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# Improving Human Rights Compliance in Supply Chains

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ARTICLES

# IMPROVING HUMAN RIGHTS COMPLIANCE IN SUPPLY CHAINS

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*Corporations try to convince us that they are good global citizens: "brands take stands" by engaging in cause philanthropy; CEOs of prominent corporations tackle a variety of issues; and social values drive marketing strategies for goods and services. But despite this rhetoric, corporations regularly fall short in their conduct. This is especially true in supply chains where a number of human rights abuses frequently occur. One solution is for corporations to engage in meaningful human rights due diligence that involves monitoring human rights, reporting on social and environmental performance, undertaking impact assessments, and consulting with groups whose human rights they can harm. The challenge is how to encourage corporations to make these changes.*

*We often rely on two types of tools to improve corporate compliance: legal institutions and reputational mechanisms. However, each of these faces significant limitations when it comes to human rights compliance in the supply chain. This Article develops a strategy based on complementarity between the two so that each compensates for the limitations of the other. Specifically, reputational mechanisms can help create incentives for compliance with international legal insti-*



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*tutions with weak or absent enforcement mechanisms. Alternatively, legal institutions can create "focal points" regarding corporate best practices that can improve reputational markets for corporate social responsibility.*

*The reputational typology developed in this Article offers three important contributions to policy and academic discussions concerning corporate misconduct. First, it allows us to create better human rights institutions by revealing the types of "carrots and sticks" that we should include to encourage corporate cooperation; this lesson is particularly timely because an international treaty on business and human rights is in development. Second, this typology illustrates how corporations may voluntarily undertake organizational change in response to a reputational crisis. Finally, this typology identifies drivers of cross-border compliance for transnational corporations.*

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## Introduction

Last year, many of the world's largest corporations took a reputational hit, with particularly large declines for U.S. companies.[1] These declines reveal a "crisis of trust in the court of public opinion" as corporations fail to deliver on our expectations of them.[2]

This is particularly true for transnational corporations (TNCs) that operate globally through elaborate supply chains. Many of our most beloved brands do not actually make the products for which we love them: iPhones, sneakers, handbags, etc.[3] Instead, these products are sourced, manufactured, assembled, transported, distributed, warehoused, marketed, and sold by several different companies, often in several parts of the world.[4]

The supply chain is a source of both strength and weakness for corporations. While they offer considerable competitive advantages for many of the world's largest companies, they are also sources of reputational vulnerability for the same. For example, Nike vaulted to the top of the footwear industry through smart choices concerning its supply chain that allowed it to save on production costs and divert those resources to marketing.[5] But media exposure revealed that this cost saving also comes at a cost, contributing to "sweatshop conditions" in these supply chains. Exposure of supply chain conditions contributed to consumer boycotts and shareholder activism—all with serious and negative reputational effects for Nike.[6] The same is true for Apple. Often heralded as *the* leader in supply chain management, Apple has

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1 Reputation Inst., Glob. RepTrak 100, Powering the World's Most Reputable Companies 9–10, 44 (2018), https://cdn2.hubspot.net/hubfs/2963875/_PDF/RepTrak/2018-GlobalRT100-Presentation.pdf?t=1535145221533%20target=.

2 *Id.* at 15 (capitalization altered).

3 *See generally* Pietra Rivoli, The Travels of a T-Shirt in the Global Economy: An Economist Examines the Markets, Power, and Politics of World Trade (2d ed. 2009).

4 Samuel J. Palmisano, *The Globally Integrated Enterprise*, Foreign Aff., May–June 2006, at 127, 129.

5 Miguel Korzeniewicz, *Commodity Chains and Marketing Strategies: Nike and the Global Athletic Footwear Industry*, *in* Commodity Chains and Global Capitalism 247, 252 (Gary Gereffi & Miguel Korzeniewicz eds., 1994) (explaining that Nike's sourcing strategy allowed it to "retain control over highly profitable nodes in the athletic footwear commodity chain, while avoiding the rigidity and pressures that characterize the more competitive nodes of the chain"); Max Nisen, *How Nike Solved Its Sweatshop Problem*, Bus. Insider (May 9, 2013), https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5.

6 Jeffrey Ballinger, *The New Free-Trade Heel: Nike's Profits Jump on the Backs of Asian Workers*, Harper's Mag., Aug. 1992, at 46.

been plagued with media exposure and public criticism concerning labor practices in its supply chain.[7]

This Article examines the following: *What does it mean to be socially responsible in the supply chain?* We can imagine two different answers: "do good" or, at least, "do no harm." Under the first approach, we might hope that transnational corporations contribute to the social welfare of those in their supply chains, such as by building hospitals, developing infrastructure, improving access to health care, contributing to water purification efforts, and more.[8]

Instead, this Article investigates the second approach to corporate social responsibility in the supply chain: the "corporate responsibility to respect" that requires corporations to "become aware of, prevent and address adverse human rights impacts."[9] It is at this nexus that social responsibility

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7 *See infra* text accompanying notes 71–73.

8 *See generally* CORPORATE SECURITY RESPONSIBILITY? (Nicole Deitelhoff & Klaus Dieter Wolf eds., 2010); Jay Butler, *Corporations as Semi-States*, 57 COLUM. J. TRANSNAT'L L. 221 (2019); Jedrzej George Frynas, *The False Developmental Promise of Corporate Social Responsibility?: Evidence from Multinational Oil Companies*, 81 INT'L AFF. 581 (2005).

9 John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 55–56, U.N. Doc. A/HRC/8/5 (Apr. 7, 2018); *see* Companion Note I to the Working Group's 2018 Report to the General Assembly (A/73/163): Corporate Human Rights Due Diligence—Background Note Elaborating on Key Aspects (Oct. 16, 2018), https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf ("The corporate responsibility to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those set out in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."). Human rights due diligence is "is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved." Summary of the Report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163): Corporate Human Rights Due Diligence: Emerging Practices, Challenges and Ways Forward (Oct. 2018) [hereinafter Corporate Human Rights Due Diligence], https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf. It is associated with four core components:

> (a) *Identifying and assessing actual or potential adverse human rights impacts* that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) *Integrating findings from impact assessments across relevant company processes* and taking appropriate action according to its involvement in the impact; (c) *Tracking the effectiveness of measures* and processes to address adverse human rights impacts in order to know if they are working; (d) *Communicating on how impacts are being addressed* and showing stakeholders—in particular affected stakeholders—that there are adequate policies and processes in place.

*Id.*; *see* Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, transmitted by the Secretary-General, Pursuant to Human Rights Council Resolutions 17/4 and 35/7, ¶¶ 10–14, U.N. Doc. A/73/163 (July 16, 2018); *see also* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETATIVE GUIDE 31 (2012) ("It is becomes a matter of corporate compliance—specifically, about human rights.[10]

A key component of a successful compliance strategy is incentives.[11] For corporations, incentives can be supplied by either national or international legal institutions or reputational mechanisms (or some combination of both). The problem is that each of these independently is inadequate to address the incentive problem for social compliance.

Let's begin with the legal incentives. Many national and international transparency laws and other initiatives only require that corporations publicly disclose what steps they take to improve social compliance in supply chains, but many do not require that corporations adopt specific compliance programs.[12] A corporation can satisfy these laws by stating what it does or does not do. In contrast, article 5(2) of the 2019 revised draft of a legally binding instrument on business and human rights ("BHR treaty") requires that state

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through human rights due diligence that an enterprise identifies the information it needs in order to understand its specific human rights risks at any specific point in time and in any specific operating context, as well as the actions it needs to take to prevent and mitigate them. 'Human rights risks' refers to the risks of having an adverse impact on human rights, as against risks to the enterprise itself, although the former increasingly leads to the latter.").

10 *See, e.g.*, Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 958 (2009) (defining compliance as "a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law"); *id.* at 960 ("Compliance programs also deter wrongdoing by generating social norms that champion law-abiding behavior. . . . Social norms fill the gaps left by more formal enforcement mechanisms. Norm-based compliance programs also increase deterrence insofar as they permit organizations to discipline employees for violations that transgress social norms, but otherwise fall just short of legal violations." (footnotes omitted)); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075, 2093 (2016) (defining the "common core of compliance [as] consist[ing] of four functional elements: (1) a structural nexus, (2) information flows, (3) monitoring and surveillance, and (4) risk-rated enforcement"); Veronica Root, *The Compliance Process*, 94 Ind. L.J. 203, 219–20 (2019) (defining the compliance process as involving "prevention, detection, investigation, and remediation"); Geoffrey P. Miller, *The Compliance Function*: *An Overview* 1 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 14-36, 2014), http://www.law.northwestern.edu/research-faculty/colloquium/law-economics/documents/2017_Spring_Miller_Compliance.pdf ("The compliance function consists of efforts organizations undertake to ensure that employees and others associated with the firm do not violate applicable rules, regulations or norms."); *see also* Org. for Econ. Co-operation & Dev., OECD Due Diligence Guidance for Responsible Business Conduct 21 (2018).

11 Miller, *supra* note 10, at 2; *see* Griffith, *supra* note 10, at 2084–85 (discussing the effect of the federal sentencing guidelines and settlement tactics on companies' willingness to implement effective compliance programs).

12 *See, e.g.*, Kamala D. Harris, Cal. Dep't of Justice, The California Transparency in Supply Chains Act: A Resource Guide, at i (2015) ("The California Transparency in Supply Chains Act does not mandate that businesses implement new measures to ensure that their product supply chains are free from human trafficking and slavery. Instead, the law only requires that covered businesses make the required disclosures—even if they do little or nothing at all to safeguard their supply chains.").

parties to the treaty adopt measures that ensure that those conducting business activities engage in human rights due diligence.[13] The draft text specifically lists the compliance requirements of human rights due diligence including identifying and assessing human rights risks, taking preventative action, monitoring human rights impacts, and communicating with stakeholders on progress.[14] However, while promising, this treaty may fail in many ways. Even if a draft text is adopted, the home jurisdictions of large transnational corporations, such as the United States, may decline to join the treaty or implement its requirements through domestic legislation. This presents a problem because treaties regulate corporations vis-à-vis state intermediaries; if states are unwilling to fulfill this role, then it proves challenging for a treaty to regulate corporations directly.

