

# ENRICHING RATIONAL CHOICE INSTITUTIONALISM FOR THE STUDY OF INTERNATIONAL LAW

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*Institutionalism in International Relations applies insights from economics, game theory and collective action theory, all forms of rational choice, to analyze situations where international cooperation is beneficial, mechanisms of cooperation, and forms of cooperation ranging from intergovernmental organizations to decentralized policy coordination. Only recently has Institutionalism, or other forms of rational choice outside of International Relations, such as law and economics, been applied to the study of international law, a unique international institution; it still has many important contributions to make in that field. However, by restricting its scope to interactions among states and purely rationalist accounts of state behavior, Institutionalism has limited its utility in analyzing areas of law and governance in which nonstate actors play important roles, international regimes interact with domestic politics, and international actors deploy a variety of norms and policies. To address this problem, this article continues an ongoing effort to develop a richer Institutional theory by incorporating insights from other International Relations paradigms. The goal is to develop a positive theory of international institutions that is more congruent with, and therefore can better explain, the complex dynamic realities of international politics and the dynamic institutions of law and governance those politics produce.*

## I. RATIONAL CHOICE INSTITUTIONALISM AND INTERNATIONAL LAW SCHOLARSHIP

Almost twenty years ago, I published *Modern International Relations Theory: A Prospectus for International Lawyers*.<sup>1</sup> That article highlighted the potential for the study of international law (IL) of the remarkable flowering of Institutional theory in the discipline of international relations (IR). While the title of the article referred to

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1. 14 YALE J. INT'L L. 335 (1989).

“modern IR” generally, the theoretical basis of the developments reviewed there was the application of a broad rational choice (Rational Choice) approach.

Institutionalism uses the tools of economics, game theory, and collective action theory, all forms of Rational Choice. Adopting a broad definition of “institutions,” it applies these tools to situations in which international cooperation may be beneficial, mechanisms by which cooperation may be achieved, and varied forms of cooperation from decentralized policy coordination to norms and rules to formal organizations.<sup>2</sup> Like the long-dominant IR theory Realism (and like much of IL theory), Institutionalism assumes that the principal actors in international politics are states, which rationally pursue their own interests through their international relations. State interests are taken to include security, prosperity, environmental protection, freedom from disease and many other goals for which international cooperation is essential.

Institutionalism addresses both the “demand” and the “supply” sides of international cooperation. On the demand side, it analyzes the benefits that international rules, organizations, procedures, and other institutions provide for states in particular situations, viewing these benefits as incentives for institutionalized cooperation.<sup>3</sup> While international institutions rarely have strong coercive powers, Institutionalists have demonstrated that relatively modest actions—such as producing unbiased information, reducing the transactions costs of interactions, pooling resources, monitoring state behavior, and helping to mediate disputes—can help states achieve their goals by overcoming structural barriers to cooperation. On the supply side, Institutionalism investigates the conditions under which beneficial cooperation is possible in the absence of a central global government and the mechanisms by which it can be achieved. While cooperation is frequently difficult and fragile, Institutionalists have demonstrated (as is obvious in the real world) that cooperation and the creation and survival of institutions are feasible in many circumstances, even in an anarchic international environment.

Only recently has Institutionalism—or related forms of Rational Choice outside of IR, such as law and economics—been applied to IL, a unique international institution. But the IR-IL research agenda has accumulated a great deal of momentum since 1989, and by now has made significant contributions.<sup>4</sup>

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2. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998).

3. See Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 336–39 (1982).

4. See, e.g., Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9, 9–11 (2005) (sources reviewed); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404–43 (2006) (reviewing IR-IL scholarship); Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. S1 (2002) (special issue on rational choice and IL).

The most controversial work in the burgeoning field of IR-IL is almost certainly Jack Goldsmith and Eric Posner's, *The Limits of International Law*.<sup>5</sup> Although Goldsmith and Posner draw on Rational Choice theory generally, they identify their approach most closely with IR Institutionalism.<sup>6</sup> Most importantly, Goldsmith and Posner posit four models of state interaction that together, they argue, explain most cases of behavior consistent with IL. These are (i) pure coincidence, resulting from independent calculations of interest by rational states; (ii) the use of IL as a coordination mechanism in situations where identical or symmetrical behavior increases payoffs; (iii) the use of IL to facilitate cooperation in situations where agreed self-restraint from short-term temptation increases long-term payoffs (as in Prisoners' Dilemma); and (iv) coercion by powerful states.<sup>7</sup> All four of these models are consistent with Institutionalism; the Coordination and Prisoners' Dilemma games are central to it.<sup>8</sup> Goldsmith and Posner deviate from IR Institutionalism primarily in their focus on the "nuts and bolts" of IL, including customary IL, and their skepticism about the role of law in international politics.<sup>9</sup> Their analysis has provoked controversy because of its single-minded reliance on Rational Choice<sup>10</sup> and the particular ways it defines and uses Rational Choice assumptions.<sup>11</sup>

Although IR scholars have harvested much of the low-hanging analytical fruit that Institutionalism theory has enabled them to reach, the approach still has many important contributions to make. That is doubly true for the study of IL, where the application of Institutionalism and other forms of Rational Choice remains in its infancy. This symposium clearly demonstrates the power and fruitfulness of Institutionalism and related Rational Choice approaches for the field of IL.

Over the past twenty years, however, international governance has become considerably more complex than the basic Institutional model of self-interested interaction among rational states. Among other important changes, non-state actors (NSAs) now play prominent roles on international issues and in international arenas, international regimes interact with domestic politics in complex ways, government agencies are international players in their own right, and international actors deploy a wide variety of norms and policies beyond traditional conventional and customary IL to influence states and NSAs.

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5. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

6. *Id.* at 16–17. The authors distinguish their approach from Realism, but their emphasis on state power reflects Realist preoccupations.

7. *Id.* at 11–13.

8. See Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 923 (1985); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 311–16 (1982).

9. GOLDSMITH & POSNER, *supra* note 5, at 17.

10. See, e.g., Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1267–68 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 5).

11. See, e.g., Hathaway & Lavinbuk, *supra* note 4, at 1423.

Developments like these can be observed within IL narrowly defined: witness the growth of individual criminal responsibility and institutions like the International Criminal Court, or the growing importance of host state–investor arbitration under bilateral investment treaties and other economic integration arrangements. These trends are even more pronounced in the “penumbra” of IL: the rapidly expanding body of “soft law” and other norms outside the strict doctrinal boundaries of IL,<sup>12</sup> the growing array of public, private, and mixed organizations with international interests and authority, and the expanding corpus of international policies and programs.

Not surprisingly, IR theory has also become more complex. IR scholars now draw on multiple paradigms distinct from—and typically viewed as competitors to—Realism and Institutionalism, as well as one another.<sup>13</sup> I discuss two such schools of theory here: Liberalism, which emphasizes the role of NSAs and domestic politics, often retaining a Rational Choice approach but looking inside and beyond the state;<sup>14</sup> and Constructivism, which emphasizes influences on behavior, and more fundamentally on the nature and identity of actors, that are social and subjective—such as shared beliefs, norms, identities and perceptions of legitimacy—and in some formulations rejects Rational Choice entirely.<sup>15</sup>

Institutionalism remains a natural vehicle for understanding international cooperation and institutions, including IL. However, by restricting its focus to interactions among states and a rationalist account of state behavior, “institutionalism has painted itself—and been painted by critics—into a corner,”<sup>16</sup> unable to address all the evolving forms of international cooperation.

To address this problem, the present article continues an ongoing effort to develop a richer Institutional theory.<sup>17</sup> My goal is to develop a positive theory of international cooperation and institutions that is more congruent with, and therefore can better explain, the complex, dynamic realities of international politics—shaped by trends like those identified above—and the equally complex and dynamic institutions of law and governance those politics produce. In addition to its explanatory power, such a theory should provide international actors with a broader menu of options for the creation and improvement of international rules,

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12. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in LEGALIZATION AND WORLD POLITICS 37 (Judith L. Goldstein et al. eds., 2001) [hereinafter Abbott & Snidal, *Hard and Soft Law*].

13. See, e.g., Anne-Marie Slaughter, *International Law and International Relations*, 285 REC. DES COURS 12, 30–54 (2000) (discussing the application of game theory to international relations.).

14. See *infra* text accompanying notes 35–41.

15. See Abbott, *supra* note 4, at 14–15.

16. *Id.* at 26.

17. For earlier efforts in this vein, see *id.*; Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141 (2002) [hereinafter Abbott & Snidal, *Values and Interests*].

institutions, and policies, so that they can better address pressing global issues.<sup>18</sup>

This goal can be achieved by selectively incorporating approaches and insights from other IR theories into Institutionalism. In this article I emphasize Liberal insights; I also consider insights from Constructivism, but in a more limited way, as these pose more difficult methodological problems.<sup>19</sup> While drawing on both approaches, I aim to maintain as much as possible the analytical virtues of Rational Choice, such as methodological individualism and parsimony, although doing so obviously poses significant challenges.

There is a converse challenge as well. Enriching Institutionalism is not simply a matter of plugging in existing insights from Liberal and Constructivist scholarship. Because Liberal and especially Constructivist theory have developed in different intellectual contexts and often in opposition to Rational Choice Institutionalism, there remain significant gaps in our understanding of the strategies, roles, and influence of NSAs, and of social and subjective factors, in the creation and operation of IL and other international institutions. I therefore highlight below a number of areas where theoretical development along these lines would be helpful.

At the same time, however, aspects of Liberal and Constructivist theory are in fact applied rather frequently in the study of particular issue areas, even in IL scholarship. Throughout this article, I emphasize one significant example, the use of Liberal approaches in the study of international trade policy and law. The challenge posed by these literatures is how to extend their theoretical applications more broadly.

Given the often competitive relations among IR paradigms, both sides may well resist this project of enrichment. Rational Choice purists like Goldsmith and Posner may see it as diluting Rational Choice and inevitably undercutting its virtues: indeed they have already said as much.<sup>20</sup> Constructivist scholars may see it not only as diluting that approach,<sup>21</sup> but also as yet another example of Rational Choice “imperialism.” Yet a degree of melding is both feasible and fruitful, opening to analysis many exciting areas of inquiry.

Part II of this article introduces Institutionalism, Liberalism, and Constructivism in greater depth and discusses some methodological problems of combining insights from distinct approaches. Part III is the heart of the article. The Part is organized around important aspects of IL and international governance. In discussing each such aspect, it focuses

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18. Cf. Slaughter, *supra* note 13, at 26.

19. I do not address Realism here, although its insights as to the relevance of power are extremely important, as these are already more deeply integrated into Institutionalist thought.

20. See GOLDSMITH & POSNER, *supra* note 5, at 17.

21. See, e.g., Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553, 557–59 (2001).

primarily on the incorporation of Liberal insights, secondarily on Constructivist insights. The subparts of Part III also identify innovations in law and governance that demonstrate the need for an enriched Institutionalism, introduce literatures that set out relevant theoretical approaches and apply them in related contexts, and suggest areas of research that would facilitate cross-fertilization. Part IV is a brief conclusion.

## II. INSTITUTIONALISM, LIBERALISM, AND CONSTRUCTIVISM

Institutionalist theories come in historical, sociological and other forms as well as Rational Choice versions.<sup>22</sup> The Rational Choice Institutionalism discussed here is often referred to as “neoliberal” Institutionalism to distinguish it from these other forms. It is “the most well-developed literature on international institutions.”<sup>23</sup>

Like all Rational Choice theories, Institutionalism utilizes a form of “methodological individualism,” focusing on the behavior of particular actors or “agents.”<sup>24</sup> Most often, however, Institutionalism, assumes that the principal actors are states, not individuals, firms, or other NSAs as in economics.<sup>25</sup> In order to isolate the behavior of states as the subject of analysis, Institutionalism treats states as unitary actors, sometimes disparagingly referred to as “black boxes.” This assumption forecloses assigning causal influence to domestic politics, the form of national governments (“regime type”) or other internal characteristics.

