International law enforcement by stakeholders comes in four distinct varieties: *predicative enforcement*, *facilitative enforcement*, *direct enforcement*, and *amplification*.

Stakeholders engage in *predicative enforcement* by lowering the costs of enforcement for another stakeholder. A classic type of predicative enforcement is performed by government actors through legislation and regulation.[71] For example, the California Transparency in Supply Chains Act requires that many companies publicly disclose their human rights due diligence practices on their websites. Consumers like Connie can learn of the practices of companies like Corbin's Coffee without undertaking their individual investigations and information-gathering. Predicative enforcement lowers the per capita costs that Connie would otherwise confront and renders it that much more likely that Connie may act. Similarly, organizations like Know the Chain and the Corporate Human Rights Benchmark collects, aggregates and compares information about the human rights practices of many large companies. Connie can reduce her per capita information gathering costs by consulting the rankings and scorecards produced by these organizations.

Facilitative enforcement is exhibited by restraint and occurs when a stakeholders adopts inaction to avoid interfering with the stakeholder enforcement by other stakeholders. For example, a consumer rights group may be dedicated to ensuring that their members and other customers receive the best quality and price for the goods and services they purchase. Connie's campaign may threaten to raise prices and may provoke the consumer group into action. Their decision to not interfere with Connie's efforts plays an important role in ensuring the success of the former.

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 important to management so that they would listen to her concerns. However, that reticence may change if Connie is able to coordinate with others. She may successfully launch a social media campaign to boycott Corbin's Coffee with the popular hashtag #CreamCorbin'sCoffee. But Connie may have greater 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. Shareholders are empowered to submit proposals under Rule 14a-8 and many have used this mechanism to demand information on

71 Hill and Jones, *supra* note ___ at 140.

whether a company has a human rights policy, the effectiveness of such policies and the state of implementation. 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. 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.

All of these stakeholder enforcement strategies – predicative, facilitative, direct and amplification – can help the rational apathy of stakeholders and the conflict, coordination and competence costs they confront if they wish to act. Predicative enforcement lowers the information costs that any one stakeholder needs to expend to identify and verify international law violations. Amplified enforcement can also help to lower 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.

II. BUT IS IT "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.[72] The punishment that the collective may impose varies from "criticism, social ostracism, commercial boycott, reputational degradation, and physical retaliation."[73] One may wonder why communities prefer this form of decentralized enforcement – practiced by the collective – as opposed to centralized enforcement, imposed by a sole authority, such as a court or king.

Sometimes it is not much of a choice. It is no coincidence that much of the path breaking scholarship on decentralized enforcement focuses on pre-modern times characterized by the absence of highly developed courts and state authorities.[74] On other occasions, however, individuals and communities choose to "opt-out" of the legal system even when one is available.[75] This diversity of situations suggests that decentralized enforcement is not limited to

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72 Gillian K. Hadfield & Barry Weingast, *What is Law? A Coordination Model of the Characteristics of a Legal Order*, 4 J. LEGAL ANALYSIS 1, 3 (2012).

73 Gillian Hadfield & Barry Weingast, *Law without the State: legal attributes and the coordination of decentralized collective punishment*, 1 J. LAW & COURT 3, 5 (2013).

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

75 Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992).

ancient Athens,[76] medieval guilds[77] or 11th century traders.[78] Instead, the need for it arises in many contexts, including the 21st century international legal order that shares many of the characteristics of these pre-modern communities, whether international lawyers and scholars care to admit it or not. The chief characteristic is that it also lacks a centralized enforcement mechanism that enforces the decrees of the world's courts or assembles. It too is dependent upon decentralized enforcement.[79]

But decentralized enforcement also has its own problems.[80] Chief among these challenges is incentives: decentralized enforcement relies on the choices of individual actors to contribute to the enforcement effort. 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[81]: 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? In the parlance of institutional analysis, these are called *information costs* and relate to the challenge of detecting, obtaining, analyzing, and verifying information before one actor can sanction another.[82] When these costs are high, individuals may choose not to participate.[83] By

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

77 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, and Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POLITICS 1, 19 (1990).

78 Lisa Bernstein, *Contract Governance in Small-World Networks: The Case of the Maghribi Traders*, 113 NW. U. L. REV. 1009, 1022-1023 (2019); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 526 (1991).

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

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

81 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*.")

82 Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 BYU L. REV. 497, 511 (2019)("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. Information costs, together with the value of lost future transactions, determine the cost of cheating.").

83 *See, e.g.*, Gillian K. Hadfield & Barry Weingast, *What is Law? A Coordination Model of the Characteristics of a Legal Order*, 4 J. LEGAL ANALYSIS 1, 4 (2012)("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.").

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 norm that was violated does not suffer similar violations in the future.[84] Here, there must be some convergence between individual and collective judgments of wrongdoing,[85] and some assurance that, if they punish, so too will others.[86] This too relies on information but about the expected behavior of others and whether they will also contribute to collective enforcement actions. It also relies on information 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 *increase 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 are valuable to them. This may not have been true always. When the norm emerged, there may have been a significant gap between individual preferences and the norm's content. But courts, governments and even market mechanisms can socialize individuals into valuing a particular norm, thereby convincing them to contribute to its preservation.

Each of these three institutions 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 to it. 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 agencies, and markets 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.