Alternatively, we can turn to the reputational markets to provide the incentives that the law cannot. But reputational markets have their own incentive problems that have to do with signaling. Corporations may only invest in costly compliance efforts if there is a prospect of a reward, such as increased market gains. The problem with reputational markets for social compliance is that the actors who supply the reputational rewards or sanctions—such as consumers—often cannot tell the difference between a good compliance program and public relations "greenwashing." This confusion creates the risk that "good firms" are undercompensated and "bad firms" are overcompensated by the reputational markets, thereby reducing the likelihood that the former will actually invest in a meaningful compliance program given that the costs invested in a compliance program are unrecognized and unrewarded in the reputational markets. This signaling problem compromises the types of voluntary organizational change that we may expect both ex ante (preventative) or ex post (reactive). Corporations may be unwilling to invest in costly compliance efforts ex ante if their efforts go unrecognized and unrewarded in the marketplace. Similarly, even corporations struggling to reestablish legitimacy following a crisis may opt for a lower level of organizational change if it is sufficient to satisfy consumers.[15]

This is where the law comes in. This Article argues that the incentive problem is surmounted by blending "law and reputation" so that (a) reputational mechanisms improve the effectiveness of legal institutions, such as the BHR treaty, or (b) legal institutions improve reputational markets for social compliance by correcting the signaling problem. This Article draws upon scholarship examining international human rights,[16] organizational behav-

13 UN OEIGWG Chairmanship, Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, at art. 5, ¶ 2 (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [hereinafter Revised Draft].

14 *Id.*

15 *See infra* Part IV.

16 *See, e.g.*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 114–26 (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a*

ior,[17] and corporate reputation[18] to develop a typology that illustrates the complementarity between reputational mechanisms and international legal institutions that can improve human rights compliance in global supply chains.

First, reputational mechanisms can help improve the effectiveness of international legal institutions (*reputation enhances law*). This Article's typology may help design better international agreements concerning human rights by identifying the "carrots and sticks" an agreement should include in order to incentivize corporations to cooperate. This insight is particularly important when we consider that the business and human rights treaty under development may never enter into force; even if it does, powerful states may refuse to join it. This Article's typology of reputational mechanisms explores how this treaty can "shortcut the state" to reach its primary audience—corporations—even if that corporation's home jurisdiction refuses to join the treaty.[19]

Second, legal institutions (both domestic and international) can improve signaling within reputational markets for social compliance, thereby correcting the incentive problem (*law enhances reputational markets*). Legal institutions can do so in a number of ways. First, legal institutions can create

*Difference?*, 111 YALE L.J. 1935, 2007 (2002); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 302–06 (2011); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS 1, 29 (Thomas Risse et al. eds., 1999); Kathryn Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 INT'L ORG. 815, 815 (1986).

17 *See, e.g.*, JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 554–56 (2000); INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS (Kenneth W. Abbott et al. eds., 2015); LAWRENCE LESSIG, CODE: VERSION 2.0, at 122–25 (2006); JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS 43 (1978); Richard H McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000); *see also* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 4–5 (1990); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 70 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 474 (2012); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 341 (1977); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493, 502–03 (1987).

18 *See, e.g.*, Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 121 (1992); Charles J. Fombrun, *The Building Blocks of Corporate Reputation: Definitions, Antecedents, Consequences*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 94, 103 (Michael L. Barnett & Timothy G. Pollock eds., 2012); A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1443–44 (2010); Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 327 (2009).

19 *See* Jay Butler, The Corporate Keepers of International Law (June 2019) (unpublished manuscript), https://ssrn.com/abstract=3405630.

a "focal point"[20] regarding normative standards that helps to correct reputational markets so that "good firms" are adequately rewarded for their investments in costly compliance programs. Legal institutions can help correct this problem by serving as a "focal point" for what constitutes best practices on global social compliance. This focal point then helps to distinguish between different companies purporting to "invest in CSR" (corporate social responsibility) so that genuine compliance programs "stand out" and are appropriately rewarded.[21]

Second, this signaling value is especially important in a postcrisis situation when a corporation embarks on organizational change. Like all organizations, a corporation is not self-sufficient.[22] It requires certain resources to survive, and those resources are provided by external actors.[23] Legitimacy is such a resource.[24] Corporations need it to secure consumers, recruit talent, appease regulators, and satisfy local communities.[25] Corporate legitimacy is

20 Under the focal-point theory of expressive law, legal institutions influence conduct, even when they lack coercive power, because of their ability to coordinate action. Specifically, Richard McAdams argues that laws are forms of "third-party expression" that can coordinate behavior by establishing focal points through legal rules. McAdams, *supra* note 17, at 1668. Legal rules can create focal points because of certain special features that laws possess—publicity, uniqueness, and reputation of officials:

> The publicity frequently accorded law means it is more likely to create the expectations necessary for coordination. Further, various features of law create a [u]niqueness to legal expression that frequently causes its message to "stand out" against the background of public discourse. Finally, because the publicity and uniqueness of law gives government officials the ability to create a focal point and influence behavior, these officials may develop a reputation for correctly "predicting" future behavior.

*Id.*

21 *See* Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 7–10 (2015) (describing the value of judicial opinions for operation of reputational sanctions).

22 PFEFFER & SALANCIK, *supra* note 17, at 2.

23 *Id.* ("Organizations are linked to environments by federations, associations, customer-supplier relationships, competitive relationships, and a social-legal apparatus defining and controlling the nature and limits of these relationships. Organizations must transact with other elements in their environment to acquire needed resources . . . .").

24 *See* Craig Deegan, *The Legitimising Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 ACCT. AUDITING & ACCOUNTABILITY J. 282, 293 (2002) ("Legitimacy is considered to be a resource on which an organisation is dependent for survival."); David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution*, 17 BUS. ETHICS Q. 5, 8 (2007); Brayden G. King & David A. Whetten, *Rethinking the Relationship Between Reputation and Legitimacy: A Social Actor Conceptualization*, 11 CORP. REPUTATION REV. 192, 192 (2008) ("Reputation and legitimacy represent intangible assets that firms rely on to enhance their performance and chances of survival.").

25 *See, e.g.*, Ronald Sims, *Toward a Better Understanding of Organizational Efforts to Rebuild Reputation Following an Ethical Scandal*, 90 J. BUS. ETHICS 453, 455 (2009) ("[T]he value of a good reputation continues to grow largely because of the competitive advantage and market differentiation it delivers—higher sales generated by satisfied customers and their referrals; relationships with the right strategic and business partners; ability to attract,

particularly low following a corporate crisis—such as one involving human rights abuses. What follows is a process of organizational change linked to reputational mechanisms: A disgraced corporation—exposed for its poor labor, environmental, or other internal practices—associates itself with one or more reputable organizations to address the reputational harm it suffered as a result of the scandal. Such associations allow these external organizations, often NGOs (nongovernmental organizations), to play a role in developing new rules that address the corporations' problematic practices, and corporations adopt these practices to obtain the association with the NGO. Through this process, legal institutions—insufficient on their own to improve corporate conduct—nonetheless improve the operation of reputational sanctions that can, in turn, incentivize corporations to engage in organizational change.[26]

Consider the following examples. Following years of public criticism and shareholder activism concerning its overseas "sweatshops," Disney partnered with the Interfaith Center on Corporate Responsibility (ICCR), among others, to launch "Project Kaleidoscope," a new international labor standards program for its factories that included a revised code of conduct and plans for remediation.[27] Similarly, Hershey, Nestlé, and Mars partnered with the International Labour Organization (ILO) in 2011 to develop a new action plan to combat child labor in cocoa growing communities in Ghana and Côte d'Ivoire following reports of child exploitation in cocoa supply chains.[28] These disparate examples illustrate two important lessons: First, moments of reputational crisis offer the potential for corporate change. Second, the need for legitimacy changes the power dynamic between the powerful and the reputable, allowing the latter to wield a stick it might not otherwise possess.

Part I explains the value and risks of the global supply chain to transnational corporations. Part II introduces a typology of reputational mechanisms based on scholarship in international law examining state compliance.

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develop and retain the best talent; benefit of the doubt by stakeholders if crisis strikes; spread of positive word of mouth; potential to raise capital and share price; and in some cases, the option to charge premium prices. Also, in an age of regulatory watchdogs, a positive reputation can improve relationships with government officials and regulators.").

26 Scholarship examining the complementarity between legal and reputational sanctions focuses on the ways that legal processes, such as lawsuits, can improve reputational sanctions by (a) providing a public signal of wrongdoing that gets public attention and provokes a reaction, and (b) supplying better information from courts to the public about the blameworthiness (or lack thereof) of the parties. *See, e.g.*, Scott Baker & Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559, 573–75 (2015).

27 PROJECT KALEIDOSCOPE WORKING GRP., PROJECT KALEIDOSCOPE: A COLLABORATIVE PROJECT TO ENCOURAGE SUSTAINED CODE COMPLIANCE, INTERIM REPORT 5 (2005), https://www.domini.com/uploads/legacy/Kaleidoscope_Interim_Report.pdf [hereinafter PROJECT KALEIDOSCOPE INTERIM REPORT].

28 *Africa: Child Labor in Cocoa Fields/Harkin-Engel Protocol*, INT'L LABOUR ORG., https://www.ilo.org/africa/technical-cooperation/accel-africa/WCMS_159486/lang—en/index.htm (last visited Nov. 27, 2019).

Part III applies this typology to corporate compliance and identifies important lessons for the institutional design of a treaty on business and human rights. Part IV uses two case studies to demonstrate how reputational crises can encourage corporate actors to engage in organizational change concerning their human rights compliance. Part V discusses implications of this typology, including concerns with "greenwashing" strategies, conditions for successful organizational change, and possibilities for global change at a time when rising nationalist tendencies and growing wariness of international commitments appear to eschew future international institutions.