In addition, Institutionalism assumes that states are rational, although subject to significant “bounds” on rationality and any prevailing external constraints.<sup>26</sup> Similarly, it assumes that states are purposive, instrumental, and strategic when their well-being depends on interactions with others.<sup>27</sup> Finally, Institutionalism assumes that states are egoistic, purposively pursuing their own interests (although it does not devote much attention to how those interests are determined).<sup>28</sup> Many actions that appear inconsistent with pure egoism—such as foreign aid or disaster assistance—can nonetheless be analyzed in Rational Choice terms by

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22. See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 936 (1996).

23. Jon C. Pevehouse, *Democracy from the Outside-In? International Organizations and Democratization*, 56 INT'L ORG. 515, 518 (2002).

24. See Checkel, *supra* note 21, at 560–62.

25. For a discussion of the version of methodological individualism employed in economics and a call for its use in IR and IL, see Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394 (1999).

26. See Duncan Snidal, *Rational Choice and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 73, 74–76 (Walter Carlsnaes et al. eds., 2002).

27. *Id.* at 82–85.

28. *Id.*

including a degree of altruism in the state's preference function or by viewing the state as seeking to optimize a normative goal.<sup>29</sup>

Institutionalist scholars built their theory around unitary, rational, and self-interested states in part as a response to the dominance of Realist theory. Realism, especially modern structural Realism,<sup>30</sup> relies on the same assumptions, while focusing on the fundamental state interest in survival and security and on the preeminent importance of power for survival.<sup>31</sup> In Realism these assumptions lead to predictions of continuing competition and conflict in the crucial areas of international relations.<sup>32</sup> By adopting a similar analytic structure—except for the specification of multiple interests—Institutionalism could not be accused of “smuggling in” cosmopolitan or other idealistic assumptions to justify its more optimistic view of international cooperation.<sup>33</sup>

A significant advantage of Rational Choice Institutionalism is its ability to generate explanations and predictions from spare, widely applicable, and frequently elegant models of state interaction. Chief among these are game theory models, such as Coordination and Prisoners' Dilemma, and economic models, such as externalities, collective goods, and common pool resources.<sup>34</sup> I seek as much as possible to preserve the clarity and parsimony that models like these make possible.

Liberalism in IR also has multiple forms. As Andrew Moravcsik notes, historically Liberalism represented a normative ideology that tended to be idealistic or utopian in its prescriptions for world order.<sup>35</sup> As a result, Realist critics were able to caricature Liberalism as naïve, and to present their positive, “realistic” approach as superior.<sup>36</sup> More recently, Moravcsik, Anne-Marie Slaughter and other IR and IL scholars have reinvented Liberalism as a positive theory.<sup>37</sup> Positive Liberalism is also based on methodological individualism, but as in economics and pluralist theories of politics the relevant actors are societal: individuals, firms, non-governmental organizations (NGOs), associations, and other NSAs.<sup>38</sup>

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29. See Abbott & Snidal, *Values and Interests*, *supra* note 17, at S145. This broad concept of Rational Choice emphasizes the manner in which actors pursue their goals, rather than the nature of those goals.

30. The classic source of structural Realism is KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

31. *Id.* at 88–93.

32. *Id.*

33. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 66–67 (1984).

34. See Abbott, *supra* note 1, at 375–95.

35. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *INT'L ORG.* 513, 514 (1997).

36. *Id.*

37. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) [hereinafter *SLAUGHTER, NEW WORLD ORDER*]; Moravcsik, *supra* note 35; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503 (1995) [hereinafter *Slaughter, Liberal States*].

38. Moravcsik, *supra* note 35, at 516–17.

For the most part, Liberalism views NSAs as self-interested, rational, and strategic, like states in Institutionalism. They “organize exchange and collective action” to further their interests, subject to constraints such as lack of resources and limitations on their influence.<sup>39</sup> In other words, NSAs pursue their interests through markets and other private spheres and also through politics, primarily domestic politics. Thus, Liberalism is largely a “bottom up” theory in which societal actors influence the preferences and policies of their national governments.<sup>40</sup> NSAs may pursue moral values or social identities as well as interests; in “idea-tional” Liberalism, concerns like these shape significant areas of domestic and foreign policy.<sup>41</sup>

In sum, Liberalism opens the “black box” of the state, exposing to analysis its internal social and governmental structures and politics. Having taken that step, Liberalism can address numerous important issues, such as the impact of different domestic governance structures on international behavior, the independent international activities of government agencies, and a range of relationships between international and domestic politics. While incorporating the political activities of NSAs certainly complicates the spare models of Institutionalism, Liberal theories are generally compatible with Rational Choice and relatively parsimonious in their own right. To illustrate that point, this article includes diagrams depicting several models of domestic and international interaction that would constitute important elements in an Institutional theory enriched with Liberal insights.

Constructivist theorists understand the world much differently.<sup>42</sup> Most notably, Constructivists argue that neither states nor NSAs have objective interests, as other theories assume.<sup>43</sup> Rather, actors’ interests are “constructed” through social processes that generate shared or “intersubjective” understandings.<sup>44</sup> Indeed, many important attributes of states and NSAs—including their identities, values and relationships, many aspects of their power,<sup>45</sup> their legitimacy and authority, and for legal fictions like the state, their very existence—are socially constructed.<sup>46</sup>

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39. *Id.* at 516.

40. As discussed below, NSAs are also increasingly active in transnational and international politics. Such interactions were prominent in the IR literature thirty years ago and have been the subject of much recent research. See, e.g., ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995).

41. Moravcsik, *supra* note 35, at 525–28.

42. See James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in *HANDBOOK OF INTERNATIONAL RELATIONS*, *supra* note 26, at 52.

43. *Id.* at 61–65.

44. *Id.*

45. See Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 *INT’L ORG.* 39, 45–49 (2005).

46. Actors do have material attributes, of course, but their meaning and effect are intersubjectively constructed.



Similarly, law—like social norms, approbation and criticism, and other related social processes—operates less by regulating or constraining actors than by constituting them with particular attributes, identities, and forms of power, socializing them to prevailing values and norms and constructing social relationships.<sup>47</sup>

More generally, Constructivists tend to view social structures, especially subjective structures, as prior to and more significant than the decisions of particular agents (thus rejecting or at least downplaying methodological individualism), even though actors' behavior continually reconstitutes social understandings.<sup>48</sup> At the least, actors have less freedom to calculate in Constructivism than in Rational Choice; instead, they often respond to situations based on their perceptions of social expectations, their identities, internalized values, and similar subjective considerations.

Many formulations of Constructivism focus on issues (e.g., how states acquired their identity in the international system) and subjective influences (e.g., “civilizational constructs” and culture) that are difficult to square with Rational Choice.<sup>49</sup> Other versions, however, are more amenable to bridge building: they focus on purposive, agent-centered processes of “strategic social construction.”<sup>50</sup> In these approaches, actors operate rationally and strategically to achieve their ends, whether egoistic, altruistic, or principled.<sup>51</sup> Yet they and those they aim to influence are also embedded in a socially constructed world in which many actors respond to values, identities, legitimacy, and norms. As a result, actors can deploy instrumental strategies based on invoking existing social understandings or constructing new ones.<sup>52</sup>

Strategic social construction is part of a promising intellectual movement to bridge the gap between Rational Choice and Constructivism and escape from the “either/or” clash of paradigms.<sup>53</sup> Scholars from both schools now see theoretical differences, such as prioritizing agents or structures, as overblown.<sup>54</sup> And Rational Choice scholars suggest that many forms of rationalist analysis can, with care, incorporate subjective

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47. Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”*: Richer Views of Law and Politics, 55 INT'L ORG. 743 (2001); John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 871–74 (1998).

48. Fearon & Wendt, *supra* note 42, at 57.

49. Ruggie, *supra* note 47, at 863–64, 866–67.

50. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 910–11 (1998).

51. *Id.* at 912.

52. See IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 16* (2007) [hereinafter HURD, *AFTER ANARCHY*]; Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 INT'L ORG. 495, 497 (2005) [hereinafter Hurd, *Strategic Use*].

53. See, e.g., Checkel, *supra* note 21, at 581.

54. See, e.g., Fearon & Wendt, *supra* note 42, at 62.

elements, even the methodologically challenging possibility of changing actor preferences.<sup>55</sup>

Some scholars view Rational Choice and Constructivism as complementary in the sense that actors sometimes respond to interest-based incentives and sometimes to norms or identities; both approaches belong in the analytical toolkit to be used where appropriate.<sup>56</sup> Even more promising, however, are approaches like strategic social construction, which view Rational Choice and Constructivism as complementary in the sense that both sets of influences operate simultaneously.<sup>57</sup>

For example, Martha Finnemore and Kathryn Sikkink posit a “life cycle” of norms, in which NGOs or other norm entrepreneurs act rationally and strategically to promote the acceptance of human rights norms.<sup>58</sup> Activists first enlist a few committed states as supporters, then gradually persuade others to sign on until the norm is widely accepted and finally internalized.<sup>59</sup> Frank Schimmelfennig argues that Eastern European states seeking EU membership achieved it not by interest-based bargaining, but by the strategic use of normative arguments.<sup>60</sup> The applicant countries demonstrated that they shared European values, and exposed inconsistencies between the stringent entry criteria laid down for them and the EU’s own rhetoric and standards of legitimacy.<sup>61</sup> Ian Hurd argues that Libya was able to respond to Security Council sanctions imposed after the Lockerbie disaster by reinterpreting the very principles the Council had used to justify sanctions—such as procedural justice and respect for international institutions—to make a case that the sanctions lacked legitimacy.<sup>62</sup> As more states began to accept Libya’s arguments, Council members—concerned with protecting the institution’s overall legitimacy—backed off from the sanctions and agreed to a compromise.<sup>63</sup>

However, there remains an important difficulty with these approaches: the intersubjective understandings and social processes Constructivism emphasizes are extremely difficult to observe, disentangle from other influences, and test.<sup>64</sup> For these reasons, Rational Choice scholars remain wary of the methodological challenges Constructivism poses, while some are skeptical of its premises.<sup>65</sup> Thus, we may not yet have the tools to fully incorporate strategic social construction into Insti-

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55. See Snidal, *supra* note 26, at 74, 84–85.

56. Fearon & Wendt, *supra* note 42, at 53.

57. See Finnemore & Sikkink, *supra* note 50, at 909–15.

58. See *id.* at 895–905.

59. *Id.* at 895.

60. Frank Schimmelfennig, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, 55 INT’L ORG. 47, 47–48 (2001).

61. *Id.* at 68–72.

62. HURD, AFTER ANARCHY, *supra* note 52, at 149–56.

63. *Id.* at 156–61.

64. *Id.* at 8. Hurd does, however, suggest some techniques for detecting perceptions of legitimacy. *Id.* at 32.

65. GOLDSMITH & POSNER, *supra* note 5, at 14–15.

tutionalist theory. I therefore treat Constructivist approaches in a more preliminary manner: indicating areas where norms, identities, legitimacy, and other subjective influences appear to play a significant role in international governance, and suggesting how that role might be explored and tested as part of an ongoing bridge-building agenda.

### III. ENRICHING INSTITUTIONALISM

#### A. *The Processes of International Law*

I begin by introducing a figure that identifies several points at which NSAs figure in the processes associated with IL. This figure was designed primarily to depict treaty relations, but it can be used by analogy with other forms of IL and its penumbra.<sup>66</sup> I will refer back to the numbered points in Figure 1 for clarity during subsequent discussions.