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84 Gillian Hadfield & Barry Weingast, *Law without the State: legal attributes and the coordination of decentralized collective punishment*, 1 J. LAW & COURT 3, 9 (2013).

85 *Id.* at 8-10.

86 McAdams, EXPRESSIVE POWERS OF LAW, *supra* note __ 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.").

We can therefore expect that individuals will engage in decentralized enforcement when the information costs of enforcement are lower than the benefits that can are expected from such enforcement. So, information and enforcement go hand in hand. When the former is absent (or costly), the latter is also likely absent. Information is a predicate for decentralized enforcement, and its procurement should not be more costly than the expected benefits from enforcement. Otherwise, the individual who punished the 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. The value of courts, governments and markets 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. 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.

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 part explains how adjudicative processes can lower information costs by rendering it easier to learn of wrongdoing by forcing information that may not otherwise occur and 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 spill-over 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.

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 info

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.[87] According to legal scholars, a court's expressive function can serve

[87] Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312 (2012)("Expressive theories posit that law, like other

two purposes: *instrumental* and *intrinsic*.[88] The instrumental purpose aims to change social norms within a community about the desirability of certain conduct, values, or beliefs.[89] The second is less about changing social norms but about making statements that are valuable in themselves.[90]

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."[91] 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) "there exists a population of potential defendants whose trials might produce narratives sufficient to deepen social commitment to the norm in question."[92]

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."[93]

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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.[]")(citations omitted).

88 Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996); deGuzman, *supra* note ___ 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.").

89 Sunstein, *supra* note ___ 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.").

90 *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.").

91 Padmanabhan, *supra* note __ at 430.

92 Padmanabhan, *supra* note __ at 430-32.

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

International criminal prosecutions also serve important intrinsic expressive functions even when their capacity to serve other objectives – deterrence, retribution rehabilitation – is in doubt.[94] Professor Meg deGuzman argues that the International Criminal Court 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."[95] 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, raising skepticism over why some cases were prosecuted over others.[96] The reality of limited case load means that few will be prosecuted and few deterred, thereby humbling both retributivist and deterrent aspirations.[97] 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."[98] Professor Mark Drumbl explains that adjudication is well suited for such purposes because "[t]rials can educate the public through the spectacle of theater."[99] Professor Drumbl writes that "[a]dversarial 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."[100]

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 stems from their ability to compel parties to share information that they may prefer to keep

94 deGuzman, *supra* note ___ at 301-312; *see also* Padmanabhan, *supra* note __ at 426-428.
95 deGuzman, *supra* note ___ at 270.
96 deGuzman, *supra* note ___ 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 __ 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.").
97 deGuzman, *supra* note ___ at 301 ("[I]n light of its resource constraints, the ICC is simply unable to make significant its stature as a global organization renders it particularly effective at global norm promulgation."); *see also* Padmanabhan, *supra* note __ at 425 ("[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.").
98 deGuzman, *supra* note ___ at 315.
99 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).
100 *Id.*; *see also* Padmanabhan, *supra* note __ 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.").

hidden.[101] They also incentivize detection: litigation systems – by offering the prospects of damages awards and other remedies, plus lawyer's fees – motivates one or more individuals to seek the truth. 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.[102] 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.[103]

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-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."[104] 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"[105] and "revealing such information through the court strengthens a creditor's leverage in settlement negotiations."[106] Courts produce spill-over 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.[107] Professor Blanchard explains that in adjudicating a failure for a State to re-pay, courts may also reveal that State's propensity to another problem – corruption. This revelation not only jeopardizes that State's ability to participate

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101 *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.").

102 Shapira, *supra* note ___ at 40.

103 *Id. 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.") (internal citation omitted); *see also* Richard McAdams, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 194 (2015)(explaining that media sources are more likely to co cover a press release if a lawsuit has been filed because lawsuits are more costly than regular press releases).

104 Blanchard, *supra* note___ at 501.

105 *Id.* at 503.

106 *Id.*

107 *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.").

in sovereign debt markets but may have political, economic, and social consequences for its relationship with other states.[108] 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."[109]

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 spill-over effects when the prospect of discovery incentivizes regulated entities to clean up their act lest they suffer embarrassment (or additional regulatory scrutiny) from what such discovery may reveal to the public.[110] The fear of exposure to third parties – such as consumers, investors, and regulators – can motivate corporate actors to improve internal policies and management systems so that they appear more presentable when discovery shines a light on otherwise private corporate practices.[111]

C. International Government Processes: International Agreements

International agreements – entered into by State actors – can 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. 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 economic, security and other benefits. A State who violates these agreements may endanger the effectiveness of these agreements for those who 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.

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108 *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.").

109 *Id.* at 539.

110 Zambrano, *supra* note ___ at 120-124.

111 *Id.* Hillary Sale has identified a comparable phenomenon in mandatory disclosure, as opposed to discovery, when regulated entities improve practices that they know that 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.").

INSTITUTIONAL FUNCTION	ADJUDICATIVE PROCESS	GOVERNMENT PROCESSES
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 info	• On-site inspections • NGO verification

1. Increase the Benefits of Enforcement

Reputation has been identified as the "the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation."[112] As Professor Andrew Guzman explains, "[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative. This allows 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."[113] This hints at the important function that international law-making offers to 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."[114]

But a county's willingness to enter into an agreement with another – and keep those commitments – depends on whether its treaty partner(s) will do the same.[115] Many international issues present mixed-motive dilemmas where the

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112 George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, XXXI J. LEGAL ST. S95. S95-S96 (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.").