## I. What Is Corporate Human Rights Compliance?

### A. *From Multination Corporation to Globally Integrated Enterprise: The Benefits of the Global Supply Chain to Transnational Corporations*

Over a decade ago, Samuel Palmisano, chair of the board, president, and CEO of IBM, wrote in *Foreign Affairs* that we are witnessing the transformation of multinational corporations into "globally integrated enterprises" and with it, a change in corporate purpose: "The corporation, then, is emerging as a combination of various functions and skills—some tightly bound and some loosely coupled—and it integrates these components of business activity and production on a global basis to produce goods and services for its customers."[29]

The tool that corporations use to connect their various functions around the world is the global supply chain.[30] There is a great variety in the types of global supply chains around the world that differ in functions, locations, workers, and governance models.[31] For example, Starbucks's operations involve at least the following functions: production, transportation, storage, manufacturing, distribution, retail, and customer service.[32] Some of these functions are performed by Starbucks while other functions are performed by third-party vendors; all these functions—and the actors who perform them—are connected to each other and to Starbucks through the latter's supply chain.[33] The organization and performance of this supply chain can play a critical role in a transnational corporation's success.

29 Palmisano, *supra* note 4, at 129–31, 133.

30 Gary Gereffi, *The Organization of Buyer Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks*, *in* Commodity Chains and Global Capitalism, *supra* note 5, at 95, *reprinted in* Gary Gereffi, Global Value Chains and Development 43, 44 (2018) (explaining that global commodity chains are characterized by "a set of products and services linked together in a sequence of value-adding economic activities").

31 Suk-Jun Lim & Joe Phillips, *Embedding CSR Values: The Global Footwear Industry's Evolving Governance Structure*, 81 J. Bus. Ethics 143, 146–48 (2008) (comparing market-based governance models with alternative governance approaches that emphasize collaboration and information sharing between buyers and suppliers).

32 James A. Cooke, *From Bean to Cup: How Starbucks Transformed Its Supply Chain*, Supply Chain Q. (2010), https://www.supplychainquarterly.com/topics/Procurement/scq201004starbucks/.

33 *Id.*

For example, in 2008, Starbucks faced a cost problem because of the organization of its supply chain: its success had led to the rapid expansion of its global footprint with new retail stores opening regularly.[34] The growth in operational costs led Howard Schultz, chairman, president, and CEO of Starbucks, to prioritize reorganization of the supply chain in order to secure Starbucks's continued success.[35]

Another supply chain leader is Apple. Research firm Gartner consistently recognized Apple for leadership in supply chain management.[36] Part of Apple's success—and why it has topped the list of supply chain leaders—is that it was able "to discover and develop unique materials, coerce and cajole suppliers, and churn out millions of units all without owning any factories."[37] But even Apple is not immune to supply chain problems, such as disruptions and delays, that could place its broader operations at risk.[38]

Regardless of particular characteristics, most global supply chains share the following features: *geographic dispersion* and *functional specialization*. First, more goods are made in more places. One reason for the growing global footprint for economic production is technology.[39] Technological improvements have enabled companies to shed their manufacturing responsibilities while retaining a reliable manufacturing base. For example, the bar code enabled retailers to share sales and production information with their contractors, thereby facilitating the offshoring of manufacturing.[40] Finally, trade policies also played an important role in facilitating supply chains.[41] The result is that there is more and more trade in intermediate goods—not finished products but components of products that cross borders repeatedly as different economies add value to a component before exporting it to another country that will do the same.[42]

34 *Id.*

35 *Id.*

36 Gartner, Press Release, Gartner Announces Rankings of Its 2015 Supply Chain Top 25, (May 14, 2015) https://www.gartner.com/en/newsroom/press-releases/2015-05-14-gartner-announces-rankings-of-its-2015-supply-chain-top-25 (announcing "masters category" for supply chain leaders (capitalization altered)).

37 Tim Culpan, *Apple's Supply Chain Struggles Are a Major Threat*, INDUSTRYWEEK (Oct. 23, 2017), https://www.industryweek.com/supply-chain/apple-s-supply-chain-struggles-are-major-threat.

38 *Id.*

39 George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 962, 964–965 (2007); Palmisano, *supra* note 4, at 129.

40 Richard Appelbaum & Nelson Lichtenstein, *A New World of Retail Supremacy: Supply Chains and Workers' Chains in the Age of Wal-Mart*, 70 INT'L LAB. & WORKING-CLASS HIST. 106, 108 (2006).

41 Palmisano, *supra* note 4, at 128–29.

42 *See* Marcelo Prince & Willa Plank, *A Short History of Apple's Manufacturing in the U.S.*, WALL ST. J. (Dec. 6, 2012), https://blogs.wsj.com/digits/2012/12/06/a-short-history-of-apples-manufacturing-in-the-u-s/. Global trade now embraces more and more exchange in intermediate goods as an increasing proportion of components are imported into a country for subsequent use in an export. Gary Gereffi & Joonkoo Lee, *Why the World Suddenly Cares About Global Supply Chains*, J. SUPPLY CHAIN MGMT., July 2012, at 24, 26.

Second, the tasks that suppliers perform not only occur in more places but are also more specialized: specific corporations, tiers of corporations, and even significant segments of national economies devote themselves to particular intermediary tasks in the production chain for a class of goods.[43] What we are witnessing is the division of labor for a particular good or service among different countries and within segments of those countries. The marketing and design of a particular good may occur in country *A*, while research and development is undertaken in country *B*, key components are sourced from countries *C–G*, and components are assembled in country *H* and distributed by vendors from country *I* to retail stores operated in countries *A–I*, with customer service performed by workers in country *J*. This organization does not only represent geographic distribution of functions but also the specialization of certain economies in particular labor functions. Such specialization and globalization are both a result of the globally integrated enterprise and one of its enabling conditions.

### B. *From Corporate Social Responsibility to Human Rights Compliance: The Risks of Governance Gaps in the Global Supply Chain*

Supply chains are not only a source of strength for a transnational corporation; they also pose risks of their own. Certainly, there are inherent risks of the supply chain: production disruption and delays, poor quality control, and so forth. But many of the risks that place transnational corporations in the public spotlight have less to do with production issues and instead concern the conditions under which products are produced or services rendered. In other words, these are issues of social compliance as opposed to quality compliance.

Both types of compliance issues arise from similar problems relating to the organization of global supply chains and the broader environment in which they operate. At a supply chain level, we confront another iteration of the agency cost problem. As the number of actors involved expands, it becomes more difficult to manage them. And this challenge is not unique to social compliance: as corporations expand their global footprints, it becomes more challenging to know and manage their various operations, creating risks of compliance in issue areas as diverse as environment, anticorruption, product quality, and human rights.[44]

The supply chain problem is further compounded given the cross-border nature of globalized production so that is may be difficult to apply and enforce laws to transnational conduct; for example, the U.S. Supreme Court refused to do so in *Kiobel v. Dutch Petroleum* because of concerns with the extraterritorial application of U.S. laws.[45] Even when harms concern purely domestic conduct, some jurisdictions refuse to enforce their laws because of

43 *See, e.g.*, Gereffi & Lee, *supra* note 42, at 26–27.

44 Geis, *supra* note 39, at 966.

45 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

state incapacity or fear of corporate flight, among other concerns.[46] The intersection of transnational business activity with state incapacity lead to significant "governance gaps" in global supply chains:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.[47]

Governance gaps create risks for both vulnerable populations *and* transnational corporations, albeit of a different nature. For vulnerable populations, governance gaps create the risk of human rights abuses. National headlines and NGO reports provide regular accounts of significant human rights abuses in the supply chains of many familiar companies, including forced labor in shrimp supply chains,[48] child labor in cocoa supply chains,[49] and human trafficking in supply chains ranging from the extractive sector to the services industries.[50] Recent litigation in United States and abroad further illustrates the human impact of transnational business conduct.[51]

Governance gaps concerning human rights compliance also create risks for transnational corporations. Specifically, these gaps create or increase *litigation*, *regulatory*, and *reputational* risks for transnational corporations. First, even the Supreme Court's decisions in *Kiobel* and, recently, *Jesner v. Arab Bank*—severely restricting the availability of the Alien Tort Statute to address human rights violations[52]—have not eliminated litigation concerning social compliance in the supply chain.[53] For example, in October 2018, the Ninth Circuit permitted a class action case to proceed against Cargill and Nestlé

46 Ruggie, *supra* note 9, ¶ 14 ("Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters.").

47 *Id.* ¶ 3.

48 *See, e.g.*, Sud v. Costco Wholesale Corp., 731 F. App'x 719, 720 (9th Cir. 2018); Wirth v. Mars, Inc., 730 F. App'x 468, 468 (9th Cir. 2018).

49 *See, e.g.*, Dana v. Hershey Co., 730 F. App'x 460, 460 (9th Cir. 2018); McCoy v. Nestle USA, Inc., 730 F. App'x 462, 462 (9th Cir. 2018).

50 U.S. Dep't of State, Trafficking in Persons Report 12–13 (2015), https://2009-2017.state.gov/documents/organization/245365.pdf.

51 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113, 123 (2013).

52 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

53 *See* Doe v. Nestle, 906 F.3d 1120, 1124 (9th Cir. 2018) ("[T]he Supreme Court in *Jesner* held that foreign corporations cannot be sued under the ATS. *Jesner* thus abrogates *Nestle I* insofar as it applies to foreign corporations. But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." (citation omitted)).

brought by "former child slaves who were kidnapped and forced to work on cocoa farms in the Ivory Coast for up to fourteen hours a day without pay. While being forced to work on the cocoa farms, plaintiffs witnessed the beating and torture of other child slaves who attempted to escape."[54] The Ninth Circuit stated that the nature of the operations allows the case to survive *Kiobel* because "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States."[55] This case is one of a number of cases over the past decade or so—before and after *Kiobel*—that concerned human rights violations in the supply chain.[56]

In addition to litigation risks, governance gaps concerning social compliance also create a regulatory risk for transnational corporations. For example, California introduced the Transparency in Supply Chains Act, which requires covered corporations to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking, including information about their practices concerning verification, audits, certifications, internal accountability standards and procedures, and training.[57] There have also been various attempts to introduce an equivalent statute at the federal level.[58]

The United States is not alone in trying to regulate issues concerning social compliance. The United Kingdom already introduced its own Modern Slavery Act in 2015,[59] and more recently, Australia joined the ranks of countries addressing modern slavery with its own law that "requires companies of a certain size operating in Australia to publicly state the steps they are taking to keep their supply chains free from the worst forms of modern-day slavery."[60] In 2018, a proposed federal bill was tabled in the Canadian House of Commons that "would require companies to publicly release a report every year, detailing what they've done to ensure their supply chains are transparent and free of goods and materials fully or partially produced by children and forced labourers."[61] Switzerland and Germany are also considering similar legislation.[62]

France took a different approach by introducing a "Duty of Vigilance Law" that requires the largest French companies to "publish annual, public

54 *Id.* at 1122.