FIGURE 1  
PROCESSES OF INTERNATIONAL LAW

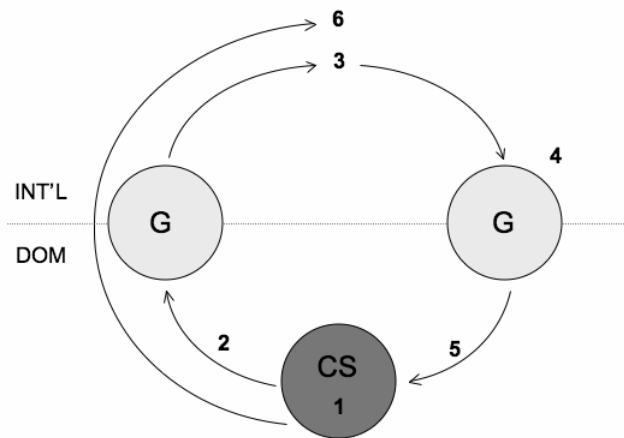


Figure 1 represents a single state. The horizontal line separates the international and domestic realms; the figure also distinguishes the government of the state (G) from its domestic civil society (CS). Points 1–5 represent the traditional IL process: (i) point 1 represents the organization and operation of NSAs within domestic civil society and politics; (ii) point 2 represents domestic efforts by NSAs to influence the government’s negotiating positions and decisions prior to its engagement with other states; (iii) point 3 represents negotiations and other interactions

66. Kenneth W. Abbott, “Economic” Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 *CARDOZO L. REV.* 971, 987–88, 998 (1996).

among states on the international plane, without direct NSA participation, as in traditional IL and Institutionalist and Realist theory; (iv) point 4 represents the process of bringing treaties and other legal commitments back to the domestic arena for approval, typically by the national legislature, and for adoption as part of the domestic legal system, at which point NSAs again attempt to influence national decisions and legal actions; and (v) point 5 represents domestic implementation of international legal rules and commitments. Points 1–5 can also represent many parallel processes that take place in the penumbra of IL, for example, the creation and implementation of soft law and international policies.

Point 6, in contrast, represents recent expansions of traditional processes that permit direct participation by NSAs on the international plane. Point 6 encompasses efforts by NSAs to influence decisions of other governments and NSAs in other states, as well as to influence and participate in international conferences, intergovernmental organizations (IGOs), and other venues where law, norms, and policies are created.

### B. *Creating, Shaping, and Adopting IL: State Preferences*

Even if one assumes that IL is created and shaped through interactions among states, as at point 3 in Figure 1, it is difficult to analyze or predict the success and content of particular interactions without specifying the interests and preferences of participating states; for example, the structure of preferences determines whether an interaction among states is governed by the incentives of Coordination or of Prisoners' Dilemma. Often, however, Institutionalists do not differentiate among states in terms of their individual preferences, but rather assume general, widely held interests,<sup>67</sup> even though that assumption limits the explanatory power of the theory to high levels of generality.<sup>68</sup> For more detailed analysis, Institutionalist scholars must specify the preferences of particular states; in Rational Choice, moreover, preferences must be identified outside the explanatory theory itself in order to avoid circularity.<sup>69</sup> The greatest danger in this regard is the ad hoc identification of preferences; standard approaches include relying on conventional assumptions or looking to some other theory or discipline.<sup>70</sup>

#### 1. *Liberal IR Theory*

The fundamental contribution of Liberal IR theory is a robust solution to the problem of identifying preferences: it sees the origin of state

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67. Hathaway & Lavinbuk, *supra* note 4, at 1431–33.

68. DENNIS C. MUELLER, PUBLIC CHOICE III 660 (2003).

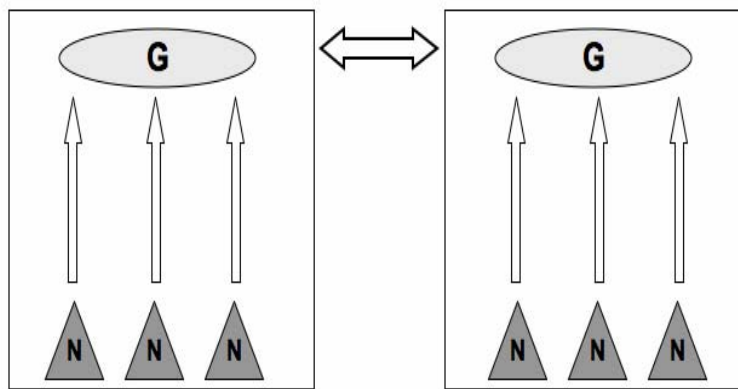
69. *Id.*

70. *Id.* at 659.

preferences in domestic politics and the activities of NSAs.<sup>71</sup> While this solution is important in itself, it also provides a basis for even more interesting, innovative, and potentially significant applications, such as efforts by international institutions to enlist domestic NSAs in support of IL, norms, and policies, and even to modify domestic politics to produce greater support.<sup>72</sup>

The most widely cited Liberal approach is that of Moravcsik, mentioned above.<sup>73</sup>

FIGURE 2  
MORAVCSIK LIBERAL THEORY



In Moravcsik's approach, individuals, firms, private groups, and other NSAs (N) operate primarily within domestic politics, seeking to influence their own governments (G) through "representative" processes, which include not only elections and other democratic procedures but all the social, political, and legal processes by which governments respond to the demands of societal actors.<sup>74</sup> If certain NSAs are motivated by values or principles rather than (or in addition to) pure self-interest, domestic politics might resemble a campaign of strategic social construction; domestic conflicts between value and interest actors are a promising area for future research.<sup>75</sup>

71. Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 366 (1999).

72. Abbott, *supra* note 4, at 14, 32–33.

73. Moravcsik, *supra* note 35.

74. *Id.* at 518.

75. Abbott & Snidal, *Values and Interests*, *supra* note 17, at S144–45. Moravcsik's discussion of "ideational Liberalism" is limited to societal pressures related to basic elements of public order, such as borders and political institutions, and does not encompass the full range of values that actors pursue through politics. Moravcsik, *supra* note 35, at 525–28.

In the end, the preferences of a state reflect the constellation of domestic interests its government has decided to represent. Once preferences have been determined in this way, states interact on the international plane, at point 3, much as in Realist or Institutionalist theory. Their international behavior depends primarily on the patterns of state preferences they encounter.<sup>76</sup> Preference patterns may be conflictual, cooperative, mixed, or simply diverse; indeed, since domestic politics are so complex and variable, the state preferences identified by Liberal methodologies are likely to be far more diverse than Realism or Institutionalism assumes.<sup>77</sup>

Such a Liberal analytical framework should lead scholars to consider—not as matters of comparative politics but as determinants of the creation and content of IL and international institutions—the domestic constitutional, legal, and political structures through which state preferences are formed, at point 2.<sup>78</sup> Such analyses are common in the area of international trade, as well as in foreign affairs law more generally: trade scholars in the United States study constitutional structures such as the respective roles of the President and Congress in formulating trade policy;<sup>79</sup> legal structures such as statutes mandating industry advisory committees;<sup>80</sup> and political structures such as the organization, resources, and lobbying effort of rivalrous domestic interests.<sup>81</sup>

Liberal theory should draw equal attention to the constitutional, legal, and political procedures by which international rules and commitments are approved, at point 4; these effectively determine the legal obligations of particular states and therefore the breadth of application of IL rules. Legal scholars often tend to treat international rules as general in application,<sup>82</sup> but as Liberalism would suggest, most are quite variable, due to rejections of and reservations to treaties, persistent objections to developing customary rules, different national doctrines of domestic application (for example, varied forms of monism and dualism), and other actions by participating states.<sup>83</sup> In international trade, the United States'

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76. Moravcsik, *supra* note 35, at 520.

77. *Id.* at 520–21.

78. *Id.* at 518.

79. See I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 14–17, 65–76 (4th ed. 2005) (discussing techniques by which Congress has delegated its constitutional international commerce power to the executive); STEPHEN D. COHEN, THE MAKING OF UNITED STATES INTERNATIONAL ECONOMIC POLICY: PRINCIPLES, PROBLEMS AND PROPOSALS FOR REFORM 97–100 (5th ed. 2000) (same); ROBERT E. BALDWIN, TRADE POLICY IN A CHANGING WORLD ECONOMY 21–24 (1988).

80. See, e.g., DESTLER, *supra* note 79, at 109–11 (analyzing impact of Trade Act of 1974 requirement that executive establish advisory committees representing industry, labor and agriculture); COHEN, *supra* note 79, at 59, 120–21 (same).

81. See DESTLER, *supra* note 79, at 185–90 (analyzing patterns of interest group politics); COHEN, *supra* note 79, at 113–35 (same); Moravcsik, *supra* note 35, at 530–31.

82. See Abbott *supra* note 71, at 367.

83. See Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201; Craig Van-

unique approval process for international agreements, known as trade promotion authority or “fast-track,” has for many years been central not only to United States trade policy, but also to the timing, success, and outcomes of international trade negotiations.<sup>84</sup>

Finally, the Moravcsik approach makes relevant to IL national policies on the formation and political activity of NSAs, as at point 1.<sup>85</sup> Examples of such policies might include laws that regulate union organizing and authorize tax deductions for contributions to NGOs, as well as more repressive measures by authoritarian governments. Policies that limit or encourage the organization and operation of NSAs, or of particular types of NSAs, will affect the formation of national preferences and hence international interactions.

It is clearly infeasible to analyze these matters for every state engaged in an international lawmaking process. However, a Liberal analysis can be done more easily by focusing on the key states in a negotiation or customary law process, or on states that typify particular groups (for example, developing versus industrialized states) or regime types (for example, democratic versus authoritarian states). In addition, Liberal scholars have sought to develop systematic hypotheses as to the impact of internal differences on international behavior.<sup>86</sup> While there is a rich literature on this point,<sup>87</sup> the most important hypothesis for IL has been summarized as follows: “liberal democracies ‘do law’—that is, enter into legal agreements and then comply with them—better than illiberal states.”<sup>88</sup> Continuing efforts to test this hypothesis and to refine our understanding of the specific features responsible for this behavior are important for the study of IL. It may be especially fruitful to combine Liberal and Constructivist insights by investigating the relative influence of the subjective understandings and the concrete institutional structures that characterize liberal democracies, and the causal pathways by which each affects national decisions.

The Liberal focus on domestic politics and national variation can also have normative implications. For example, John McGinnis argues that U.S. courts should not look to foreign law as persuasive authority in constitutional interpretation because such law emerges from local politi-

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Grasstek & Pierre Sauvé, *The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?*, 9 J. INT’L ECON. L. 837, 841–48 (2006).

84. J. F. HORNBECK & WILLIAM H. COOPER, CRS REPORT FOR CONGRESS: TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL33743.pdf>.

85. Moravcsik, *supra* note 35, at 516–21.

86. *See id.* at 531–32.

87. Perhaps the most important Liberal predictions relate to the “democratic peace.” *See id.* For analyses with regard to IL, see, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 331 (1997); Slaughter, *Liberal States*, *supra* note 37, at 509–10; Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 377 (1995).

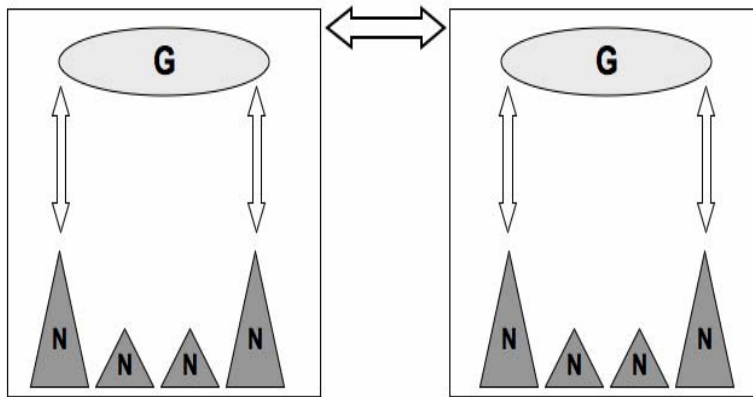
88. Hathaway & Lavinbuk, *supra* note 4, at 1432–33.

cal processes designed to produce rules suitable for the specific circumstances of foreign polities, forms part of an integrated system of national laws and institutions that differs from that of the United States, and reflects unique national social norms and arrangements.<sup>89</sup>

## 2. *Public Choice Theory*

A cognate literature prominent in the Rational Choice canon is public choice theory.<sup>90</sup> Simply put, public choice is the use of economics to study political decision making.<sup>91</sup> Like Liberal IR theory, it focuses on the domestic political activities of individuals and private groups—seen as rational, egoistic utility maximizers—aimed at influencing political and legal decisions: at point 2 and to a lesser extent point 4 in the international legal process.<sup>92</sup> Figure 3 depicts the public choice model of politics.