113 Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1849 (2002)("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.")(citations omitted).

114 Guzman, *supra* note ___ at 1855.

115 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."); Chayes & Chayes, *supra* note ___ at 150 ("Since

parties are better off in they cooperate but there are strong incentives to defect.[116] This is certainly true in policy areas where states would want to retain maximum sovereignty, such as national defense, economic policy development, and responses to climate change. A state's willingness to restrict this sovereignty is dependent upon its perceived benefits 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 to it who may assess whether it is still in their interest to keep participating. Instead, international law also produces information that is consumed by non-parties. 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. . . . soft 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."[117]

2. Decrease 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. These provisions reduce the risk that a State that joins the agreement may restrict its sovereignty when no one else does.[118] *Ex post*, these provisions discourage States from defecting because their non-compliance will be known.[119] As explained by Professors Abram Chayes & Antonia Handler Chayes, "[a] party disposed to comply needs

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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.").

116 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, 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.").

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

118 Chayes & Chayes, *supra* note ___ at 151 (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 by deterring states that may consider noncompliance); Abbott, *supra* note ___ at 13-15, 28-29; Mitchell, *supra* note ___ 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.").

119 Abbott, *supra* note ___ at 15-17.

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 deter the second, and that probability increases with the transparency of the treaty regime."[120] 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.[121] Professors Chayes and Chayes argue that "[r]eporting thus can be a kind of early warning system for substantive compliance problems"[122] because "[i]t identifies parties that have deficits in domestic capability and similar barriers to compliance"[123] and "turns up problems of ambiguity and interpretation."[124]

International legal scholars have highlighted the ways that information-sharing provisions are particularly prevalent in arms control treaties that limit how a State may defend itself.[125] In the New START Treaty, for example, Russia and the United States agree to verifiable limits on strategic offensive arms, such as intercontinental ballistic missiles.[126] Unsurprisingly, the agreement provides for a variety of verification methods, including 18 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; strategic delivery vehicle and launcher notifications, among others.[127] The two States also agree to exchange information on new missiles entering the force; basing location of treaty accountable missiles; status change for missiles; and advance notice of strategic exercises.[128]

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120 Chayes & Chayes, *supra* note ___ at 151.

121 *See, e.g.*, Xinyuan Dai, *Information Systems in Treaty Regimes*, 54 WORLD POLITICS 405, 412-417 (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 ___ at 28 (explaining that international agreements are more likely to 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 ___ at 285 (explaining that in the financial regulatory context, "the surveillance of compliance with international regulatory agreements is in many ways haphazard" and "[f]ull scrutiny by international financial institutions is available for a relatively finite range of instruments.").

122 Chayes & Chayes, *supra* note ___ at 155.

123 *Id.*

124 *Id.*

125 Abbott, *supra* note ___ at 30-53. Transparency provisions are also 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. Under the Agreement, "[c]ountries must report their greenhouse gas inventories and progress towards their emissions reduction targets every two years" and "these national level reports will be subject to an independent 'technical expert review'" and "[c]ountries will then be subject to a 'multilateral examination' to consider progress toward their targets." Natural Resources Defense Council, Paris Climate Agreement: Everything You Need to Know (Dec. 12, 2018), https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know.

126 U.S. Dept. of State, *New START Treaty*, https://www.state.gov/new-start (last visited Oct. 10, 2023).

127 *Id.*

128 *Id.*

In 2023, Russia stopped complying with its treaty obligations under the New START Treaty, including by refusing to allow inspections; denying U.S. requests to meet in the treaty's consultative body; and refusing to provide treaty-mandated notifications.[129] According to the U.S. Department of State, the U.S. responded to these illegal acts by Russia with appropriate counter-measures, including withholding information data and notifications and "refraining from facilitating Russian inspections on U.S. territory."[130] Russia's non-compliance 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."[131]

Information-sharing is also facilitated by the contributions of non-governmental organizations (NGOs) that monitor State compliance.[132] 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."[133] NGOs are also valuable because they can "help to check and verify party reporting"[134] and "provide the basic evaluation and assessment of party performance."[135] 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.[136] As Professor Xinyuan Dai explains, the International Whaling Commission relies on "the voluntary efforts of wildlife groups to check and report on the comings and goings of whaling vessels."[137] In another example, Professor Dai identifies how women's rights groups provides feedback to the Committee on the Elimination of Discrimination against Women who are tasked with monitoring State compliance with the agreement.[138]

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129 U.S. Dept. of State, *Russian Noncompliance with and Invalid Suspension of the New START Treaty* (June 1, 2023), https://www.state.gov/russian-noncompliance-with-and-invalid-suspension-of-the-new-start-treaty; U.S. Dept. of State, New START Treaty Aggregate Numbers of Strategic Offensive Arms (May 12, 2023), https://www.state.gov/new-start-treaty-aggregate-numbers-of-strategic-offensive-arms-5.

130 *Id.*

131 U.S. Senate, Foreign Relations Comm., *Menendez, Reed, Warner Statement on Russia's Failure to Comply with New Strategic Arms Reduction Treaty* (Jan. 31, 2023).