55 *Id.* at 1126.

56 *See, e.g.*, Doe v. Wal-Mart Stores, Inc., 572 F.3d 677, 679–80 (9th Cir. 2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

57 CAL. CIV. CODE § 1714.43 (West 2019).

58 *See, e.g.*, Business Supply Chain Transparency on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong. (2018).

59 Modern Slavery Act 2015, c. 30.

60 Komala Ramachandra, *Australia Starts Tackling Modern Slavery*, HUMAN RIGHTS WATCH (Jan. 8, 2019), https://www.hrw.org/news/2019/01/09/australia-starts-tackling-modern-slavery.

61 Samantha Beattie, *Modern Slavery Bill Targets Canadian Imports of Goods Made by Slaves*, HUFFPOST (Dec. 14, 2018), https://www.huffingtonpost.ca/2018/12/14/modern-slavery-bill-john-mckay-forced-child-labour_a_23618530/.

62 *See* Ramachandra, *supra* note 60.

vigilance plans . . . [that] include[ ] impacts linked to their own activities, those of companies under their control, and those of suppliers and subcontractors, with whom they have an established commercial relationship."[63] Additionally, "[w]hen companies default on these obligations, the law empowers victims and other concerned parties to bring the issue before a judge" who can "apply fines of up to €10 million when companies fail to publish plans," and "[f]ines can go up to €30 million if this failure resulted in damages that would otherwise have been preventable."[64]

Finally, there are also a number of proposals for new international institutions to regulate issues of human rights compliance. Some have proposed a new International Court of Civil Justice to address transnational mass tort cases.[65] Others propose a new set of Hague Rules for international arbitration of business and human rights cases.[66] And, as discussed in Section I.C, work continues on a new international treaty on business and human rights.[67] All these developments are in response to the harms created by governance gaps in global supply chains.

The final risk to transnational corporations is reputational. It is no secret that a good reputation is a vital asset to corporations because it influences whether stakeholders will engage with them and on what terms.[68] For over a decade, the Reputation Institute has published an annual ranking of the world's one hundred most reputable companies.[69] "Ethical behavior, fairness, product value and transparency are among the most important factors in determining a company's reputation."[70] In 2018, Apple took a significant reputational hit, despite the many strengths of its supply chain.[71] Apple's reputational problem may be its very profitability; according to the chief research officer of the Reputation Institute, "[b]eing viewed as highly profitable has a negative perception in terms of corporate social responsibility . . . . Apple has really been punished in the court of public opinion."[72]

63 Press Release, Eur. Coal. for Corp. Justice, France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection (Feb. 21, 2017), http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection.

64 *Id.*

65 *See, e.g.*, MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2019).

66 *See e.g.*, BRUNO SIMMA ET AL., CTR. FOR INT'L LEGAL COOPERATION, INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES: ELEMENTS FOR CONSIDERATION IN DRAFT ARBITRAL RULES, MODEL CLAUSES, AND OTHER ASPECTS OF THE ARBITRAL PROCESS (2018).

67 *See infra* Section I.C.

68 *See infra* Section II.A.

69 REPUTATION INST., *supra* note 1, at 41.

70 Vicky Valet, *The World's Most Reputable Companies 2018*, FORBES (Mar. 15, 2018) https://www.forbes.com/sites/vickyvalet/2018/03/15/the-worlds-most-reputable-companies-2018/#318ad47526d5.

71 REPUTATION INST., *supra* note 1, at 45.

72 Valet, *supra* note 70 (quoting Stephen Hahn-Griffiths).

One explanation for this reputational loss is that the public is looking for signs of social contribution from successful companies.[73]

The supply chain of a transnational business can demonstrate its social contribution to the world, for good or ill. Reports of human trafficking, modern slavery, child labor, forced displacements, and environmental contamination provide a poor narrative of a business's impact on the world; it is not surprising when the reputation of a transnational business plummets after such revelations.[74] The litigation and regulatory risks discussed above also contribute to reputation risk: the more light that legal institutions shine on problems in supply chains, the more vulnerable transnational corporations are to negative evaluation and reputational damage.[75] But supply chains also offer opportunities for transnational corporations to demonstrate their prosocial character when they go above and beyond what applicable laws require concerning conditions in their supply chains.

### *C. Regulating the Supply Chain*

Globalization has fueled expanding networks of global supply chains and an ever-broadening corporate footprint.[76] Over the decades, the international community experimented with several "hard-" and "soft-law" approaches to counteract these permissive environments. The following Section discusses some of the most recent initiatives proposed or developed to address the challenge of governing corporate activity across borders. For example, in 1999, UN Secretary-General Kofi Annan proposed the United Nations Global Compact that promotes a set of values based on internationally recognized documents, such as the Universal Declaration of Human Rights.[77] The Global Compact is a voluntary initiative that imposes on its corporate members a requirement to abide by its ten foundational principles, relating to human rights, labor, the environment, and anticorruption, as well as to report annually on its progress toward these commitments.[78]

A few years later in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the Norms on the Responsibilities

73 *Id.*; *see also* CONE COMMC'NS, 2017 CONE COMMUNICATIONS CSR STUDY 2, 31 (2017), http://www.conecomm.com/2017-cone-communications-csr-study-pdf.

74 *See, e.g.*, Edwin Lopez & Jennifer McKevitt, *The 5 Most Notorious Supply Chain Ethics Scandals of 2016*, SUPPLY CHAIN DIVE (Dec. 26, 2016), https://www.supplychaindive.com/news/top-2016-ethics-slavery-supply-chain-scandals/432391/.

75 SIMMONS, *supra* note 16, at 132 ("[L]itigation's power resides not so much in its ability to provide every victim with a decisive win in court. Litigation is also a *political* strategy . . . . It can often be used strategically not only to win cases, but also to publicize and mobilize a cause.").

76 *See supra* notes 29–33 and accompanying text.

77 Press Release, Secretary-General, Executive Summary and Conclusion of High-Level Meeting on Global Compact, U.N. Press Release SG/2065 (July 27, 2000) [hereinafter Press Release, U.N. Global Compact].

78 *See The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Oct. 19, 2019); Georg Kell et al., *Silent Reform Through the Global Compact*, UN CHRON., Mar. 2007, at 26, 26.

of Transnational Corporations and Other Business Enterprises ("Norms") that were intended as a standard code of conduct for transnational corporations.[79] The Norms became controversial because of a number of their prominent features, including recognizing transnational corporations as duty bearers of human rights standards with particular human rights obligations of transnational corporations.[80] The Norms were also presented as mandatory as opposed to voluntary. It is no surprise, therefore, that several global trade associations explicitly objected to the Norms.[81] It is also probably equally unsurprising that the Norms were effectively tabled in 2004, with the UN Commission on Human Rights deciding to subject the Norms to additional study.[82]

But the end of the Norms did not mark the end of the business and human rights agenda. Instead, in 2008, the UN Special Representative on Business and Human Rights, John Ruggie, introduced his tripartite framework for business and human rights known as the "Protect, Respect and Remedy Framework."[83] This framework consists of three important but separate pillars: (a) the state's duty to protect against human rights abuses by third parties; (b) the corporate responsibility to respect human rights; and (c) greater access by victims to effective remedies, both judicial and nonjudicial.[84]

Three years later, UN Special Representative Ruggie introduced the United Nations Guiding Principles on Business and Human Rights ("Guiding Principles") that provide thirty-one principles that help to operationalize the

79 David Kinley et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SEC. L.J. 30, 31 (2007) ("The Norms comprise a set of human rights obligations directed at companies, but which would be imposed upon them by way of the usual means of international law, namely, the domestic laws of individual states.").

80 U.N. Econ. & Soc. Council, Comm'n on Human Rights, Subcomm. on Promotion and Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, art. 2, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26 2003) (listing duties relating to the right to equal opportunity and nondiscriminatory treatment, right to security of persons, rights of workers, and respect for national sovereignty and human rights).

81 *See, e.g.*, INT'L CHAMBER OF COMMERCE & INT'L ORG. OF EMP'RS, JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT "NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS" 3 (2004), https://bit.ly/2Ujkl3W ("Only States have legal obligations, so only States can fulfil human rights . . . . Private persons are not the duty-bearers of the rights in the UN human rights treaties, and related agreements: consequently, private actors cannot violate human rights."); *see also* Thomas M.T. Niles, *UN Code No Help to Companies*, FIN. TIMES, Dec. 17, 2003, at 18; Daniel Vasella, *Business Must Help Frame New Human Rights Rules*, FIN. TIMES, Apr. 8, 2004, at 19; Letter from Maria L. Cattaui, Secretary-General, Int'l Chamber of Commerce, to Dzidek Kedzia, Chief, Office of the High Comm'r for Human Rights, United Nations 5 (Sept. 7, 2004).

82 Kinley et al., *supra* note 79, at 32.

83 *See* Ruggie, *supra* note 9.

84 *Id.*

Protect, Respect and Remedy Framework.[85] The Guiding Principles expanded on each of the three pillars, including the corporate responsibility to respect human rights. According to the Guiding Principles, a company's responsibility for due diligence includes evaluating (a) the "country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose"; (b) "human rights impacts their own activities may have within that context—for example, in their capacity as producers, service providers, employers, and neighbours"; and (c) "whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors."[86] Appropriate due diligence requires formulating a firm-specific human rights policy, impact assessments, integration of the human rights policy throughout the firm, and tracking performance through monitoring and auditing.[87]

There are promising signs that the Guiding Principles—including the corporate responsibility to respect—have caught on. The Guiding Principles have been incorporated, in whole or in part, into a number of industry and multi-industry codes and guides, including the OECD Guidelines for Multinational Corporations,[88] International Bar Association Practical Guide,[89] IPIECA (oil and gas industry) human rights due diligence practical guide,[90] and the International Code of Conduct for Private Security Service Providers.[91]

While the Guiding Principles may provide the current language for business and human rights, not everyone is impressed. Analysis by the Business and Human Rights Resource Centre identified three major weaknesses concerning compliance with the "corporate responsibility to respect" between 2011–2016: (1) "[a] sense of impunity for corporate human rights abuses in many countries"; (2) a "[l]ow-recognition of business [and] human rights issues among firms [headquartered] in significant emerging economies"; and (3) "[a] lack of understanding on how to implement respect for human

85 *See* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 4–34 (2011).