FIGURE 3  
PUBLIC CHOICE THEORY



Clearly some private interests (N) are more influential than others, due to their numbers, location, organization, resources, political skill, and other attributes. In essence, public choice views private actors as possessing different types and levels of political power, depicted in Figure 3 by NSA triangles of different sizes. The most interesting hypotheses of public choice theory suggest that the differential influence of particular types of private groups systematically biases national decisions.<sup>93</sup>

89. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006).

90. MUELLER, *supra* note 68.

91. *Id.* at 1.

92. *Id.* at 1–2.

93. The classic text is MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).



Importantly, public choice views government officials and agencies, not as mere “transmission belts” for private influence, as in Moravcsik’s version of Liberal theory, but as additional classes of NSAs that seek to maximize their private utility, for example, officials’ chances of reelection and agencies’ budgets.<sup>94</sup> Hence public choice analyses are transactional, not representational: influential interest groups provide officials with campaign contributions and electoral support (and sometimes with bribes) in return for laws, regulations, protection from competition, and other public actions, as depicted in Figure 3 by two-headed arrows.<sup>95</sup>

Like Moravcsik’s Liberalism, public choice is based on an elegant model of political transactions that determine state preferences and international behavior. It leads scholars to consider an even wider range of domestic legal and political structures, including those relevant to political transactions by officials and agencies, such as campaign finance and antibribery laws. While public choice theory has generally focused on domestic issues, it is equally applicable to national decisions with international implications. In the literature on international trade, for example, exogenous trade theory attempts to predict which domestic interests will be granted the highest levels of protection based on their political activities and influence.<sup>96</sup>

Alan Sykes uses public choice to analyze the rules of international trade law. For example, Sykes explains how utility-maximizing national officials benefit from the “escape clauses” typically inserted into trade agreements.<sup>97</sup> Such clauses allow importing country officials to respond to protectionist demands from particularly powerful interest groups; however, the clauses include substantive and procedural hurdles to ensure that they are only used when the benefits to importing country officials of granting protection outweigh the political costs to exporting country officials whose constituents are harmed by the protectionist measures. It seems clear that public choice could be applied to many other areas of IL.

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94. MUELLER, *supra* note 68, at 230 (representatives maximize chances of election); *id.* at 362 (“budget maximizing bureaucrat”).

95. See, e.g., Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 137 (1957) (theorizing that government officials act like entrepreneurs, “selling policies for votes instead of products for money”); Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special Interest Politics*, 63 REV. ECON. STUD. 265, 265 (1996) (stating theory of interactions between interest groups making campaign contributions and political parties setting policies).

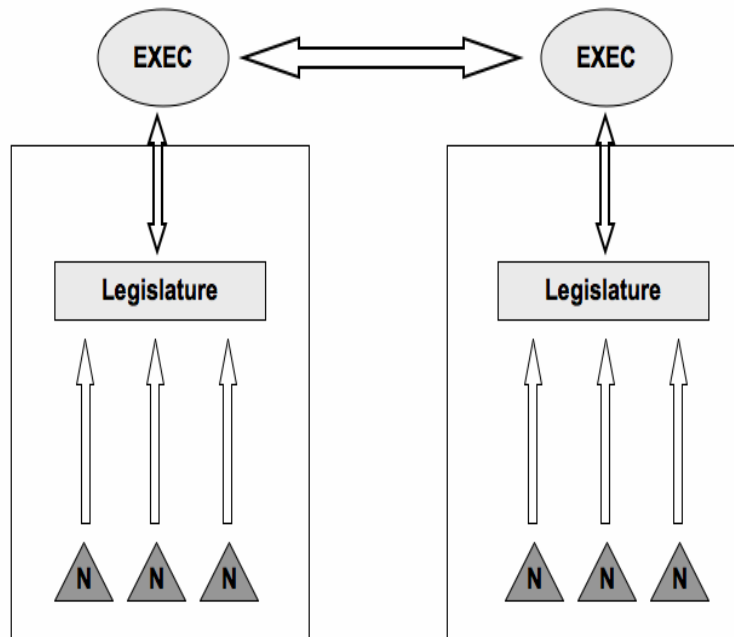
96. MUELLER, *supra* note 68, at 350–53.

97. Alan O Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 281–82 (1991).

### 3. *Two-Level Game Theory*

A third important Rational Choice approach, Robert Putnam's two-level game theory, is designed specifically for international relations.<sup>98</sup> It focuses simultaneously on domestic and international political actions, providing an elegant model of the complex politics behind the creation and shaping of IL and other international outcomes. Figure 4 represents the two-level game approach.

FIGURE 4  
PUTNAM TWO-LEVEL GAME



In this model, national executive officials interact with societal actors and legislators in domestic politics, especially at point 4 in Figure 1. Officials must seek approval of international agreements, while legislators and interest groups seek to influence the content of those agreements and decide whether to support them once presented. At the same time, executive officials are engaged in negotiations with other governments, as at point 3; they are simultaneously “playing on two chessboards.”<sup>99</sup>

98. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

99. *Id.*

Two-level game theory leads scholars to consider not only domestic constitutional, legal, and political institutions and procedures, as in Liberal theory and public choice, but also the structures and processes of international negotiations.<sup>100</sup> Perhaps most importantly, it directs attention to the strategies of executive officials for dealing with the simultaneous pressures of two political chess matches. In general, officials will try to modify the scope of the negotiations or the negotiated text to ensure approval at home. This may include adding new issues that gain the support of powerful interest groups<sup>101</sup> It may also include inserting provisions that provide benefits or participation opportunities for NSAs that might otherwise oppose the agreement. For example, Kal Raustiala argues that the private complaint procedures established by the environmental “side agreement” to NAFTA are best understood as ways to satisfy the demands of largely antagonistic NGOs for a role in NAFTA governance.<sup>102</sup>

Scholars also hypothesize, however, that skillful negotiators can in certain circumstances use domestic political and legal constraints to bolster their influence in international negotiations,<sup>103</sup> and can use the constraints of international negotiations—such as tentative agreements or package deals, like the one GATT trade negotiators adopted in the Uruguay Round<sup>104</sup> and the similar approach intended for the current WTO Doha Round<sup>105</sup>—to overcome domestic resistance. Recent work extends this approach to postratification implementation, where different incentives prevail.<sup>106</sup>

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100. On international trade negotiations, for example, see *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* (John S. Odell ed., 2006); JOHN S. ODELL, *NEGOTIATING THE WORLD ECONOMY* (2000).

101. For example, in the WTO Uruguay Round, United States and other developed country negotiators succeeded in adding intellectual property and services issues to the negotiations, gaining the support of powerful domestic constituencies. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 *HARV. ENVTL. L. REV.* 1, 10 n.29 (2001).

102. Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 389, 389–413 (2004). Raustiala argues that these provisions are difficult to explain by approaches that emphasize state interests. *Id.*

103. For example, executive negotiators may cite restrictive legislative expressions or enactments at home to justify their refusal to make international concessions. See DESTLER, *supra* note 79, at 111–14.

104. See Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 *U. PA. J. INT'L ECON. L.* 535, 452 (1998).

105. See, e.g., VanGrasstek & Sauv , *supra* note 83, at 839.

106. See generally Andrew Murtha & Robert Pahre, *Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on Intellectual Property Rights*, 59 *INT'L ORG.* 695 (2005).

C. *Creating and Shaping IL: NSA Participation on the International Plane*

All three Rational Choice approaches just reviewed offer elegant, parsimonious models of domestic political processes (and in the case of two-level game theory, of international processes) that influence state preferences, national legal and political decisions with international implications, and the creation, content, and adoption of IL. However, all three share an important limitation: they assume that NSAs (other than executive officials) operate only within domestic politics, when in fact business, labor, and other interest groups, as well as NGOs and other norm entrepreneurs—often organized as transnational associations or advocacy networks<sup>107</sup>—actively seek to influence foreign governments and NSAs as well as international negotiations, conferences, organizations, and other activities on the international plane, as at point 6 in Figure 1.<sup>108</sup> These efforts involve normative and subjective strategies—strategic social construction—as well as the manipulation of incentives.<sup>109</sup>

Moreover, one of the most significant trends in international governance is the growing role of NSAs in international institutions, especially within the United Nations system.<sup>110</sup> Examples include rapid growth in the number of NGOs accredited to ECOSOC, a sharp increase in NSA participation in global conferences, and numerous innovative participatory arrangements developed by international agencies.<sup>111</sup> As one illustration of the latter trend, the United Nations Commission on Sustainable Development (CSD) convenes “multi-stakeholder dialogues” that bring national and United Nations officials together with the “major groups” in civil society that are recognized as having a stake in sustainable development.<sup>112</sup> The dialogues consider major current issues, although they take place outside the Commission’s core intergovernmental process.<sup>113</sup> Recognizing certain civil society groups as international stakeholders is itself a noteworthy innovation, reflecting a process of social construction that has invested those groups with new identities as international actors and new political authority and power. Similarly, the dialogues’ influence on state decisions seems likely to result more from persuasion and other subjective techniques than from material bargain-

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107. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (describing and discussing transnational advocacy networks).

108. *Id.* at 2.

109. *Id.*

110. For an influential review of this trend in one important issue area, see Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

111. See SEC’Y-GEN.’S PANEL OF EMINENT PERSONS ON U.N. RELATIONS WITH CIVIL SOC’Y, *UN System and Civil Society: An Inventory and Analysis of Practices*, at pt. II (2003), available at <http://www.un.org/reform/civilsociety/practices.shtml>.

112. *Id.* at pt. III.

113. For information on the dialogues, see United Nations Division for Sustainable Development—Major Groups, <http://www.un.org/esa/sustdev/mgroups/msdialog.htm> (last visited Oct. 1, 2007).

ing. In short, institutions like the CSD multistakeholder dialogues can only be understood with the application of both Liberal and Constructivist perspectives.

Scholars have devoted much attention to the growing international role of NSAs. Two important review articles summarize the lessons of recent research. Thomas Risse seeks to identify the conditions under which transnational actors—especially NGOs that rely on knowledge and moral authority—influence state rulemaking.<sup>114</sup> Risse argues that NSAs have the greatest impact at the agenda-setting stage, and can increase their influence by working through IGOs that provide opportunities for interaction with governments and other forms of support.<sup>115</sup> At the rule-making stage, NGOs exercise influence by building coalitions within and among states.<sup>116</sup> Here their influence depends on the degree of access to decision makers each state's laws and practices permit.<sup>117</sup> Richard Price also focuses on the conditions for NGO influence, identifying organizational traits such as expertise and moral authority, and the opportunities for persuasion provided by sympathetic leaders.<sup>118</sup>

Although the literature on NSA influence impressively melds Liberal and Constructivist insights, it remains insufficient for the purpose of enriching Institutionalism. First, the analyses reviewed by Risse and Price are in general far less clear, elegant, and parsimonious than either the Liberal models reviewed and depicted above or Institutional models such as Prisoners' Dilemma. Second, these studies largely focus on efforts by NSAs to persuade or pressure governments directly; they fail to address many significant issues regarding NSA interactions with international institutions.<sup>119</sup> For example:

- Under what circumstances do NSAs attempt to create new or substantially modified international institutions, rather than simply using existing institutions as platforms; what types of institutions do they favor; and what strategies do they use to create and promote them?<sup>120</sup>
- What material and subjective strategies do NSAs use when they operate within international conferences, participatory IGOs, and mixed institutions like the CSD dialogues; what types and

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114. Thomas Risse, *Transnational Actors and World Politics*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 26, at 255.