132 Abram Chayes & Antonia Handler Chayes, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 164 (1995).

133 Chayes & Chayes, *supra* note___ at 251.

134 *Id.*

135 *Id.*

136 *Id.*

137 Xinyuan Dai, "Orchestrating monitoring: the optimal adaptation of international organizations" *in* INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS 142 (Kenneth Abbott, Philipp Genschel, Duncan Snidal & Bernhard Zangl 2015).

138 *Id.*

D. International Market Processes: Stakeholder Mechanisms

INSTITUTIONAL FUNCTION	ADJUDICATIVE PROCESS	GOVERNMENT PROCESS	STAKEHOLDER PROCESS
Increases the benefits of decentralized enforcement	• Expressive effects • Spillover-effects	• Coordination	• Multiple incentives
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 info	• On-site inspections • NGO verification	• Mandated disclosures

1. Increases the Benefits of Enforcement

An important benefit of stakeholder enforcement is that it converts otherwise company-specific investments by stakeholders into generalizable investments that can be deployed across a broader range of corporations. As discussed above, decentralized enforcement of international law by stakeholders 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. The 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. The investor would also need to collect information on Tesla's current practices and formulate recommendations on what it requires Tesla to do. As discussed below, different forms of stakeholder engagement may reduce these costs that the investor would otherwise incur.

However, even a reduction of costs does not eliminate it. 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. These costs are justified if the gains from such an engagement may change the human rights due diligence practices of other companies that want to avoid similar engagements with the investor. The international law nature of these practices provides a generalizable standard that is not unique to a particular company but also apply to Apple, Nike and others. The payoffs change for investor change when the investor – or other stakeholder – can expect peer corporations to change their behavior to comply with international law in response to the investor's engagement with Tesla.

These spill-over payoffs reduce the threshold for benefits that an investor needs to be assured in order to engage Tesla. The investor may initially be reluctant to invest the time and resources to engage Tesla on its human rights due diligence practices because it expects a 10% probability that its engagement would change Tesla's policies. However, if the same engagement had spillover effects on Apple, Nike and others, then the investor's expected benefits increase even if the probability of change at Tesla remains the same.[139]

International law also provides economies of scale for stakeholder engagement. Because it offers a global standard, an investor can use much of the same information in its engagement with Tesla to engage other companies. Consider the opposite: If the information that the investor gathers only has utility in its engagement with Tesla, it becomes an asset-specific investment that has value in improving Tesla's conduct but limited utility concerning any other company's conduct.[140]

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."[141] 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.[142]

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139 Black, *supra* note ___ 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*."); *see also* 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.").

140 *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.").

141 Black, *supra* note ___ 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.").

142 *See* Gond and Piani, *supra* note __ at 80, 93 (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).

2. Decreases the Costs of Enforcement

As discussed in Section ___, *supra*, 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 of incurred by other stakeholders when they enforce international law. An easy example of predicative enforcement is a government actor that can mandate that a particular industry disclose corporate information that would be otherwise difficult for the public to obtain. In the human rights context, a number of 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. 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. Critically, the Act does not require that any company actually make any of these efforts but only that they disclose what they do or do not do. 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 of the public learning about the human rights practices of Apple, Netflix, Wal-Mart 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 walk-outs 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 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 associated with the enforcement of international law by providing guidance on what stakeholders should expect of corporations. For example, access to health is recognized as a human right in the Universal Declaration of Human Rights and core international human rights agreements, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)(Art. 12), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)(Art. 5), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)(Art. 12), Convention on the Rights of the Child (CRC)(Art. 24), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)(Art. 28, 43, and 45), and Convention on the Rights of Persons with Disabilities

(CRPD)(Art. 25).[143] 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 human rights guidelines for pharmaceutical companies regarding access to medicines.[144] These guidelines identified the importance of a corporation having a publicly available policy on access to medicines; direct board-level responsibility and accountability for that policy; clear management systems, "including quantitative targets, to implement and monitor its access-to-medicines policy"; annual reporting; and "an effective, transparent, accessible and independent monitoring and accountability mechanism."[145] The 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 by lowering the detection costs of identifying which stakeholders do and do not comply with these international law norms. 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.[146] ATMI "evaluates and compares 20 of the world's leading research-based pharmaceutical companies according to their effort to improve access to medicine in [low and middle income countries]."[147] These rankings inform shareholders and other stakeholders about how well a company is complying with international law norms on the right to health. In the absence of the Special Rapporteur's guidance and the ATM Index, 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 UN special rapporteur and the ATM Index decreases both the coordination costs of identifying appropriate norms for corporations and gathering information on corporate compliance with these norms.

Finally, each of these stakeholder enforcement strategies also has its own expressive function. When the Special Rapporteur articulates global norms, those pronouncements have expressive value. The same is true of the industry rankings produced by the ATM Index. These statements, comparisons, analyses and reports combine with the expressive value of information produced by international courts and inter-governmental organizations regarding the same. Collectively, the expressive value of information can help corporate actors internalize norms regarding their expected conduct. The expressive function of

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143 United Nations Office of the High Commissioner for Human Rights, INTERNATIONAL STANDARDS ON THE RIGHT TO PHYSICAL AND MENTAL HEALTH, SPECIAL RAPPORTEUR ON THE RIGHT TO HEALTH, https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health.