86 *See* Ruggie, *supra* note 9, ¶ 57.

87 *Id.* ¶¶ 59–63.

88 ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), https://bit.ly/1kPDOqW (introducing a new chapter on human rights).

89 INT'L BAR ASS'N, IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 7 (2016), https://bit.ly/2CPnLUK.

90 INT'L PETROLEUM INDUS. ENVTL. CONSERVATION ASS'N, HUMAN RIGHTS DUE DILIGENCE PROCESS 2 (2012), https://bit.ly/2HAhXo3.

91 GENEVA ACAD. OF INT'L HUMANITARIAN LAW & HUMAN RIGHTS, THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS 9 (2013), https://bit.ly/2SeDQNw.

rights in practice."[92] In 2018, the UN Working Group on Business and Human Rights reported "gaps in current practice in corporate disclosure of risk assessments and human rights due diligence processes, as well as the 'taking action' and 'tracking of responses' components of human rights due diligence."[93]

Due to these and similar concerns, the United Nations Human Rights Council adopted a resolution in 2014 "to establish an open-ended intergovernmental working group" with the "mandate . . . to elaborate an international legally binding instrument" on "transnational corporations and other business enterprises" with respect to human rights."[94] However, it was a controversial move from the onset, garnering support from twenty countries,[95] opposition from another fourteen countries,[96] with thirteen additional countries abstaining.[97]

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92 *5 Years On: The UN Guiding Principles on Business and Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., https://business-humanrights.org/en/ungps-at-5 (last visited Oct. 27, 2019).

93 Summary: Corporate Human Rights Due Diligence, *supra* note 9; *see* U.N. Human Rights Council, Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, ¶ 10, U.N. Doc. A/HRC/40/48 (Jan. 2, 2019) [hereinafter Report on the Fourth Session] (reporting that several delegations and NGOs noted "multiple reasons for further developments in the field of business and human rights" including the "unfair power imbalance between companies and rights holders, the growing power of companies vis-à-vis States, the increased scope of the rights granted to companies on the international stage without corresponding obligations and the lack of effective regulation in conflict and post-conflict settings"); *see also* JOINT COMMITTEE ON THE DRAFT MODERN SLAVERY BILL, REPORT ON DRAFT MODERN SLAVERY BILL, 2013–4, HL 166, HC 1019, ¶ 169 (UK) (reporting the concern that "voluntary agreements would not be afforded high business priority" because, as former U.S. Ambassador-at-Large Luis CdeBaca warned, "[v]oluntary codes of practice in corporations typically get done by their corporate social responsibility people, whereas mandatory regulations end up being handled by their general counsel and even their directors because they are part of a filing requirement"); Virginia Mantouvalou, *The UK Modern Slavery Act 2015 Three Years On*, 81 MOD. L. REV. 1017, 1042–43 (2018) (describing strengths and weaknesses of the UK Modern Slavery Act for incentivizing companies to improve social compliance in supply chains).

94 U.N. Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

95 Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam all voted in favor. *UN Human Rights Council Sessions*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions (last visited Oct. 21, 2019).

96 Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, United Kingdom, and United States all voted in opposition. *Id.*

97 Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and United Arab Emirates all abstained. *Id.*

In July 2018, the open-ended intergovernmental working group released the text of a "zero draft"[98] of the proposed treaty, with a revised draft published in 2019.[99] While many provisions address the biggest criticism of the Guiding Principles—inadequate access to remedies—article 5 of the revised draft is significant because it addresses the prevention of human rights abuses and speaks to the type of conduct that we want from transnational corporations, as opposed to state actors.[100] It addresses human rights due diligence responsibilities of corporations, including the following: monitoring human rights impacts of business activities; identifying and assessing any actual or potential human rights activities that may arise; taking appropriate action to prevent human rights violations; and communicating with stakeholders on "the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise."[101]

These draft texts were not without their critics. Concerns raised by NGOs and civil society criticized the initial zero draft for not going far enough to protect human rights, pointing out the lack of protection for human rights defenders;[102] failure to prescribe direct obligations for business corporations;[103] failure to adequately address gender discrimination and power imbalances, within stakeholder engagement and more broadly;[104] risk of excluding certain types of corporations, such as state-owned enterprises;[105] and insufficient extraterritorial obligations of state actors,[106] among other concerns.

At the other end, the International Organisation of Employers (IOE), International Chamber of Commerce (ICC), Business & Industry Advisory Committee to the OECD (BIAC), and Business Europe also took aim at the

98 U.N. Human Rights Office of the High Comm'r, Zero Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (July 16, 2018).

99 Revised Draft, *supra* note 13.

100 *Id.* art. 5.

101 *Id.*

102 *See* Carlos Lopez, *Human Rights Defenders and Corporate Accountability—Is There a Place for Them in a Treaty on Business & Human Rights?*, *in* COMPILATION OF COMMENTARIES ON THE "ZERO DRAFT" 6, 6 (2018) [hereinafter COMMENTARIES ON THE "ZERO DRAFT"]; Report on the Fourth Session, *supra* note 93, ¶ 20.

103 *See* Charlie Holt et al., *The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps Along the Irresistible Path to Corporate Accountability*, *in* COMMENTARIES ON THE "ZERO DRAFT," *supra* note 102, at 9, 10.

104 *See* Felogene Anumo & Inna Michaeli, *Justice Not "Special Attention": Feminist Visions for the Binding Treaty*, *in* COMMENTARIES ON THE "ZERO DRAFT," *supra* note 102, at 20, 21.

105 *See* Maddalena Neglia, *The Publication of the "Zero Draft" Documents Is Positive News, but It Calls for Much Further Discussion*, *in* COMMENTARIES ON THE "ZERO DRAFT," *supra* note 102, at 28, 28.

106 *See* Raphaela Lopes & Arnold Kwesiga, *What the Zero Draft and Protocol Lack: Meaningful Access to Justice—A Global South Perspective*, *in* COMMENTARIES ON THE "ZERO DRAFT," *supra* note 102, at 34, 34.

draft texts.[107] One concern with the initial zero draft was their view that it relied exclusively on sanctions to encourage the desired business conduct,[108] a concern also observed by members of civil society that still applies to the revised draft.[109] But whereas members of civil society faulted the zero draft for not going far enough to impose direct obligations on TNCs the trade associations faulted the zero draft for leaving that door ajar through vague language.[110]

But these concerns—from both ends of the policy spectrum—miss the fundamental weakness of the draft texts: state cooperation. As a prospective treaty, it requires the consent of states to enter into force. Its very creation is therefore dependent on the support of states. Even if a treaty emerges, it binds states even though the real targets of the treaty are corporations. Despite industry concerns, it appears that the draft text attempts to constrain the real target through a familiar route: bind states so that they will, in turn, bind TNCs within their territories or otherwise under their "jurisdiction and control." For example, due diligence under article 5 requires that states implement domestic legislation that obligates TNCs to perform due diligence as set forth in the revised draft.[111]

Unfortunately, there are signs that states may not support this treaty. It was a very close vote of the UN Human Rights Council that led to work on this prospective treaty, with fourteen countries opposing the resolution and thirteen abstaining from the vote, leaving only twenty supporters.[112] This problem grows when we consider the identity of the opponents: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, United Kingdom, and United States.[113] These are the home states of many of the largest transnational corporations in the world. Even if a treaty enters into force, their cooperation is necessary to make the treaty work as designed, such as by implementing the necessary legislation that effectuates the provisions of the draft text.[114] As designed, the draft treaty does not reach the TNCs but through the channel of their home states.

The draft treaty is also vulnerable to challenges that have very little to do with *it* in particular and concerns the reality of multilateral treaty making

107 INT'L ORG. OF EMP'RS ET AL., BUSINESS RESPONSE TO THE ZERO DRAFT LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES ("ZERO DRAFT TREATY") AND THE DRAFT OPTIONAL PROTOCOL TO THE LEGALLY BINDING INSTRUMENT ("DRAFT OPTIONAL PROTOCOL") ANNEX (2018), https://bit.ly/2CsAWwk.

108 *Id.* at 7–8.

109 Surya Deva, *The Zero Draft of the Proposed Business and Human Rights Treaty, Part II: On the Right Track, but Not Ready Yet, in* COMMENTARIES ON THE "ZERO DRAFT," *supra* note 102, at 24, 24.

110 INT'L ORG. OF EMP'RS ET AL., *supra* note 107, at 10.

111 Revised Draft, *supra* note 13, art. 5.

112 *UN Human Rights Council Sessions*, *supra* note 95.

113 *Id.*

114 Report on the Fourth Session, *supra* note 93, at 6–7.

today. Some scholars warn of "stagnation" in multilateral treaty making, making it harder to get treaties off the ground.[115] It is especially difficult when the treaty concerns *human rights*; these treaties can prove controversial enough to chill state support, as evidenced by the number of human rights treaties that the United States has yet to ratify or even sign.[116] Finally, we cannot ignore the political realities of the moment we occupy now. Nationalist sentiment is supplanting global sensibilities in many areas of the world, rendering it unlikely that state leaders can "sell" yet another global treaty—with its attendant "entangling commitments"—to their constituents.

However, these are only insurmountable problems if the treaty relies on states to reach transnational corporate conduct. But what if there were a way for the treaty, in draft or final form, to shortcut states and reach its intended business audience directly?

## II. Explaining Compliance Through Reputation

This Part explains the significance of reputational mechanisms for encouraging compliance with international institutions, particularly treaties. Before proceeding, it is important to clarify some terminology: *institutions* are "the humanly devised constraints that shape human interaction" and "include any form of constraint that human beings devise to shape human interaction."[117] In the context of international business, institutions include international treaties, industry codes of conduct, and multistakeholder initiatives; all these institutions provide the "rules of the game" for the conduct of transnational corporations.[118] In contrast, *organizations* are the players in the game: transnational corporations, NGOs, United Nations, shareholders, etc.[119] The combination of institutions (rules) and organizations (players) structures the choices that transnational corporations and national states encounter in the international arena.