115. *Id.* at 264.

116. *Id.* at 265.

117. *Id.* at 266.

118. Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 WORLD POL. 579, 587–92 (2003).

119. Risse's observation that IGOs serve as platforms for NSAs is an important exception.

120. A related literature analyzes the shifting of issues among existing regimes that embody different principles, a type of forum shopping. See, e.g., Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 6 (2004).

degrees of influence do they exert in those settings; and which types of actors and strategies have the greatest influence?

- How do participatory and mixed institutions like the CSD dialogues themselves attempt to influence legal and political outcomes dominated by states; what types and degree of influence do they exert?

These are all fertile areas for research, holding promise for the study of civil society as well as for an enriched Institutionalism.

#### *D. Alternatives to IL: Soft Law and Transgovernmental Regimes*

The ordinary components of “hard” IL, primarily treaty and custom, are not the only normative forms used in international governance. One major alternative, “soft law”—that is, norms that are not legally binding, or that are formally binding but provide opportunities to escape normative strictures or interpret them to one’s liking—has been significant and controversial for decades,<sup>121</sup> but its forms and uses continue to expand.<sup>122</sup> It is important, then, to consider, not only why states turn to soft law, but also what role NSAs play in its selection, creation, and application.

Duncan Snidal and I have suggested a number of considerations that lead private actors to prefer and advocate either hard law or some form of soft law, although considerably more could be done in this regard.<sup>123</sup> We suggest, for example, that NSAs seeking international norms to advance their interests normally prefer hard law, because it raises the costs of violation and provides additional legal avenues for enforcement. If other groups block these efforts, however, advocates may compromise on soft law. The form of soft law most private groups prefer is a precise (though legally nonbinding) statement of norms or commitments. Precise normative expressions can be powerful tools of “accountability politics,” as they enable advocates to expose failures of compliance with relative clarity and to “shame” states into fulfilling their commitments. Precise normative commitments can also fuel an incentive-based, “transnational legal process” aimed at incorporating soft norms into binding domestic law.<sup>124</sup> On the other hand, soft law is not always the second-best option: civil society advocates, in particular, may prefer soft law processes such as global UN conferences in the first instance, as these are

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121. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. DOC. A/810 (Dec. 10, 1948). A classic statement of opposition to multiplying the forms of international norms is Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983).

122. See Abbott & Snidal, *Hard and Soft Law*, *supra* note 12, at 57–70.

123. *Id.* at 66–70.

124. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2648–55 (1997).

typically far more open to NSA participation than hard law venues like the WTO.<sup>125</sup>

Turning to the public choice and two-level game perspectives, Snidal and I hypothesize that national officials will prefer hard IL when they need to make credible commitments to powerful domestic interests, or when a hard commitment provides them leverage in negotiating with domestic legislators and their constituents. Soft law provides converse benefits, however: it allows officials to float “trial balloons” to judge likely domestic reactions, “buy off” private interests without unduly raising the ire of their opponents, and provide some current benefits to interest groups while retaining the opportunity to extract additional political concessions in return for harder action later.<sup>126</sup>

A second alternative to traditional IL is “transgovernmental” rule-making, extensively analyzed by Anne-Marie Slaughter.<sup>127</sup> Here, national officials, ministries, agencies, courts, and other governmental units are international actors in their own right, distinct from “the state.”<sup>128</sup> Most significantly, perhaps, networks of agencies negotiate, implement, and diffuse norms that are often precise and elaborate, and may be politically powerful though not binding as a matter of IL.<sup>129</sup>

An important example is the Basel Committee on Banking Supervision, made up of officials from the central banks and banking regulators in the thirteen largest banking markets.<sup>130</sup> The Basel Committee has adopted a “Concordat” to coordinate regulation of international banking by home and host countries, principles for effective banking supervision by regulators, and guidelines for the calculation of adequate bank capital.<sup>131</sup> It promotes these guidelines to nonmember agencies and provides technical assistance for their implementation.<sup>132</sup>

Other transgovernmental networks operate within formal IGOs. For example, Interpol, which coordinates transnational law enforcement, is a formal organization governed by a state-adopted constitution, but operates in practice as a network of police agencies.<sup>133</sup> The Financial Action Task Force, which promulgates standards for the control of money laundering and terrorist financing, is an intergovernmental body housed at the Organisation for Economic Co-operation and Development

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125. See Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 50, 73–74 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

126. *Id.* at 69–71.

127. SLAUGHTER, *NEW WORLD ORDER*, *supra* note 37.

128. *Id.* at 31–35.

129. *Id.* at 62–64.

130. *Id.* at 42–43.

131. *Id.*

132. See Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 *INT'L ORG.* 589, 604–05 (2001).

133. SLAUGHTER, *NEW WORLD ORDER*, *supra* note 37, at 55–56.

(OECD), but operates as a network of financial regulators.<sup>134</sup> IGOs also provide informal networking opportunities for national regulators, such as at the annual IMF–World Bank meetings.

Slaughter argues that transgovernmental networks like the Basel Committee serve important regulatory functions.<sup>135</sup> They expand the regulatory reach of national agencies to match the scale of global problems, build trust among regulators and provide incentives for them to develop good reputations, facilitate the exchange of information, and provide assistance and “professional socialization” to developing country officials.<sup>136</sup> Slaughter also argues that networks are more effective and politically acceptable than alternative forms of organization: they are faster and more flexible than IGOs and treaty processes, more democratic than private networks, and less coercive than hard law and other mandatory arrangements.<sup>137</sup>

This analysis suggests that agency networks use both Rational Choice strategies, such as information and incentives, and Constructivist strategies, such as professional socialization. Similarly, regulatory networks seem to exercise “soft power” partly through rational processes—such as demonstrating the benefits their preferred regulatory approaches have brought to member economies and providing assistance for implementation—and partly through subjective ones—such as communicating international expectations for aspiring developed states. While these approaches may be “soft,” both can still mask significant degrees of coercion by agencies of powerful states. These relatively small institutions provide excellent laboratories for exploring and testing the impact of diverse normative strategies.

Rational Choice also suggests less attractive domestic interpretations of regulatory networks that have not yet been fully explored. The independent transnational activities of regulators may exhibit “agency slack,” with the agents—regulatory officials—pursuing their private interests at the expense of their principals—national governments and the constituents they represent. Officials almost certainly utilize informal networks to avoid burdensome interagency and legislative approval processes, and public choice theory suggests that officials will use them to enhance their power and budgets at home.<sup>138</sup> Put another way, regulators may use networks to play their own two- (or three-) level games. Additional Rational Choice analysis along these lines could contribute to a more nuanced picture of transgovernmental institutions.

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134. Simmons, *supra* note 132, at 607–08.

135. SLAUGHTER, *NEW WORLD ORDER*, *supra* note 37, at 36–55.

136. *Id.*

137. *Id.* at 3–5.

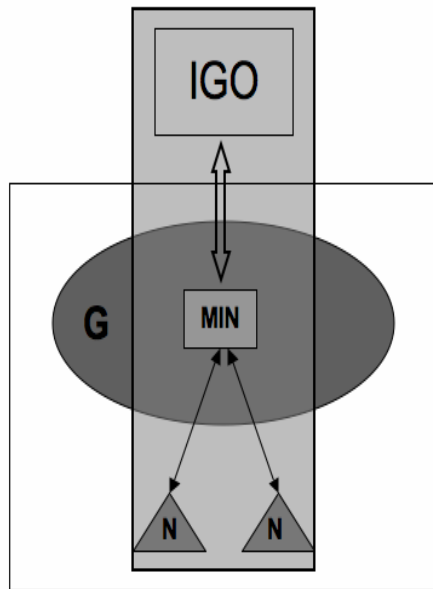
138. See sources cited *supra* notes 94–95 and accompanying text.



*E. Mixed Regimes: International-Domestic “Silos”*

International regimes are most often viewed as interstate arrangements, in which NSAs may be allowed to participate.<sup>139</sup> From a Liberal perspective, however, many regimes are “mixed,” not purely interstate, in two senses: they involve governmental agencies and private actors as well as states, and they operate in domestic as well as international arenas. These insights suggest an expanded model of international regimes, depicted in Figure 5.

FIGURE 5  
“SILO” REGIME



In many international conferences, IGOs and other interstate forums where IL, soft law, and international policies are formulated (IGO in Figure 5), delegates are drawn not from high executive levels or foreign ministries that represent the entire government of a state (G in Figure 5), but from the specific functional ministries and agencies (MIN in Figure 5) responsible for the issue area under consideration: trade ministries at the WTO, finance ministries at the World Bank and IMF, central banks at the Basel Committee, health ministries at the WHO, law enforcement agencies at Interpol, labor ministries at the ILO, and so on.<sup>140</sup>

139. For the works responsible for introducing regime theory, see *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

140. See Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL*

Some IGOs make functional representation mandatory: the WHO, for example, requires delegates to be “qualified by their technical competence in the field of health, preferably representing the national health administration.”<sup>141</sup> There are good substantive reasons for this form of representation, although it may produce a limiting homogeneity of perspective.

The “vertical” participation of national functional agencies in an IGO or other international forum automatically creates “horizontal” relationships among those agencies. At the least, the forum provides opportunities for a network to form and meet, and it frequently becomes a major node in network operations. Thus nearly every IGO encompasses, and may even create, a transgovernmental network with some degree of cohesion.

Within its home country, each functional ministry or agency typically interacts with a constellation of NSAs (N in Figure 5), as well as with other public agencies. These relationships take several forms:

- Interest groups, NGOs, and other NSAs lobby the agency, as at points 2 and 4 in Figure 1. Lobbyists provide information and ideas as well as political incentives. Over time, particular interests may develop considerable influence over agency decisions. This influence can be malign: an agency may even be “captured” by the interests it was intended to regulate.<sup>142</sup> Often, however, the relationship is benign: advocates and agency come to share a common perspective on the problems they face as part of a single “epistemic community,” a network united by common knowledge, causal understandings, and often norms.<sup>143</sup>
- The agency may collaborate with private organizations in making and applying rules and in carrying out operations. The health ministry, for example, may collaborate with private laboratories, research facilities, health finance organizations, and NGOs.<sup>144</sup>

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TRADING SYSTEM AT THE MILLENNIUM (Roger B. Porter et al. eds., 2001). Keohane and Nye argue that demands by NGOs and other groups in civil society to participate in international institutions—as well as concerns over the democratic deficit in international institutions and other factors—are undermining the postwar club model, in which functional ministries cooperate in closed forums focusing on particular issue areas. The present article suggests, however, that to a considerable extent the integrated, functional nature of international regimes already extends vertically into civil society, encompassing like-minded private actors as well as national officials.

141. World Health Organization [WHO], *Constitution of the World Health Organization*, art. 11, available at <http://www.who.int/gb/bd/PDF/BDenglish/Constitution.pdf>.

142. See, e.g., George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–6 (1971).

143. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (introduction to a Special Issue entitled “Knowledge, Power, and International Policy Coordination”).

144. See *infra* notes 148–49.

The securities agency may collaborate with self-regulatory bodies such as stock exchanges and brokers associations.<sup>145</sup>

- The agency may even delegate substantial elements of its work to private organizations. For example, health, development and similar ministries often rely on NGOs to carry out field programs.<sup>146</sup>

NSAs within such a domestic constellation often develop direct relationships with the relevant IGO, based on shared epistemic understandings and values, and on the resources they can provide. They may serve on national delegations, use their knowledge and contacts to lobby IGO staff, participate in IGO deliberations, and take on operational tasks for the IGO. For example, in its efforts to identify, confirm, and respond to significant outbreaks of infectious disease, WHO relies on the Global Outbreak Alert and Response Network (GOARN), which includes public and private scientific organizations, the Red Cross/Red Crescent societies, and international humanitarian NGOs.<sup>147</sup> To conduct research and help strengthen national health systems, it relies on “collaborating centers,” including private laboratories and other nonstate organizations.<sup>148</sup> And to promote the discovery and distribution of drugs for developing countries, WHO increasingly relies on partnerships with pharmaceutical companies, often with NGO involvement.<sup>149</sup>

The several relationships discussed here together constitute what might be called an institutional “silo,” (the vertical, lightly shaded rectangle in Figure 5), which is composed of a diverse mix of international, state, agency, and private actors and which extends vertically from the IGO or other international forum through the national government and deeply into civil society. While some members of this extended public-private network may be political adversaries, at least on particular issues, on the whole its members will often share common interests, causal understandings, preferences, and normative commitments. This entire “silo,” and the horizontal, transnational relationships it supports, constitute the “regime.”