144 *Id.* at 18-19.

145 *Id.* at 18-19.

146 *See* Access to Medicine Index Methodology, at 14, 28 (explaining governance indicators GA1-GA5).

147 2022 Access to Medicines Index at 5.

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 compliance.

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 serve as the metric for success.[148] In some contexts, it may be efficiency while in others it may be distributive fairness.[149] This Section identifies three goals of international law enforcement: *deterrence* (of same and future perpetrators); *punishment of perpetrator*; and *reparations for victims of harm*.[150] It concludes that stakeholder mechanisms are particularly well suited to deterring international law violations by the same or similar business actors because of the various actors that can incentivize a corporation to change its practice 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.

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148 Komesar, IMPERFECT ALTERNATIVES, *supra* note ___ at 5 ("[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).

149 Komesar, IMPERFECT ALTERNATIVES, *supra* note ___ at 5.

150 *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).

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."[151]

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 poorly the market functions at allocating resources efficiently.[152] 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.[153] 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's Komesar's third warning: avoid equating a social goal with law or public policy. "Most existing theories of law and public policy focus attention on social goals and values."[154] 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. But according to Professor Komesar, there are appropriate and inappropriate ways to use them in comparative institutional analysis.[155] They are particularly valuable in evaluating institutions normatively: "institutional performance and, therefore, institutional choice cannot be assessed except against the bench mark of some social goal or set of goals."[156] 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

151 Komesar, IMPERFECT ALTERNATIVES, *supra* note ___ at 6.
152 *Id.* at 20-21.
153 *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.").
154 *Id.* at 4.
155 *Id.* at 5, 14-27.
156 *Id.* at 5.

in question is best carried out by a particular institution."[157] The reality is that 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."[158]

The final warning is perhaps the most humbling, even chilling: "[I]nstitutions move together. When one institution is at its best or worst, the alternative institutions are often at their best or worst."[159] 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."[160] This means 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 having to do with incentives, participation, and influence. As Professor Komesar explains, participation in institutional decision-making depends on both the costs and benefits of such participation. 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.

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 are certain of the risks that international law violations pose to them in particular and/or the effectiveness of international law to address such risks. This means that *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, which leads to little motivation to advocate for change domestically or to pressure their governments to introduce transnational regulation.

Of course, this calculus changes dramatically when populations are aware of the risks that corporate violations pose to them or others. It is therefore not surprising that the governments that proposed a resolution proposing an

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157 *Id.* at 5.

158 *Id.* at 5. This warning is related to Komesar' overall caution against "the tendency to romanticize institutions": "however 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." Eskridge, *supra* note ___ at 428 (describing the Komesarian approach).

159 Komesar, *supra* note ____ at 23.

160 *Id.* at 23.

internationally legally binding treaty on business and human rights included Ecuador,[161] which was locked in a long and infamous legal battle with Chevron over the latter's accountability for environmental contamination.[162] Similarly, scholars have attributed the French Duty of Vigilance Law to a reaction to the collapse of Rana Plaza in Bangladesh and the loss of over 1, 100 lives.[163] These events transformed the speculative and unknown into the specific and concrete so that dispersed populations knew the risks that continued international law violations posed to them or others. This knowledge altered the per capita benefits that parties derive from participation.

In contrast, multinational organizations and their associations are fewer with higher per capita benefits from participation. While the specifics of regulation may be unknown *ex ante*, they 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.[164] However, as Professor Melissa Durkee identifies, corporate actors are able to circumvent many rules that would otherwise ban their influence over international law-making by creating or directing nonprofit actors that, in turn, advise international officials.[165] In

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161 H.R.C. Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

162 Sara Randazzo, *Litigation Without End: Chevron Battles On in 28-Year-old Ecuador Lawsuit*, WALL ST. J. (May 2, 2021)(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.").

163 Polly Botsford, *Corporate responsibility: 'Vigilant' French law puts duty of care on companies*, INT'L BAR ASS'N ("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."), https://www.ibanet.org/article/1324A0D4-268F-40D1-AD30-F863BA212D39.

164 *See, e.g.*, World Health Organization, GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, (Nov. 2008)("In 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. Article 6.8 ("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."). U.N. Hum. Rts. Council, OEIGWG Chairmanship, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 3d Revised Draft* (Aug. 17, 2021), *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

165 Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229 (2016)(identifying "astroturf activism" as a "phenomenon whereby business entities gain access to international lawmakers through front groups that obscure the identity of the profit-seeking enterprise that is

another example, Professors Sergio Puig and Greg Shaffer explain how tobacco companies used the dispute resolution provisions available in investor-state dispute settlement to discourage or punish states that had imposed tobacco controls in their jurisdictions.[166]

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 cases have been filed worldwide against MNCs for their alleged complicity in human rights abuses"[167] but "[n]o corporation has been found guilty and most human rights litigation cases were dismissed."[168] Moreover, "[l]ess than a handful of cases were settled."[169] The U.S. Supreme Court cases of *Kiobel v. Royal Dutch Petroleum*,[170] *Jesner v. Arab Bank*,[171] and *Nestle v. Doe*[172] severely restricted the ability to hold corporations liable under the Alien Tort Statute for the violation of international law committed abroad.[173]

The lack of legal recourse severely restricts the potential for courts to serve a deterrent effect. Professors Schrempf-Stirling and Wettstein explain that foreign direct litigation incentivized defendant corporations to introduce human rights policies: "[A]fter ExxonMobil and Chevron sued for their complicity in human rights Indonesia and Nigeria, respectively, both corporations started introducing human rights policies and other CSR measures during or shortly

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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.").