Section A begins by explaining the significance of reputational incentives for the type of actor that is the primary audience for global social compliance: transnational corporations. Drawing upon research in reputation management and communications studies, this Section explains the strategic

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115 Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 Eur. J. Int'l. L. 733, 734–35 (2014).

116 Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, Glob. Justice Ctr. (June 22, 2017), http://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties ("The United States . . . still has not ratified many significant human rights treaties, including the Convention on the Rights of Persons With Disabilities and the International Covenant on Economic, Social, and Cultural Rights—part of the International Bill of Human Rights. The United States also has not ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), one of only seven countries who hasn't[,] including Iran, Nauru, Palau, Somalia, Sudan and Tonga. The United States and Somalia are the only countries that have not ratified Convention on the Rights of the Child.").

117 North, *supra* note 17, at 3–4.

118 *Id.* at 4–5.

119 *Id.*

value of a reputation to a corporation and the strategies that a corporation may draw upon to repair its reputation following a crisis. Section B provides a brief literature review of international legal theories exploring the role of reputational mechanisms for encouraging compliance by state actors. It provides this overview through a typology of reputational mechanisms that distinguish between incentives for adopting versus abiding by international treaty norms and incentives provided by other treaty members versus external actors. Finally, Section C explains the significance of this typology for institutional design purposes and applies this analysis to business actors.

### *A. The Value of a Reputation*

According to reputation expert Charles Fombrun, a "corporate reputation is a perceptual representation of a company's past actions and future prospects that describe the firm's overall appeal to all of its key constituents when compared with other leading rivals."[120] There are two main reasons to focus on a corporation's reputation in order to design governance strategies for it: *asset* and *dependence*.

First, a positive reputation is an asset to a corporation because it influences whether its key stakeholders will want to interact with it and the terms upon which they will want to interact.[121] These stakeholders rely on reputation when deciding whether to provide a corporation with something it needs in order to succeed: investors provide capital,[122] employees provide talent,[123] consumers provide revenue,[124] suppliers provide product sourcing

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120 Charles J. Fombrun, Reputation: Realizing Value from the Corporate Image 72 (1996); *see also* David L. Deephouse, *Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories*, 26 J. Mgmt. 1091, 1093 (2000) ("A firm's reputation is produced by the interactions of the firm with its stakeholders and by information about the firm and its actions circulated among stakeholders, including specialized information intermediaries."); Yuri Mishina et al., *The Path Dependence of Organizational Reputation: How Social Judgment Influences Assessments of Capability and Character*, 33 Strategic Mgmt. J. 459, 460 (2012) ("Organizational reputation is defined as the collective, stakeholder group-specific assessment regarding an organization's capability to create value based on its characteristics and qualities."); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691, 693–96 (1986) (discussing reputation as property).

121 *See, e.g.*, Edward M. Iacobucci, *On the Interaction Between Legal and Reputational Sanctions*, 43 J. Legal. Stud. 189, 190–91 (2014).

122 *See generally* David Webber, The Rise of the Working-Class Shareholder (2018).

123 *See* John Dodge, *The War for Tech Talent Escalates*, Bos. Globe, Feb. 19, 2016, at G1 (describing the fierce competition for software engineers and other employees in Massachusetts's tech industry).

124 *See* Michael L. Barnett & Andrew J. Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 Corp. Reputation Rev. 1, 4 (2008); Morten Thanning Vendelø, *Narrating Corporate Reputation: Becoming Legitimate Through Storytelling*, Int'l Stud. Mgmt. & Org., Fall 1998, at 120, 120; *see also* Hess & Dunfee, *supra* note 24, at 17 (explaining information asymmetries between firms and stakeholders).

and support,[125] and communities provide the social license to operate.[126] A corporate reputation influences these actors' decisions to interact with a corporation because that reputation may provide stakeholders with the only information they have about the corporation and upon which they can predict its future conduct.

Second, while important, a reputation is not self-created; instead, it is a product of what *other* people think about you.[127] You can influence your own reputation, but you are not its author.[128] A corporation cultivates its reputation by influencing the views of others about itself, primarily its key constituents such as investors, consumers, suppliers, employees, and regulators.[129] Therefore, a corporation's reputation rises and falls based on what these different actors think about it.[130] These two attributes of reputation—as an *asset* that is created by *others*—provide external stakeholders with some level of leverage over a corporation.[131] The following Sections outline the differ-

125 *See* Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 606 (2015) ("[E]ven firms as powerful as Apple are deeply concerned about their reputation for treating suppliers fairly.").

126 *See, e.g.*, Nicholas Bariyo & Jacquie McNish, *Tanzania's Tougher Mining Laws Rattle Companies*, WALL ST. J. (Aug. 2, 2017), https://www.wsj.com/articles/tanzanias-tougher-mining-laws-rattles-companies-1501666200 (reporting that mining companies in Tanzania confront increasing pressure from the government in what President Magufuli described as his "economic war," including export bans, restrictions on foreign travel, and demands for billions of dollars in back taxes, penalties, and interest); Tsvetana Paraskova, *Nigerian Protesters Storm Shell Crude Oil Flow Station*, OILPRICE.COM (Aug. 11, 2017), https://oilprice.com/Latest-Energy-News/World-News/Nigerian-Protesters-Storm-Shell-Crude-Oil-Flow-Station.html (describing how hundreds of protesters attacked a Shell-owned crude flow station "protesting against lack of jobs," "demanding infrastructure development," "asking for an end to oil pollution in the Niger Delta[,] and claim[ing] that they were not benefiting from the oil-rich resources in the restive area"). *But see, e.g.*, JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION 4 (2013) (explaining that reputational capital may not matter as much in some markets because of the effects of regulation on contracting decisions).

127 FOMBRUN, *supra* note 120, at 59; E. Geoffrey Love & Matthew Kraatz, *Character, Conformity, or the Bottom Line? How and Why Downsizing Affected Corporate Reputation*, 52 ACAD. MGMT. J. 314, 314 (2009) ("Corporate reputation is an important asset (or liability) bestowed upon a firm by external audiences.").

128 *See, e.g.*, Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 930–55 (2018) (discussing reputational sanctions for organizational defendants).

129 *See* Stelios Zyglidopoulos & Nelson Phillips, *Responding to Reputational Crises: A Stakeholder Perspective*, 2 CORP. REPUTATION REV. 333, 335 (1999) ("Reputation is, therefore, fundamentally a stakeholder-based concept; it grows out of a stakeholder relationship and it is shaped, if not determined, by that relationship."); *see also* Post, *supra* note 120, at 692.

130 *See* FOMBRUN, *supra* note 120, at 81 ("Corporate reputations have bottom-line effects. A good reputation enhances profitability because it attracts customers to the company's products, investors to its securities, and employees to its jobs. In turn, esteem inflates the price at which a public company's securities trade.").

131 However, while the potential for leverage is there, it is important to be realistic about its limitations. Specifically, the extent of leverage depends on the value of a reputation to a corporation and its vulnerability to reputational damage. *See* Nicole Deitelhoff & Klaus Dieter Wolf, *Business and Human Rights: How Corporate Norm Violators Become Norm*

ent types of leverage that can result from reputational mechanisms and the ways those mechanisms influence corporate conduct.

### *B. A Typology of Reputational Mechanisms*

In order to understand the potential of reputational mechanisms in international institutions, we need to start with how reputation affects the behavior of the traditional focus of international governance: states. This Section provides a typology of reputational mechanisms that can encourage state actors to both commit to international treaties and to comply with those treaty obligations. This framework adopts Thomas Risse and Stephen Ropp's definitions for two types of organizational change: *commitment* and *compliance*. According to Risse and Ropp, commitment refers to an organizational stage where "actors accept international human rights as valid and binding for themselves," whereas compliance is the "sustained behavior and domestic practices that conform to the international human rights norms."[132]

This typology is based on international law scholarship examining the role of reputational mechanisms for encouraging state compliance with international treaties.[133] While states and corporations have different stakeholders and different incentives, both of these actors value reputation and respond to reputational mechanisms. By illustrating the dynamics of reputational governance for states, we can get a picture of how international treaties and other institutions can similarly incentivize TNCs using reputational mechanisms.

Reputation requires an audience, one that makes judgments about an actor and provides benefits or sanctions based on those judgments.[134] When that audience is comprised of actors who are also members of the same treaty, the reputational mechanisms they wield are *internal* because they are produced by parties within the shared treaty.[135] In contrast, *external* reputational mechanisms occur when the primary reputational benefits or costs for

*Entrepreneurs*, *in* THE PERSISTENT POWER OF HUMAN RIGHTS 222, 230 (Thomas Risse et al. eds., 2013) (discussing the importance of brand value for social vulnerability of corporations). Some corporations are particularly sensitive to reputational damage because consumers pay a premium because of the brand's value. *See generally* Hal R. Varian, *Who Really Makes the iPod?*, N.Y. TIMES (June 28, 2007), https://www.nytimes.com/2007/06/28/technology/28iht-ipod.1.6378095.html. However, not all corporations are equally sensitive to reputational shifts.

132 Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, *in* THE PERSISTENT POWER OF HUMAN RIGHTS, *supra note* 131, at 3, 9–10 (emphasis omitted).

133 *See, e.g.*, Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 242 (2009); Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. INT'L ECON. L. 623, 638 (2010); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1849 (2002); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 171 (2010).

134 *See, e.g.*, Fombrun, *supra* note 18; Mishina et al., *supra* note 120, at 459.