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145. Sec. & Exch. Comm’n, *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://sec.gov/about/whatwedo.shtml> (last visited Oct. 22, 2007) (noting that U.S. Securities and Exchange Commission cooperates with self-regulatory organizations and private sector groups).

146. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *MANAGING AID: PRACTICES OF DAC MEMBER COUNTRIES* 96, 98 (2005) (“Most [OECD] countries channel a significant portion of their humanitarian funding through national and international NGOs”; “All [OECD] countries provide foreign assistance funds to civil society organizations . . . to implement activities on behalf of development agencies.”).

147. For a discussion of GOARN, see <http://www.who.int/csr/outbreaknetwork/en/> (last visited Oct. 22, 2007).

148. For a discussion of WHO collaborating centers, see <http://www.who.int/collaboratingcentres/en/index.html> (last visited Oct. 22, 2007).

149. See Roy Widdus, *Public-Private Partnerships for Health: Their Main Targets, Their Diversity, and Their Future Directions*, 79 BULL. WORLD HEALTH ORG. 713 (2001).

This conception of an international regime suggests several hypotheses:

- A silo regime, such as the extensive network of health organizations associated with the WHO, may be able to deploy far greater human, material, and ideational resources and thus have greater influence than a narrow view of the organization would suggest. The diverse makeup of such a regime allows it to deploy a wide range of incentive-based and subjective or normative strategies on the international and domestic planes.
- Some audiences may accord greater legitimacy to a silo regime than to a purely interstate organization. Because of the participation of societal stakeholders, the silo regime may be perceived as more representative, better informed, more thorough and consistent in its normative commitments, and more likely to be effective. Those who find NSA participation in international governance inappropriate, on the other hand, may accord such a regime less legitimacy.<sup>150</sup>
- Rules and policies adopted in an epistemically and normatively unified silo regime may on average be more “extreme”—as defined for the particular issue area—than would be the case if member-state delegates reflected the interests of their median domestic voters. This might be so even for interstate decisions, at point 3 in Figure 1, because of the delegates’ homogeneous perspective. But it seems even more likely for actions taken with broader governmental and private participation, as at point 6—for example, at an inclusive UN conference—because of the shared understandings and values of the entire group. This hypothesis may help explain why so many international norms are cast as soft law: when a normative process is in some sense a factional exercise, participants realize that hard law is unlikely to be approved by member governments.
- More broadly, when an agreement reached in an international forum is brought back to the domestic arena for approval, at point 4, the political influence of the participating ministry and its domestic network (and the network of its opponents) will largely determine the outcome. But the ministries and NSAs linked to particular regimes have widely varying degrees of domestic political influence: relatively weak ministries such as health and social welfare may find agreements blocked by powerful finance or trade ministries. In addition, if a regime-based agreement is

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150. For an especially strong statement of this position, see John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 215–16 (2000).

more extreme than the interests of the median domestic voter or the dominant domestic coalition, it will face even broader political opposition at home. These factors may help explain why some agreements negotiated and signed by state delegates are not subsequently ratified.<sup>151</sup>

- Once an agreement is ratified, the national ministry and NSA network associated with the regime will be primarily responsible for its domestic implementation, at point 5. Here too, political influence, resources, and skill vary widely; other agencies and their networks may refuse to cooperate or try to block implementation. These factors may help explain some noncompliance with IL, and more generally why legal rules in different issue areas are differentially effective.

*F. Enforcing IL: Political and Legal, Public and Private Procedures*

Many of the procedures and institutions through which IL is enforced—national protests, retorsions, and Security Council sanctions—are state based. But here too, international politics and law have become more complex.

Looking first at political actions, Margaret Keck and Kathryn Sikkink identify a “boomerang model” of enforcement, originally observed in the area of human rights.<sup>152</sup> In this model, a government violates human rights norms in its treatment of its own citizens; the victims are unable to obtain redress locally. However, the victims are supported by local NGOs, which are members of a transnational advocacy coalition. Local NGOs activate the coalition by providing information about the violations, and the coalition activates member groups in law-abiding countries.<sup>153</sup> Those groups initiate three responses: (i) they publicize the violations and criticize the target government, with the aim of “shaming” it into compliance and legitimizing social action against it; (ii) they lobby their own governments to protest the violations and consider sanctions; and (iii) they urge international institutions to take similar actions.<sup>154</sup>

The boomerang model draws together many of the insights reviewed here. It is predominantly a Liberal model, with NSAs playing central roles. As in Moravcsik’s Liberal approach, NGOs seek to influence their own governments (in both the violating and law-abiding

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151. See generally UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776–1976, (Christian L. Wiktor ed., 1976) (documenting unratified treaties of the United States).

152. KECK & SIKKINK, *supra* note 107, at 12.

153. *Id.* at 12, 24.

154. *Id.* at 12–13. Risse and Sikkink expand this model to other transnational and international linkages. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 17–35 (Thomas Risse et al. eds., 1999).

states), at point 2 in Figure 1. In addition, NGOs are transnationally linked and operate on the international plane, at point 6, where they attempt to influence both the violating government—as in the literature reviewed by Risse and Price<sup>155</sup>—and IGOs. Whether formally recognized or not, the NGO network is an essential part of the regime, much as in the silo model introduced here. Finally, while some NGOs (and many states) may be able to create material incentives for better behavior by the violating government, the pressures they apply on the violator are primarily normative and subjective—yet wholly strategic. The boomerang model is an important contribution to our understanding of international enforcement; research that tested its applicability in issue areas other than human rights and assessed the distinct impacts of material and subjective strategies would be very valuable.

Legal enforcement procedures have traditionally been state-to-state, for example, through arbitration, proceedings in the International Court of Justice, or GATT/WTO dispute settlement.<sup>156</sup> But here too both institutional innovations and scholarship increasingly focus on NSAs.

Even in traditional international legal procedures, states typically act on behalf of private interests. For example, states espouse claims of private investors for unlawful interference by host governments; by analogy to endogenous trade theory, one can analyze the political characteristics that influence the likelihood of espousal. Gregory Shaffer extends this line of inquiry to international trade, focusing on WTO dispute settlement.<sup>157</sup> He argues that exporting firms, their associations, and their lawyers enter “public-private partnerships” with national trade officials to pursue WTO litigation.<sup>158</sup> In these partnerships, trade officials are the gatekeepers to the WTO process, but pursue their own private goals; firms control information and other resources essential to a successful case, and pursue their different goals.<sup>159</sup> Hence cooperation is valuable to both sides, although it is rarely smooth.

In some areas of IL, NSA participation in dispute resolution is well developed. For example, under bilateral investment treaties, economic integration arrangements such as NAFTA, and other investment agreements, private investors are authorized to bring legal claims directly against host governments, typically in arbitration.<sup>160</sup> Alan Sykes has per-

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155. For these discussions, see Price, *supra* note 118; Risse, *supra* note 114.

156. See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

157. GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

158. See generally *id.*

159. *Id.*

160. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, § B, Dec. 17, 1992, 32 I.L.M. 289 (1993).

ceptively analyzed why these arrangements prevail in agreements on investment but not on trade, using Liberal and public choice approaches.<sup>161</sup>

Even international courts are increasingly open to private litigants without the political filter of government approval,<sup>162</sup> in what Keohane, Moravcsik, and Slaughter call “transnational” dispute resolution.<sup>163</sup> In the European Court of Human Rights, for example, private litigants control the docket, judges are insulated from government influence, and independent national judges implement the Court’s decisions.<sup>164</sup> Keohane, Moravcsik, and Slaughter hypothesize on Liberal grounds that such transnational procedures are more likely than interstate mechanisms to become stronger over time, create unanticipated legal results, and restrict state action,<sup>165</sup> and that judges in such tribunals are more likely to increase their institutional authority.<sup>166</sup>

### G. *Building Support for IL: Enlisting and Strengthening Domestic Actors*

States and international institutions are not merely passive targets of influence by NSAs, as some Liberal approaches may suggest.<sup>167</sup> What is more, domestic political structures and the organization, preferences, and influence of NSAs are not fixed. Domestic political processes and NSA preferences and activities are at least partially endogenous: governments and international institutions can enlist domestic actors to support IL and other international norms and policies, and can enhance the domestic political influence of supporters.<sup>168</sup> Understanding these strategies and using them more effectively could be among the most significant payoffs of an enriched Institutionalist theory.

The domestic political effects of international rules and institutions may be unintended. For example, Oona Hathaway argues that as a state implements a trade liberalization agreement, the resulting import competition eliminates some domestic firms that opposed liberalization and causes others to adjust in ways that reduce their demand for protection.<sup>169</sup>

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161. Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005).

162. See CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES (Tullio Treves et al. eds., 2005).

163. Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, in LEGALIZATION AND WORLD POLITICS, *supra* note 12, at 73.

164. *Id.* at 85.

165. *Id.* at 95, 97.

166. *Id.* at 86.

167. E.g., Moravcsik, *supra* note 35, at 518.

168. Study of the influence of international factors on domestic politics is known in IR as “second image reversed” scholarship. See JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION* 4–5 (2005); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT’L ORG. 881 (1978).

169. Oona A. Hathaway, *Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection*, 52 INT’L ORG. 575, 584 (1998).

At the same time, expanded trade strengthens exporters and importers that support liberalization.<sup>170</sup> Thus even modest agreements modify domestic politics in ways that enhance support for future liberalization in a positive feedback loop.<sup>171</sup>

Likewise, the Helsinki Final Act—a soft law agreement between the West and the Soviet Union that reinforced Soviet hegemony in Eastern Europe but also incorporated human rights principles—affected domestic politics in both the Soviet Union and the United States with historic results.<sup>172</sup> As Daniel Thomas notes, these effects were “entirely unforeseen.”<sup>173</sup> In Eastern Europe and the Soviet Union, groups of activists organized around the new commitments, “framed” them in subjectively potent ways, mobilized the public to demand implementation, and enlisted foreign governments and IGOs to support their efforts.<sup>174</sup> In the United States, where foreign policy did not then encompass human rights, transnational NGOs engaged the government, enlisted allies in Congress, pressured presidential candidates, and forced the United States to take Helsinki seriously.<sup>175</sup> In both cases, the agreement enabled advocates to reshape domestic politics and engage in strategic social construction.

Domestic effects can also be intentional, even if modest. For example, while conventions approved by the International Labor Organization (ILO)<sup>176</sup> must be ratified by states, the ILO Constitution requires member state governments to submit the text of an approved convention to their legislatures or other appropriate authorities for approval within one year.<sup>177</sup> This is by any measure a limited requirement, but it modestly influences the relations between the branches of national governments and provides an opportunity and focal point for domestic political action by NSAs.<sup>178</sup> Similarly, in 1985, a GATT “eminent persons” group noted that protectionist measures often escape domestic public scrutiny.<sup>179</sup> It proposed that the GATT Secretariat work with governments to promote a “protectionist balance sheet” that would specify and publicize the domestic costs and benefits of proposed trade measures.<sup>180</sup> The aim was not only to provide a focal point for action by existing interest

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170. *Id.*

171. *Id.* at 584–86.

172. See DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM 255–56 (2001).

173. *Id.* at 257.

174. See *id.* at 97–109, 272–75.

175. See *id.* at 121–42.

176. Of course, the organs of the ILO are unique in including delegates selected by national labor and employer groups.

177. Int'l. Lab. Org. [ILO], *Constitution of the International Labour Organization*, art. 19(5) (amended 1974), available at <http://www.ilo.org/iloex/english/constq.htm>.