166 Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-Out*, 16 YALE J. HEALTH POLICY, L. & ETHICS 327, 328 (2016)(explaining that "tobacco companies are strategically using international litigation, such as ISDS, to challenge tobacco control measures around the world, including bans of flavored cigarettes; marketing and advertising restrictions; labeling requirements of health risks; import and export taxes; price, import, and export controls; and brand registration recognition.").

167 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).

168 *Id.*

169 *Id. See also* 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, 1250 (2022)("[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.").

170 569 U.S. 108 (2013).

171 138 S. Ct. 1386 (2018).

172 141 S. Ct. 1931 (2021).

173 *But see Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166 (Sup. Ct. Can. 2020) https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do.

after the legal proceedings."[174] They explain that these are not isolated incidents; instead, in a study of 55 human rights litigation cases (involving 40 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.[175] 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.[176] 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. However, these effects wane when the prospect of litigation wanes.

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, it relies 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 and those who do – such as investors – may not be impacted by the harm to exercise the leverage they possess. The investors' per capita benefits from participation in stakeholder engagement 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 the latter's poor ranking in a reputed benchmark. Those actions raise the per capita benefits of investor engagement because the violation of child labor laws now implicates the interests of investors because of the 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. As discussed above, many corporate violations of international law arise because of business decisions made regarding supply chain management, corporate governance, and business models.[177] These practices need to change in order to

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174 Schrempf-Stirling & Wettstein, *supra* note ____ at 548.

175 *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%.").

176 *Id.* at 558.

177 *See generally* Jennifer Zerk, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES (2012) (reviewing more than 40 cases of alleged corporate involvement in human rights abuses and how these mechanisms operate in practice).

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.[178] The EU Corporate Sustainability Due Diligence Directive explicitly recognizes the importance of board oversight for preventing human rights and environmental harms, as well as the impact of supply chain contract provisions.[179] 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 recognizing contributing factors particular to an industry or specific organization. The contract clauses that contribute to human rights violations for a garment retailer are going to differ from those that lead to 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 lower cost than others and there is little probability that 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. 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.[180]

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178 *See* Joel Lange, et al., *The Rise of Modern Slavery and Its Place in Corporate Compliance,* DOW JONES (Feb. 22, 2023)(discussing the use of "modern slavery" in every single country through businesses and situations of forced labor).

179 *See* European Commission, *Corporate sustainability due diligence,* EU COMMISSION, (explaining the European Commission's proposal for a Directive on corporate sustainability due diligence to "anchor human rights and environmental considerations in companies' operations.").

180 Olsen, *supra* note ___ at 32 (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 have violated international law. 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. The possibilities include both monetary and non-monetary penalties against either or both. In the corporate context, individual executives and corporations can be punished through monetary judgments, criminal prosecutions (against individual executives and corporations), seizure of goods, and stock market decreases. 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. How does one punish a corporation for violating international law?

Very few victims of corporate human rights violations receive a monetary award.[181] In one study, scholars conclude that only 25 cases resulted in monetary judgments under the Alien Tort Statute after it was introduced in 1793.[182] The awards have a collective value of almost $70 billion but most of that amount represents a judgment in a specific case.[183] More importantly, "only six out of these twenty-five awards appear to have been collected, and only partially, typically because defendants lacked financial resources."[184] And there have been very few cases that resulted in a monetary judgment against a corporate defendant.[185] 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 too willing to pay monetary fines as a consequence for failing to prevent and detect misconduct."[186] 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

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181 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, 1250 (2022)("ATS has not been a success story from the perspective of individual material benefits.").

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

183 *Id.*

184 *Id.*

185 *Id.* at 1268 (describing *Licea v. Curacao Drydock Co.*). The court found that the major corporations involved had significantly profited from forced labor. *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366. Laborers were held in captivity, where their passports were taken from them. *Id.* at 1360. 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* Sarkarm *supra* note ___ at 7 ("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.").

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

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."[187]

If billion dollar fines cannot discourage future misconduct, then perhaps it is worth exploring the other types of penalties that may change behavior. In the United States, Customs and Border Protection are authorized to seize imports that they suspect were produced with forced labor.[188] Moreover, the Uyghur Forced Labor Prevention Act "makes a determination that 'any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part' in the XUAR should be assumed to be the product of forced labor unless proven otherwise by 'clear and convincing evidence'"; "[t]his 'rebuttable presumption' means that all such goods are barred from entry into the United States."[189]

Some countries have gone a step further and 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 argued constituted complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, deliberate endangerment of people's lives and forced labor.[190] 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.[191] 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; the case is still ongoing.[192]

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 in 20 years ago."[193] 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."[194] Swedish prosecutors

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187 *Id.* Interestingly, she proposes that corporate actors may change their behavior if they are subjected to non-monetary penalties, such as official findings of guilt, governmental access to internal firm operations, and appointment of a trustee or monitor. *Id.* at 1040-1042. It is interesting to consider whether the imposition of similar non-monetary penalties may change the behavior of recidivist firms that violate international law.