135 *See, e.g.*, Hathaway & Shapiro, *supra* note 16, at 305–06; *see also infra* text accompanying notes 157–59.

adopting and adhering to a treaty are provided by actors who are not parties to that treaty (Table 1).[136]

TABLE 1

| Reputational Explanations for State Compliance with Legally Binding International Institutions | | |
|---|---|---|
| | **Internal** | **External** |
| **Commitment** | Type 1<br>Reputational gains of membership from "insiders" | Type 2<br>Reputational gains of membership from "outsiders" |
| **Compliance** | Type 3<br>Benefit of reciprocal obligations | Type 4<br>Credibility of future commitments |

Internal reputational mechanisms are incentives that are incorporated into the institution itself because the reputational gains or losses come from the other members of the institution. A Type 1 reputational mechanism refers to a situation when a state adopts an institution in order to enhance its reputation among the other parties to that institution. In contrast, a Type 2 reputational mechanism is one where a state joins an institution in order to improve its reputation among actors not party to the institution.[137]

For example, both types of reputational mechanisms explain why states that never intend to comply with the terms of a human rights treaty join it nonetheless.[138] Oona Hathaway identifies reputational benefits for state "positioning" where "treaties offer rewards 'for positions rather than for effects.'"[139] Specifically, treaty membership can satisfy the expectations of potential investors or state donors who

> seek[ ] evidence of commitment to the norms embedded in the human rights treaties that they can in turn use to placate more genuinely interested parties to which they must answer (including stockholders and customers of companies wishing to invest in the country and constituents of governments that wish to provide aid to or engage in deeper political or economic ties with the ratifying countries).[140]

136 *See, e.g.*, Hathaway & Shapiro, *supra* note 16, at 306–08; *see also infra* Section IV.A.

137 *See, e.g.*, SIMMONS, *supra* note 16, at 13 ("As more countries—especially regional peers—ratify human rights accords, it becomes more difficult to justify nonadherence and to deflect criticism for remaining a nonparty.").

138 Hathaway, *supra* note 16, at 2007.

139 *Id.* (quoting DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 132 (1974)).

140 *Id.* at 2009.

For those reasons, "[c]ountries that are parties to the treaties can therefore enjoy the benefits of ratification without actually supplying the human rights protections to which they have committed."[141]

While Types 1 and 2 reputational mechanisms explain why state actors join treaties, Types 3 and 4 reputational mechanisms explain why they comply. After all, if a state actor already gains reputational benefits just by joining a treaty, then it must gain additional reputational benefits (or suffer reputational losses) for it to comply. The reputational benefits of compliance can originate from within a treaty (Type 3) or from without (Type 4). In a Type 3 reputational mechanism, state parties keep their commitments out of concern that defection, if discovered, would discourage the other state parties from cooperating with it in the future when it needs those states to keep their commitments to it.[142] In contrast, a Type 4 reputational mechanism is one where state actors not party to the treaty nonetheless provide incentives for compliance with it.[143] External state actors provide these types of incentives through either current treaty relationships or the prospect of potential treaty relationships in the future.

The importance of these mechanisms for encouraging state compliance depends on whether the international institution (such as a treaty or "soft law" guideline) provides private benefits or public goods. Some international institutions create private benefits for participants so that participants comply because they do not want to endanger their ability to enjoy these benefits. This incentive for compliance is based on reciprocity: if I don't help you when you need it, you will not help me when I need it. This reputational mechanism works when the other parties to the international institution have something to give that the potential defector desires.[144]

For example, the market access rules of the WTO (World Trade Organization) are respected because the state parties have an ongoing interest in free trade: "The prospect of being denied market access by a trade partner lessens the temptation to defect now."[145] In international finance, regulators may "rely on another in order to gain access to witnesses or evidence concerning a domestic violation that may be located in another jurisdiction."[146] Failing to live up to one's commitments increases the likelihood that another regulator will not share information or assist with access to key witnesses in the future when the potential defector needs it.[147]

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141 *Id.*

142 *See, e.g.*, Brummer, *supra* note 133, at 625; Hathaway & Shapiro, *supra* note 16, at 305–06 (describing "internal outcasting").

143 *See, e.g.*, Hathaway & Shapiro, *supra* note 16, at 306–08 (describing "external outcasting").

144 *See, e.g.*, SIMMONS, *supra* note 16, at 116; Hathaway & Shapiro, *supra* note 16, at 340.

145 *See, e.g.*, SIMMONS, *supra* note 16, at 117.

146 Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 285 (2011).

147 Brummer, *supra* note 133, at 638.

However, reciprocity cannot always fuel compliance because not all institutional arrangements offer private benefits to their members. Oona Hathaway and Scott Shapiro identify this as a particular problem with human rights treaties that create legal obligations upon states but do not offer them private benefits for cooperation (besides contributing to the improved welfare of humanity). Here, Hathaway and Shapiro point out that in-kind sanctions are impractical for ensuring state compliance: one state party to a human rights treaty cannot respond to another state's violations of that treaty by suspending its human rights commitments to its own citizens.[148] Instead, they advocate for "cross-countermeasures" that offer non-in-kind sanctions: "[R]ather than threaten torture in response to torture, the regime threatens exclusion from the private benefits generated by the broader set of relationships of which the human rights agreement is a part."[149]

This type of reputational sanction for noncompliance is exercised by both current treaty partners, which threaten to withhold benefits from existing treaty arrangements, and future treaty partners. In this latter situation, a state that is not party to the same treaty as state *Y*, for example, is watching state *Y*'s performance under that treaty for clues as to the likelihood that state *Y* would honor treaty commitments to it in the future.[150] As Andrew Guzman explains, "[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative. This allows the state to enjoy long-term relationships with other cooperative states, provides a greater ability to make binding promises, and reduces the perceived need for monitoring and verification."[151] In contrast, states with poor reputations for compliance will encounter greater difficulties with making their future commitments credible, increasing the risks that "potential partners are less willing to offer concessions in exchange for a promised course of action."[152]

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148 Hathaway & Shapiro, *supra* note 16, at 320; *see also* SIMMONS, *supra* note 16, at 123; Hathaway & Shapiro, *supra* note 16, at 314 ("Denying in-kind benefits simply means denying the outcast the same kind, class, or category of benefits that the outcast denied to other members by breaking the rules of the regime.").

149 Hathaway & Shapiro, *supra* note 16, at 321 (explaining how the threatened penalty for extreme noncompliance with the European Convention on Human Rights "is exclusion from the Council of Europe and all the benefits of membership that come with it").

150 SIMMONS, *supra* note 16, at 120.

151 Guzman, *supra* note 133, at 1849. See also Brewster, *supra* note 133, at 242, for an explanation of the rationalist account based on reputation:

> States have reputations that extend into the indefinite future and potentially apply across issue areas. States care about their reputations because they are engaged in cooperative activities with other states and continued interaction depends, at least in part, on having a good reputation for cooperation. As a consequence, states count reputational loss due to non-compliance with international law as a cost that is balanced against the possible benefits of such actions. Reputational concerns make state compliance with international law more likely because a bad reputation leads to less cooperative opportunities in the future.

152 Guzman, *supra* note 133, at 1850.

One or more of these reputational mechanisms can encourage state compliance with international treaties when other methods of securing compliance—such as enforcement mechanisms—are weak or absent. The following Section applies this typology to the conduct of corporations under international institutions.

### C. *Adapting the Typology for a Corporate Audience*

Understanding the reasons why states comply with international law can reveal important insights about the conditions under which corporations may similarly comply. However, we need to adapt features of the framework when analyzing business conduct. The first change is definitional: when we talk about corporations, *commitment* to human rights refers to instances "when companies publicly declare their acceptance of human rights norms by either statements of compliance with international human rights law, by acceding to national, regional or global CSR-initiatives or by issuing company codes of conduct."[153] In contrast, corporations practice *compliance* "when they begin to institutionalize human rights within the company, i.e. when companies incorporate human rights norms into their management structures and risk management strategies or establish CSR units or departments."[154]

Second, while reputational mechanisms exercise similar effects on corporate actors, the "carrots and sticks" change: business actors commit to institutions that are not binding on them because of benefits offered by either members of that institution or external parties. For example, a commitment to an institution can secure a business's place in a particular industry or multi-industry association. The members of that association may offer benefits to a business that join it or external stakeholders, like consumers, may reward companies that join that institution. Similarly, a business may want to comply with the institution because of fear of sanction by the other members of that institution, such as suspension or expulsion, or risk to future cooperation from these members. A business may also comply with its commitments when external stakeholders monitor its behavior, violations are observable, and stakeholders levy sanctions (or offer rewards) for noncompliance (or compliance).

## III. Using Reputational Mechanisms to Improve Treaty Design: Challenges with Creating Self-Enforcing Agreements for Public Goods

The value of reputational mechanisms for legal institutions, such as multilateral treaties, is that they make an international agreement "self-enforcing" so that "two or more parties adhere to the agreement as long as each gains more from continuing the agreement than from abrogating it."[155] Self-

153 Deitelhoff & Wolf, *supra* note 131, at 226.
154 *Id.*
155 Simmons, *supra* note 16, at 116.

enforcing agreements help address the problem of compliance because "[t]he nature of the agreement itself provides incentives for the actors to stick to it even in the absence of external enforcement mechanisms."[156] Therefore, ideally, reputational mechanisms can improve the reach and effectiveness of a legal institution that otherwise suffers from enforcement problems. In the global social compliance context, reputational mechanisms could encourage business actors to comply with the BHR treaty's norms, such as article 5's provision on due diligence, even if state actors refuse to adopt or implement the treaty.

The power of internal reputational mechanisms comes from reciprocity.[157] Compliance with a treaty is in the party's interest when such compliance is visible and contributes to its reputation as a cooperative treaty member; here, the other treaty members are the primary audience for a state party's compliance.[158] Compliance leads to a positive reputation while defection leads to the opposite. Of course, state parties may not care about their reputations unless there are consequences attached to those reputations; this is why reciprocity matters. A good reputation allows a state party to secure future cooperation from other members of the treaty.[159]

According to Hathaway and Shapiro, "outcasting" measures encourage states to comply with international legal obligations because of states' desires for future cooperation with each other.[160] Outcasting encourages compliance because of the prospect of future benefits that a state may lose should it fail to abide by its own commitments.[161] For example, an "external outcasting regime requires member states to withdraw cooperative benefits from a state that violates the law. The withdrawal of cooperative benefits is meant to create an incentive for the outcast state to change its behavior."[162]

Given that the BHR treaty is still in a preliminary stage, it is worth exploring the possibilities of making it self-enforcing through internal reputational mechanisms. Unfortunately, as currently drafted, the BHR draft treaty does not possess the types of internal reputational mechanisms that could encourage parties to comply with its terms. This is because the commitments that states make are not reciprocal obligations; the commitments they render to others are not commitments they desire at some future point.