178. ILO procedures complement this requirement by soliciting comments on draft conventions from national worker and employer groups.

179. See GATT Independent Study Group, *Trade Policies for a Better Future: Proposals for Action*, C/133 (Mar. 27, 1985) (the “Leutwiler Report”).

180. See *id.* at 35–37.



groups, but also to “help to create a constituency in favor of open trade policies.”<sup>181</sup>

Xinyuan Dai argues more broadly that government decisions on compliance with IL and international commitments tend to favor the interests of domestic groups that have good information about national policies and groups that have electoral clout because of their size. International institutions can build support for compliance through strategies that strengthen procompliance constituencies in both of these ways. First, institutions can disseminate more complete information on government policies and actions to procompliance groups. Second, they can strengthen procompliance constituencies politically by disseminating information that will attract additional members, e.g., those who may suffer as a result of noncompliance.<sup>182</sup>

Jon Pevehouse argues that regional IGOs can assist in national transitions to democracy.<sup>183</sup> On the international plane, IGOs and member states can pressure and even sanction authoritarian states. But their greatest influence comes through impacts on domestic politics. Many such impacts are primarily incentive-based. For example, IGOs can help blunt opposition by business and military elites: economic institutions can offer guarantees that a democratic government will not interfere with property rights or trade; security institutions can provide assurances that the military will still have a role to play.<sup>184</sup> Participation in international regimes also allows democratic leaders to commit themselves publicly to reform with the aim of foreclosing opposition. Other impacts are more purely subjective. For example, criticism by IGOs communicates to local elites and other actors that an authoritarian government is no longer regarded as legitimate. IGOs can also help persuade and socialize military and other elites to adopt democratic norms.

Numerous other international institutions enlist domestic actors and shape domestic politics in ways that require the application of Liberal and Constructivist insights; many have yet to be thoroughly analyzed. Consider one example, the Global Fund to Fight AIDS, Tuberculosis and Malaria, an international health financing agency.<sup>185</sup> The Fund is structured as a public-private partnership; its board includes representatives of Northern and Southern governments, IGOs, NGOs, business, foundations, and persons living with the target diseases.<sup>186</sup> One of the Fund’s core operating principles, moreover, is to support country pro-

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181. *Id.* The proposal was not adopted. The WTO Trade Policy Review Mechanism provides for review of national trade measures, but largely abandons the effort to penetrate domestic politics.

182. Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT’L ORG. 363 (2005).

183. PEVEHOUSE, *supra* note 168, at 78.

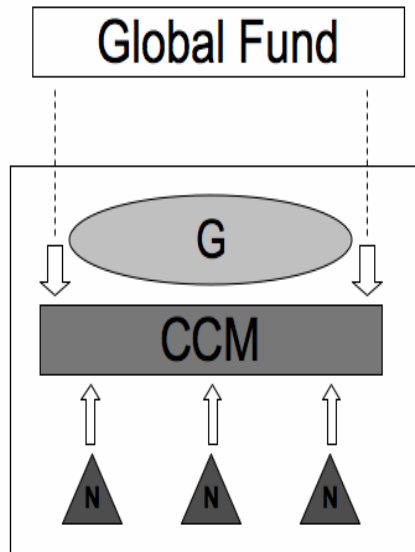
184. *Id.* at 23.

185. For information on the Fund, see The Global Fund, <http://www.theglobalfund.org> (last visited Oct. 1, 2007).

186. The Global Fund Board, <http://www.theglobalfund.org/en/about/board/> (last visited Oct. 1, 2007).

grams that reflect similar levels of stakeholder “ownership.”<sup>187</sup> The Fund calls for local civil society and private sector participation in all funded programs.<sup>188</sup> More concretely, it requires that each grant proposal be developed by an alliance of public and private stakeholders, organized in a Country Coordinating Mechanism (CCM), which will also supervise implementation if the proposal is funded.<sup>189</sup> Figure 6 depicts this relationship.

FIGURE 6  
GLOBAL FUND



While the expressed rationale for CCMs is simply that stakeholder ownership produces more effective programs, the requirement seems also to reflect a normative commitment to broad social participation, as embodied in the Fund’s own structure. The CCM requirement “teaches” the norm of participation, communicating its appropriateness and legitimacy to governments and civil society in applicant countries, and casting it as an international expectation.<sup>190</sup> Over time, such arrangements could have significant domestic effects. At the least, CCMs provide existing NGOs and private sector groups an avenue of influence over funded pro-

187. How the Global Fund Works, <http://www.theglobalfund.org/en/about/how/> (last visited Oct. 1, 2007).

188. *Id.*

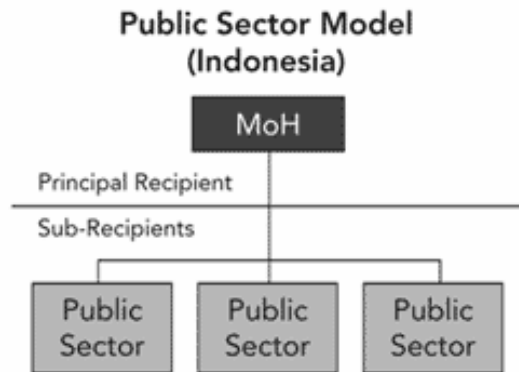
189. See THE GLOBAL FUND, REVISED GUIDELINES ON THE PURPOSE, STRUCTURE, AND COMPOSITION OF COUNTRY COORDINATING MECHANISMS AND REQUIREMENTS FOR GRANT ELIGIBILITY (2005) [hereinafter GLOBAL FUND GUIDELINES], available at [http://www.theglobalfund.org/pdf/5\\_pp\\_guidelines\\_ccm\\_4\\_en.pdf](http://www.theglobalfund.org/pdf/5_pp_guidelines_ccm_4_en.pdf).

190. See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 12 (1996).

jects, and perhaps over national health policy more generally. The CCM requirement may also stimulate the formation and engagement of new advocacy organizations, while constraining potential government interference, at point 1 in Figure 1. As with Helsinki, these developments could have broad effects on domestic politics, even beyond health.

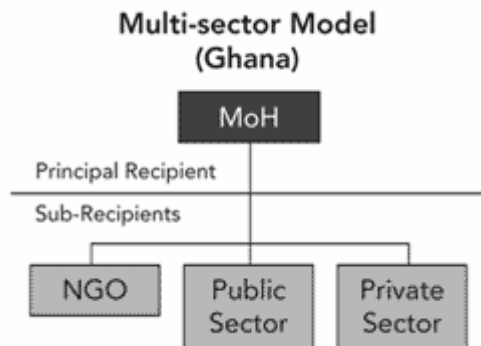
The domestic structures through which Fund grants are actually administered—depicted in Figures 7A–D below—reflect these potential

FIGURE 7A



impacts.<sup>191</sup> Some grants are administered wholly within the public sector,<sup>192</sup> while others are subcontracted by government agencies to public and/or private organizations.

FIGURE 7B



191. The depictions in Figures 7A–D are taken from the website of the Global Fund. See <http://www.theglobalfund.org/en/apply/mechanisms/structures/> (last visited Oct. 1, 2007).

192. In these diagrams “MoH” stands for Ministry of Health; FBO stands for faith-based organization.

A number of domestic administration structures, however, deviate significantly from—and indeed seem to subvert—traditional legal and political arrangements:

FIGURE 7C

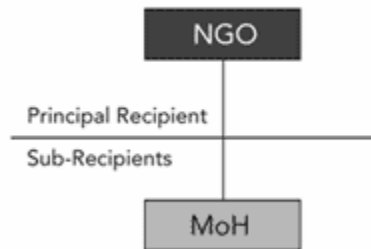
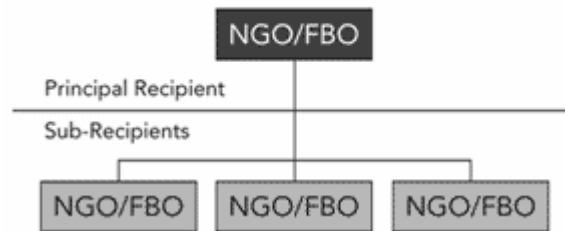
**Philippines Model**

FIGURE 7D

**NGO/FBO Model  
(Thailand)**

It would be highly valuable, if methodologically difficult, to test the strength of the various causal pathways through which institutions like the Fund influence states. Within funded projects, at least, the Fund's influence is largely coercive: a country cannot obtain financing unless it establishes a CCM.<sup>193</sup> But the CCM requirement also has a domestic political effect: it establishes an avenue for influence by private groups that could lead to deeper, broader, and more enduring participation than the Fund actually mandates. Finally, the CCM requirement has a subjective effect, socializing governments and civil society groups to norms of participation. This effect might also extend beyond Fund requirements and beyond the field of health.

Other IGOs influence domestic politics in similar ways. Perhaps the strongest example is the World Bank. The Bank's Comprehensive Development Framework includes principles similar to those of the Global

193. GLOBAL FUND GUIDELINES, *supra* note 189, at 1–2.

Fund: national development goals and strategies should be “owned” by client countries based on local stakeholder participation in shaping them, and Bank assistance should be managed through local stakeholder partnerships.<sup>194</sup> More concretely, the poorest Bank borrowers are required to prepare Poverty Reduction Strategy Papers (PRSPs) that set out poverty reduction plans before requesting project funding.<sup>195</sup> The Bank requires that PRSPs be prepared with broad civil society and private sector participation, and that they encourage civil society participation in poverty reduction programs.<sup>196</sup> In designing its Country Assistance Strategies, moreover, the Bank consults with local stakeholders and encourages local cooperation.<sup>197</sup>

In essence, as depicted in Figure 6 above, the Fund and Bank use their economic leverage to reach into the domestic societies of client countries, empower and encourage societal actors to participate in national politics and governance, communicate norms and expectations of participation, and blunt government resistance. “Ownership” policies may make for more effective health and development programs, but their overall impact may be far greater. To the extent domestic politics determines state preferences, moreover, these policies could over time reshape international relations and enhance IL.

#### *H. Regulating Private Conduct: Hard and Soft Law for Non-State Actors*

In many areas of international life, the behavior of NSAs, not of states, is the source of global problems. This is true of lawful and even beneficial behaviors that create transnational externalities such as pollution and carbon emissions; it is also true of a growing array of unlawful and even malign activities such as international terrorism, transnational organized crime, human rights violations, and trafficking in humans, endangered species, conflict diamonds, nuclear technologies, and many other items.

The traditional IL response to such problems echoes Moravcsik’s and Putnam’s Liberal models. Domestic politics and transnational pressure lead governments to acknowledge a problem (point 2 in Figure 1) and participate in international rule making (point 3). Any agreement reached in the international forum must then be approved by states (point 4), and the agreement delegates to governments the task of implementing the agreement domestically to control the behavior of NSAs (point 5). Among other examples, this model characterizes the many

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194. See World Bank, <http://go.worldbank.org/1SOQVO7GV0> (last visited Oct. 25, 2007).

195. See World Bank, Poverty Reduction Strategy Papers, <http://go.worldbank.org/D7AJW879O0> (last visited Oct. 25, 2007).

196. See *id.*

197. See World Bank, Country Assistance Strategies, <http://go.worldbank.org/4M75BI76J0> (last visited Oct. 25, 2007).

agreements that require national criminalization of private activities, such as the several terrorism conventions, the genocide convention, the UN convention on transnational organized crime, and the OECD convention on international bribery.<sup>198</sup> Because of the widely differing normative commitments and capacities of states, the approach results in highly uneven rule implementation.