188 U.S. Customs & Border Protection, Forced Labor, https://www.cbp.gov/trade/forced-labor (last visited Oct. 10, 2023).

189 Ctr. for Strategic & Int'l Studs., *The Uyghur Forced Labor Prevention Act Goes into Effect* (June 27, 2022), https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect.

190 Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022).

191 *Id.*

192 Sherpa & Eur. Ctr. for Const. & Hum. Rts., *Charges Confirmed Against Lafarge for Complicity in Crimes Against Humanity in Syria* (May 18, 2022).

193 Jan M. Olsen, *Sweden Charges 2 Oil Executives for War Crimes in Sudan*, AP NEWS (Nov. 11, 2021).

194 *Trial Starts in Sweden of 2 Oil Executives Accused of Complicity in War Crimes in Sudan*, AP NEWS (Sept. 5, 2023).

"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 sale of the Sudan business in 2003."[195] The case went to trial in 2023.[196] While both cases made international news, it is too soon to say whether they signal a broader phenomena 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.[197] The study finds that "[f]ollowing assassinations, we estimate significant negative abnormal returns for firms associated with these events."[198] 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."[199] The study also finds that "institutional investors that follow event-based trading strategies—such as hedge-funds—divest in mining companies after assassination events."[200]

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.[201] 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 allegedly opened fire on them at close range during a peaceful protest against the company's mining activities."[202] The

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195 *Sweden Charges Lundin Energy Executives with Complicity in Sudan War Crimes*, REUTERS (Nov. 11, 2021).

196 Anna Ringstrom, *Former Oil Firm Executives Go on Trial in Sweden over Sudan War Crimes*, REUTERS (Sept. 5, 2023).

197 David Kreitmeir, Nathan Lane, and Paul A. Raschky, *The Value of Names – Civil Society, Information, and Governing Multinationals on the Global Periphery* 3 (unpublished manuscript).

198 *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.").

199 *Id.*

200 *Id.* at 4.

201 Gabriel Friedman, *Days before merger, complaints filed asking for investigation of Pan American and Tahoe Resources*, FIN. POST (Jan. 3, 2019).

202 *See* Notice of Civil Claim, *García v. Tahoe Resources Inc.*, S-144726 (Can. B.C. Sup. Ct. decided Nov. 9, 2015) https://www.amnesty.ca/sites/amnesty/files/imce/images/Tahoe-Notice-Civil-Claim.pdf, *rev'd*, 2017 BCCA 39, (Can. B.C. Ct. App. Decided Jan. 26, 2017) https://www.bccourts.ca/jdb-txt/ca/17/00/2017BCCA0039.htm.

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."[203]

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.[204] While it subsequently dropped, the immediate cause of its stock price drop was the order of the Guatemalan court that had suspended its license to its valuable mine because of concerns over informed consent.[205] Critics and protesters argued that Tahoe's mining license was granted without proper environmental assessments and informed consent by the indigenous populations.[206] The concerns over the license had led to frequent protests at the Escobal mine that had interrupted operations. In 2017, Guatemala's Supreme Court suspended its 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.[207] 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

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203 Garcia v. Tahoe Res. Inc., 82 B.C.L.R. (5th) 415, para. 7, *available at* https://www.amnesty.ca/sites/amnesty/files/imce/images/SCBC-judgment-on-FNC-Nov-2015.pdf.

204 Gabriel Friedman, *Days before merger, complaints filed asking for investigation of Pan American and Tahoe Resources*, FIN. POST (Jan. 3, 2019).

205 Maxx Chatsko, *Here's Why Tahoe Resources Stock Fell as Much as 22.1% Today*, The Motley Fool (Aug. 25, 2017).

206 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).

207 Cecilia Jamasmie, *Tahoe's Escobal mine license to remain suspended – Guatemalan court*, Mining.com (Sept. 4, 2018); Cecilia Jamasmie, *Tahoe Resources forced to halt Escobal mine in Guatemala*, Mining.com (July 6, 2017)("The Canadian miner said the court decision supports a claim brought by an anti-mining group (CALAS) against the country's Ministry of Energy and Mines, alleging it violated the local indigenous people's right of consultation in advance of granting the Escobal mining license to Tahoe's Guatemalan subsidiary"). 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).

33%."[208] It is therefore difficult to argue that Tahoe's violation of international law alone had an immediate effect on its stock price.[209]

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.[210] 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 non-repetition."[211] We can classify these various types of specific remedies in categories familiar under international law: *restitution*, *financial compensation*, *rehabilitation*, *satisfaction*, and *guarantees of non-repetition*.[212] 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" and can include "restoration of liberty, enjoyment of human rights, identity, family life

208 Kessler Topaz Meltzer & Check, LLP, *Shareholder Class Action Filed Against Tahoe Resources, Inc. Securities - (TAHO; THO)*, CISION PR NEWSWIRE (July 12, 2017), https://www.prnewswire.com/news-releases/shareholder-class-action-filed-against-tahoe-resources-inc-securities--taho-tho-300486512.html; Maxx Chatsko, *Here's Why Tahoe Resources Stock Fell as Much as 22.1% Today*, The Motley Fool (Aug. 25, 2017)

209 Similarly, a study found that corporations do not suffer a stock price drop after violating international law. Shayak Sarkar, ESSAYS ON DEVELOPMENT, FINANCE, AND INTERNATIONAL LAW 7-10, 20 (2018) (Ph.D. dissertation, Harvard University)(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)).