Since Nuremberg, of course, IL has undergone a dramatic change—in large part due to an extended campaign of strategic social construction—such that individuals now bear international legal responsibility for violations of international humanitarian law such as genocide, torture, and crimes against humanity. What is more, tribunals like those created by the Security Council for the former Yugoslavia and Rwanda and the International Criminal Court assign individual criminal responsibility on the international plane.<sup>199</sup> In many other areas, however, it is not widely accepted that individuals, corporations, and other NSAs are subject to international legal responsibility,<sup>200</sup> or that they should be.<sup>201</sup>

In this context, recent decades have seen noteworthy innovations in the penumbra of IL.<sup>202</sup> One is the adoption by states and IGOs of international soft-law instruments that prescribe norms directly applicable to NSAs.<sup>203</sup> The OECD Guidelines for Multinational Enterprises (MNEs) are perhaps the earliest example; adopted in 1976, the Guidelines prescribe a broad and detailed code of conduct for MNEs, albeit with very limited monitoring and enforcement procedures.<sup>204</sup> The ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, adopted in 1977, follows a similar approach: it addresses not only traditional labor issues but also broader social issues affected by MNEs.<sup>205</sup> The ILO engages in modest promotional activities to support the Declaration, hoping that its principles will be internalized by business and implemented through “social dialogue.”<sup>206</sup>

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198. Many of these agreements call for extradition to another state as an alternative to prosecution and for mutual legal assistance in connection with prosecution, refinements of the two-level game model.

199. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 28–29 (2006).

200. See *id.* at 29. Clapham himself argues that existing IL, traditionally applied only to states, already imposes obligations on individuals. *Id.* at 28–29.

201. *Id.* at 25.

202. *Id.* at 25–28.

203. The UN Centre for Transnational Corporations worked for years to produce a voluntary UN code of conduct for multinational enterprises. See *id.* at 238. However, this effort was abandoned in 1992. See *id.*

204. For the most recent version of the OECD Guidelines and their implementation procedures, see <http://www.oecd.org/daf/investment/guidelines/> (last visited Oct. 1, 2007).

205. For the text of the Declaration, see <http://www.ilo.org/public/english/employment/multi/tripartite/declaration.htm> (last visited Oct. 25, 2007). See also CLAPHAM, *supra* note 199, at 211–12.

206. See Inter. Lab. Org. [ILO], <http://www.ilo.org/public/english/employment/multi/tripartite/index.htm> (last visited Oct. 22, 2007); see also CLAPHAM, *supra* note 199, at 218 (encouraging multinationals to embrace the Tripartite Declaration, and accordingly, to increase employment opportunities

Among the most visible initiatives of this kind is the UN Global Compact (UNGC), introduced by Secretary-General Kofi Annan in 2000.<sup>207</sup> The UNGC embodies ten principles drawn from major treaties and other instruments, including the ILO Declaration on Fundamental Principles and Rights at Work, Universal Declaration of Human Rights, and Rio Declaration on Environment and Development.<sup>208</sup> Reliance on these prominent, state-based, consensual instruments creates legitimacy for the principles, while their soft law status allows the UNGC to adapt principles originally designed for states for direct application to private conduct. Firms and other NSAs pledge to implement the principles in their operations.<sup>209</sup> Rather than attempting to “enforce” the principles, the UNGC creates opportunities for normative and technical learning through sharing of information among firms and interactions with NGOs.<sup>210</sup>

In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, an expert body advising the UN Commission on Human Rights,<sup>211</sup> approved Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, and transmitted them to the Commission for adoption.<sup>212</sup> The Commission determined, however, that the Norms had no legal status at that stage, and directed the Sub-Commission not to monitor their use.<sup>213</sup> In 2005, rather than adopt the Norms, the Commission requested the Secretary-General to appoint a special representative to explore issues of business and human rights.<sup>214</sup>

Although approaches like these are an increasingly significant part of the penumbra of IL, their adoption, content, implementation, and effectiveness have received little study. They merit more extended analysis within both IR and IL. In that connection, they are perfect examples of legal and governance innovations that can only be understood through a blend of Institutional, Liberal and Constructivist insights.

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employment standards, equal opportunity and nondiscrimination, and the use of technology that generates employment).

207. See Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Oct. 1, 2007).

208. See Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Oct. 1, 2007).

209. See THE GLOBAL COMPACT, AFTER THE SIGNATURE: A GUIDE TO ENGAGEMENT IN THE UNITED NATIONS GLOBAL COMPACT, available at [http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_Welcome\\_Kit\\_final\\_260307.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_Welcome_Kit_final_260307.pdf) (last visited Oct. 22, 2007).

210. Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Oct. 1, 2007).

211. The Commission has now been replaced by the Human Rights Council. See G.A. Res. 60/251, ¶5, U. N. Doc. A/RES/60/251 (Apr. 3, 2006).

212. See CLAPHAM, *supra* note 199, at 226.

213. *Id.*

214. See *id.* at 225–26. For the first report of the special representative, John Ruggie, see [http://www.ohchr.org/english/issues/trans\\_corporations/reports.htm](http://www.ohchr.org/english/issues/trans_corporations/reports.htm) (last visited Oct. 22, 2007).

A second innovation is the rise of parallel normative systems in which NSAs create and administer non-legally-binding rules that apply to firms and other NSAs.<sup>215</sup> Some norms of this kind are formulated and applied in collaboration with states. For example, in the Kimberley Process the NGOs that brought to light the issue of conflict diamonds participated in deliberations on an international response along with states and the UN.<sup>216</sup> The principal outcome of those deliberations—the Kimberley Process Certification Scheme—is administered by states, but NGOs and industry associations participate in monitoring and other working groups.<sup>217</sup> In addition, a self-regulatory arrangement administered by the international diamond industry supplements the Certification Scheme.<sup>218</sup>

Other transnational norms are created and applied wholly by private actors. Thousands of business firms and trade associations have adopted self-regulatory codes of conduct addressing worker rights, the environment, human rights and similar issues.<sup>219</sup> To a considerable extent, these developments are part of a vibrant corporate social responsibility movement, led by business-based advocacy organizations and motivated by a combination of ethical concerns and long-term financial considerations.<sup>220</sup> Yet one can also interpret these codes as efforts to preempt civil society pressures for stricter voluntary norms and mandatory state regulation.<sup>221</sup>

As a result, some NGOs have promulgated their own codes of conduct, often with robust monitoring and implementation procedures, that depend on voluntary adoption by firms.<sup>222</sup> These have attracted more limited participation than business codes, but have helped shape the global discourse of social responsibility. Even more interesting are multi-stakeholder institutions that bring together businesses, NGOs, socially responsible investors, universities, and other NSAs. Prominent examples include the Forest Stewardship Council, Fairtrade Labeling Organizations International, Social Accountability International, the Global

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215. See Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State* (paper prepared for the Global Governance Project, Oxford University, October 2007) (copy on file with the author).

216. J. Andrew Grant & Ian Taylor, *Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems*, 93 *ROUND TABLE* 385, 386 (2004).

217. Kimberley Process—Background, [http://www.kimberleyprocess.com/index.php?option=com\\_content&task=blogcategory&id=14&Itemid=26](http://www.kimberleyprocess.com/index.php?option=com_content&task=blogcategory&id=14&Itemid=26).

218. See WORLD DIAMOND COUNCIL, *THE ESSENTIAL GUIDE TO IMPLEMENTING THE KIMBERLEY PROCESS* (2003), available at <http://www.iffiso.com/wdebk.pdf>.

219. RUTH PEARSON ET AL., *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS CODES OF CONDUCT IN THE GLOBAL ECONOMY* 16 (2002).

220. *Id.*; DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).

221. See Abbott & Snidal, *supra* note 215, at 26–27.

222. See PEARSON, *supra* note 219, at 14–15.



Reporting Initiative, and the Fair Labor Association.<sup>223</sup> In addition to promulgating norms of behavior for firms, many of these institutions operate complex transnational implementation systems. They work with suppliers in developing countries, train and accredit auditors, grant (and sometimes withdraw) permission to use logos and labels, inspect and certify factories, and operate complaint procedures and dispute-settlement systems.<sup>224</sup>

Most such institutions draw heavily on IL. For example, most labor standards promulgated by organizations such as Social Accountability International and the Fair Labor Association echo the core worker rights in the ILO Fundamental Declaration;<sup>225</sup> in this respect such private standards act as “force multipliers” for international agreements and institutions. As with the UNGC, reliance on IL contributes to their legitimacy. Since perceptions of legitimacy are essential to attracting business adherents and mobilizing consumers and other audiences to demand adherence and compliance, many of these institutions are adopting detailed governance standards to enhance their independence and procedural fairness. The ISEAL Alliance, a consortium of standard setting and conformity-assessment organizations, including several of those mentioned here, has promulgated a “Code of Good Practice” for standard-setting that addresses issues such as stakeholder participation, notice and comment procedures, justifications for proposed standards, consensus decision making, transparency, procedures for procedural complaints, rule clarity and interpretation, and harmonization.<sup>226</sup> As Errol Meidinger argues, organizations like these are developing many of the trappings of a public legal system.<sup>227</sup>

Such institutions perform many of the functions associated with IL, IGOs, and other interstate institutions, yet they are largely—if not wholly—private. Understanding them requires Liberal insights, yet their activities extend far beyond the standard Liberal models of domestic politics discussed above. In addition, without the coercive power of the

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223. See, e.g., Margaret Levi & April Linton, *Fair Trade: A Cup at a Time?*, 31 POL. & SOC'Y 407 (2003); Errol E. Medinger, *Forest Certification as a Global Civil Society Regulatory Institution*, in SOCIAL AND POLITICAL DIMENSIONS OF FOREST CERTIFICATION 265, 266–67 (Errol E. Medinger et al. eds., 2003); Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 THE POL'Y STUD. J. 1, 10–11 (2003); Alan Willis, *The Role of the Global Reporting Initiative's Sustainability Reporting Guidelines in the Social Screening of Investments*, 43 J. BUS. ETHICS 233, 236 (2003).

224. See Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, (Buffalo Legal Studies Research Paper Series, Paper No. 2006-19, 2006), available at <http://www.law.buffalo.edu/eemeid/scholarship/Zurich.pdf> (analyzing Forest Stewardship Council and similar institutions as rule-based regulatory systems).

225. See Abbott & Snidal, *supra* note 215, at 29, 39.

226. Int'l Soc. & Envtl. Accreditation & Labeling Alliance, Code of Good Practice for Setting Social and Environmental Standards (2006), available at <http://www.isealalliance.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=212>.

227. Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47, 76 (2006) (discussing how the Forest Stewardship Council has developed operating procedures similar to public institutions).

state, these institutions rely heavily on normative, subjective strategies: building legitimacy, persuading, socializing, teaching, and attempting to reshape the identity of target firms. As a result they also require the application of Constructivist insights, at least those that address highly developed, purposive institutions.

#### IV. CONCLUSION

Rational choice Institutionalism in IR is a rich and powerful theoretical paradigm that promises to make many further contributions to the study of IL. However, in many settings the theory's focus on interest-based interactions among states limits its ability to explain current developments in international law and governance. I have emphasized here the growing role of NSAs and the increasing interpenetration of international and domestic politics, and to a lesser extent the normative and subjective strategies that international actors and institutions deploy.

The article has described a number of institutional innovations that reflect these trends, such as the growing role of NSAs in international legal and political forums, the development of "silo" regimes that span international and domestic society, IGO strategies like the Global Fund's CCM requirement that reshape domestic politics and inculcate norms, and private transnational regimes designed to regulate NSAs.

Developments like these cry out for an enriched Institutionalism theory. I seek to develop such a theory by incorporating insights from other IR paradigms, primarily Liberal and, more tentatively, Constructivist theory. The article has discussed a variety of relevant literatures, in IR and cognate disciplines like public choice, and linked them to important aspects of IL and its penumbra. In doing so, it has identified several relatively spare and often elegant models—including Moravcsik's model of preference formation, the two-level game, the silo-regime model, and the domestic "ownership" model—that facilitate theoretical enrichment while preserving as much as possible the clarity, parsimony, and power of Institutionalism. The project of enrichment is by no means complete, but as this article has, I hope, demonstrated, that project offers exciting intellectual possibilities.