210 Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 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)(discussing effective remedies for victims such as such as "restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration").

211 U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 27 (2011).

212 *See, e.g.*, 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, G.A. Res, 60/147, U.N. Doc. A/RES/60/147 ¶ ¶ 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); Report of the UN Working Group, *Human rights and transnational corporations and other business enterprises*, *supra* note ___ at ¶ 42 (describing the concept of "full reparation" articulated by the Inter-American Court of Human Rights).

and citizenship, return to one's place of residence, restoration of employment and return of property."[213]

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."[214] Rehabilitation includes "medical and psychological care as well as legal and social services."[215] Satisfaction is associated with a wide variety of 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."[216] Finally guarantees of non-repetition can include "[s]trengthening the independence of the judiciary" and "[e]nsuring effective civilian control of military and security forces," among others.[217]

The variety of remedies recognizes that those harmed by corporate human rights violations may pursue both monetary and non-monetary objectives. According to Ewell, Hathaway, and Nohle, "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."[218] They explain that judgments can still have 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.[219] 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.[220]

The UN Working Group on Business & Human Rights also recognized 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."[221] While remedies should redress the harms that the victim suffered, remedies should also ensure that the same or similar corporate actors

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213 U.N. Doc. A/RES/60/147, *supra* note ___ at ¶¶ 19; Report of the UN Working Group, *Human rights and transnational corporations and other business enterprises*, *supra* note ___ at ¶ 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.").

214 U.N. Doc. A/RES/60/147, *supra* note ___ at ¶ 20; *see also* Pasqualucci, *supra* note ___ at 32 ("The term 'moral damages' in international law and in civil law systems generally equates with damages for emotional distress and, in the appropriate case, with damages for the loss of society, comfort, and protection under common law.").

215 U.N. Doc. A/RES/60/147, *supra* note ___ at ¶ 21.

216 Pasqualucci, *supra* note ___ at 24.

217 U.N. Doc. A/RES/60/147, *supra* note ___ at ¶ 23.

218 Ewell *et al.*, *supra* note ___ at 1253.

219 *Id.* at 1261.

220 *Id.* at 1268-1273.

221 Report of the UN Working Group, *Human rights and transnational corporations and other business enterprises*, *supra* note ___ at ¶ 40.

refrain from committing similar violations in the future.[222] One type of remedy acting alone is unlikely to achieve all these ends. They also emphasized the importance of ensuring that "rights holders should be central to the entire remedy process."[223] 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 be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms."[224]

Stakeholder mechanisms are particularly weak when it comes to providing reparations because, as discussed, they generally do not offer rehabilitation, compensation, satisfaction, or restitution. One or more stakeholder groups may have been involved in filing a human rights lawsuit or advocating for a criminal prosecution that, in turn, offered one or more of these remedies. But the purely non-state stakeholder mechanisms discussed above do not usually satisfy these objectives. Instead, judicial and governmental processes may prove superior to stakeholder mechanisms because if their ability to order compensation to victims or other non-monetary remedies.

However, stakeholder mechanisms may have one unique advantage: guarantees of non-repetition. As discussed above, 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. Admittedly, litigation can encourage similar changes but, as also discussed, the prospects of human rights litigation are dimming in the United States and elsewhere.[225] In their absence, stakeholders can still provide comparable incentives to change policies, educate the board of directors, evaluate business partnerships, and seek out collaborations with civil society. Stakeholder mechanisms also have the advantage of offering bespoke recommendations to corporations based on sector, size, and potential human rights impacts. It is worth noting that many internationally recognized guarantees of non-repetition envision a State perpetrator of human rights because of the emphasis placed on improving public institutions and oversight.[226] 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 that a particular company or sector does not violate a type of human right in the future.

Overall, however, stakeholder mechanisms fail 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 impacted by past violations by the corporation or those

222 *Id.*
223 *Id.* at ¶ 19.
224 *Id.* at ¶¶ 20-25.
225 *See* notes ___-___, *supra*, and accompanying text.
226 U.N. Doc. A/RES/60/147, *supra* note ___ at ¶ 23.

most likely to be next. News media, investor groups, benchmarking organizations, industry associations, consumer advocacy groups and others can also play an instrumental role in influencing the likelihood, content, and processes of remediation. The question is whether any of these groups reliably, effectively, and genuinely consults with rights-holders before engaging with corporations (or fellow stakeholders) on a particular organizational change. If not, this is a particular area for improvement for stakeholder groups who can improve the effectiveness of their own actions by ensuring that they are attentive to the needs of rights-holders, such as by adhering to the principles of effective remedies identified by the UN Working Group on Business and Human Rights.

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 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 familiar problem within corporate governance: agency costs. Stakeholder agency costs arise from the divergence between management's decisions and stakeholder preferences, such as that a corporation comply with international law norms on climate change, human rights, labor standards, and development. The effectiveness of stakeholder engagement 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. There is always a residual utility loss but 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 government processes and their familiarity disproportionately guide domestic and 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 has 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 international law.