156 *Id.*

157 *Id.* at 116–17.

158 *Id.*

159 Brewster, *supra* note 133, at 242; Brummer, *supra* note 133, at 625 (explaining how defection from treaty commitments could compromise the ability of a state actor to cooperate with others to advance its own national interest in the future); Guzman, *supra* note 133, at 1849.

160 Hathaway & Shapiro, *supra* note 16, at 305.

161 *Id.* at 340–41. Similarly, the literature on self-enforcing contracts explains that parties keep their commitments when the value of future transactions outweighs the short-term gain of opportunism; the prospect of future benefits is key to inducing cooperation. *See, e.g.*, Benjamin Klein, *The Role of Incomplete Contracts in Self-Enforcing Relationships*, 92 REVUE D'ÉCONOMIE INDUSTRIELLE 67, 71 (2000).

162 Hathaway & Shapiro, *supra* note 16, at 320.

This is even more true for the BHR treaty's indirect audience: corporations. Their cooperation with the treaty's terms does not provide them with a reputation that they can exchange for something of value vis-à-vis the other members of the treaty.[163] A shorthand for the difference is that the BHR treaty provides responsibilities but not rights to those performing those responsibilities. For example, the BHR treaty outlines a number of corporate responsibilities for protecting human rights but the rights holders are the beneficiaries of those responsibilities—third-party constituents harmed or potentially harmed by transnational business conduct. The treaty does not create "rights" for corporate actors that can be used as a carrot to induce cooperation.

The lack of carrots distinguishes the BHR treaty from its nonbinding cousin, the United Nations Global Compact (GC), which does offer a number of benefits for its corporate participants. Specifically, the "main positive incentives provided by membership in the GC are reputational and financial. Members of the GC can use its logo in advertising and especially smaller businesses mention the networking opportunities offered as part of the GC local networks as a positive."[164] Additionally, the GC also fosters peer learning and capacity building by members.[165]

Interestingly, one of the most important carrots that the GC offers to members—reputational gains—may only be available because it is a *nonbinding* and therefore voluntary institution: companies that join it are seen as socially responsible because they are going "above and beyond" by abiding by institutions that they are not legally bound to obey. GC participants therefore enjoy a reputational bump by doing something that they were not obligated to do. A legally binding institution does not have the same reputational effect if corporations are legally obligated to obey. As a result, a nonbinding institution primarily offers reputational gains for commitment and compliance, whereas a legally binding institution offers reputational losses for failures in commitment and compliance; the baseline differs between the two.

The lack of rights in the BHR treaty is not surprising. Many believe that transnational corporations already enjoy significant rights in domestic political arenas and on the world stage.[166] International institutions like the BHR

163 *See, e.g.*, Deva, *supra* note 109, at 24 ("The zero draft relies exclusively on sanctions to ensure that business activities of a transnational character are consistent with human rights norms. While disincentives are critical, equally vital would be for state parties to create economic incentives for responsible businesses, not merely in domestic public procurement policies but also in all commercial dealings (e.g., contracts, loans, export credits) of a transnational nature.").

164 Wagaki Mwangi et al., *Encouraging Greater Compliance: Local Networks and the United Nations Global Compact*, *in* THE PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 131, at 203, 208.

165 *Id.*

166 *See* Deva, *supra* note 109, at 24 ("The zero draft of the treaty tries to address the asymmetry between the rights and obligations of businesses by proposing to attach legal consequences for human rights violations.").

treaty are intended to curb their power and not augment it. These institutions are also a response to a number of large-scale transnational harms capturing public and policy attention.[167] In this moment, most people are not overly concerned with designing yet another institution that provides transnational corporations with additional rights. While understandable, the impulse to condemn and constrain has led to a lack of direct incentives for cooperation offered by the BHR treaty; it does not have carrots to give.

One potential solution is to rely on "cross-countermeasures," as Hathaway and Shapiro recommend, to encourage compliance with human rights treaties that offer public goods rather than private benefits. Their key insight is that the treaty at issue does not need to offer private benefits on its own in order to encourage a state party to comply. A state party is induced to comply so long as there are future benefits offered by *a* treaty regime that are placed at risk by noncompliance. And "[w]here opportunities for cross-countermeasures do not already exist, they can be created through careful institutional design."[168]

A few possibilities come to mind. States can create benefits for corporations that comply with key provisions of the BHR treaty. Here, we are talking about two different types of states: home states and nonhome states. Under the BHR treaty, a member state takes on a number of legal commitments regarding regulating corporations within its home jurisdictions according to the terms of the BHR treaty. But what if a corporation's home state refuses to join the treaty or abide by its own commitments? For example, Acme Corporation (Acme) has its headquarters within state *A*. State *A* could incentivize Acme to perform human rights due diligence in conformity with the BHR treaty by implementing appropriate legislation and living up to its own commitments under the treaty. But what if state *A* refuses to do so? One possibility is that state *B*, as a third-party state, may offer Acme incentives that state *A* does not; here, incentives may not take the form of direct sanctions under the treaty but other types of benefits or inducements. The problem here is whether state *B* has the capability or willingness to offer private benefits to Acme for compliance; this is a return to the state support problem discussed in Section I.C. Or state *B* could offer incentives to state *A* so that it, in turn, can incentivize Acme to comply, but this, in turn, depends on state *B*'s capacity and willingness to do so. Hathaway and Shapiro note that the power of outcasting depends on broad participation of states in international legal institutions.[169] These measures may not work at a moment in time when states are questioning their participation in multilateral institutional arrangements.

167 *See supra* notes 1–7 and accompanying text.

168 Hathaway & Shapiro, *supra* note 16, at 321.

169 *Id.* at 340 ("[G]enerally speaking, outcasting is more powerful if there are more participants in the outcasting regime. A larger number of participants means that the collective benefits are likely to be more significant and therefore the outcasting sanction more powerful.").

If the incentive for compliance does not come from within the treaty, then it must originate from outside it. The following Part explains how external reputational mechanisms (Type 4) encourage corporations to comply with a treaty or other international institution.

## IV. Using Treaty Design to Improve Reputational Markets: Organizational Change as Information Disclosure

### A. *External Reputational Mechanisms and Corporate Change*

Even failed treaties have value. This is good news because many treaties confront a high risk of failure: They may fail to get adopted. Even if adopted, states may decline to ratify them. And even ratified treaties confront an enforcement problem when states ignore their legal obligations. But treaties, like other types of law, create downstream effects that may succeed where the treaty does not.

This Section explains how the process of creating a treaty on business and human rights may be beneficial even if the BHR treaty never emerges or fails to achieve our objectives for it. This is because its primary value is not in *its* ability to regulate business and human rights but in the way it improves *reputational markets* for business and human rights. This Section considers how legal institutions intervene in reputational markets by enabling corporate organizational change to "stand out" among similar disclosures by other companies. For example, a reputational crisis may incentivize transnational corporations to engage in organizational change. This organizational change is a form of information disclosure that corporations use to reestablish legitimacy in the eyes of their stakeholders. To be effective in reestablishing legitimacy, the disclosure must "stand out" meaningfully against the backdrop of disclosures made by other corporations. Otherwise, it will be ignored or dismissed as cheap talk by stakeholders and will not have much reputational rehabilitative value.

This is where treaties come in: a treaty—even a prospective one—can transform a corporation's organizational change into a credible informational signal. This is because treaties can potentially create focal points regarding our expectations for what constitutes good practices in certain policy areas, such as social compliance. Specifically, they enjoy a number of the hallmarks of third-party expression that scholars identify as important for creating focal points, such as publicity and uniqueness.[170] First, even draft treaties are heavily publicized because of the various government and nongovernmental actors involved. To date, there have been two draft texts released for the BHR treaty, with commentaries provided by many business and civil society actors. Even critical commentaries are important because resistance encourages publicity: By inviting resistance from the public (such as prominent business associations or governments), a draft treaty gets attention. The points of contention become high profile and the subject of policy

170 McAdams, *supra* note 17, at 1668.

debates, both regarding the prospective treaty and independently. This publicity aids the draft treaty in standing out so that its norms can form a baseline of expectations.

Second, as a prospective legal institution, treaties stand out from other types of messages because these too "can speak more emphatically" than other types of messages.[171] This is because of unique features that legal institutions possess that other competing messages do not, such as (but not necessarily) legitimacy or coercive capabilities.[172] What matters is whatever makes law different from other forms of expression so that messages from the former stand out from the latter. Here, treaty making enjoys certain types of processes that distinguish it from other types of private ordering. The BHR treaty process was initiated by the Human Rights Council of the United Nations, thereby enjoying the publicity and status of a mandate provided by the world's most prominent international organization. It occurs over a longer time horizon and informs the agenda of many annual policy meetings. All these features help distinguish the baseline that the BHR treaty sets from norms created independently through exclusive private ordering.

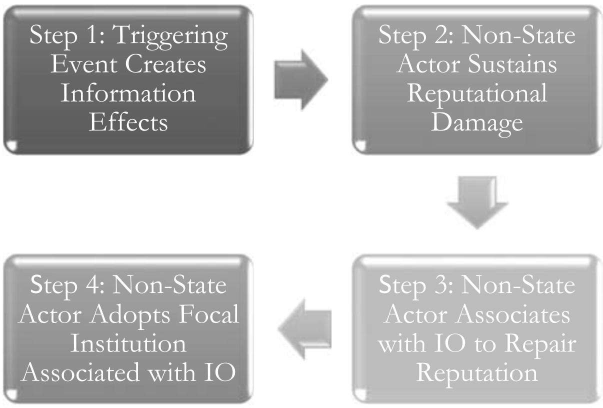
The creation of focal points helps to improve signaling within reputational markets for social compliance. By establishing a baseline for consensus regarding best practices in social compliance, the prospective treaty can convert that baseline into a focal point. By adhering to that baseline, a corporation can credibly signal its organizational change and distinguish it from its peers. That baseline allows stakeholders to engage in firm-to-firm comparisons of the different changes that corporations adopt in response to a crisis. Corporations that meet that baseline can credibly distinguish their behavior from corporations that do not. These changes are now visible to stakeholders where they might not have been before and, as a result, corporations that meet that baseline will receive great reputational rewards. By calibrating greater reputational rewards with greater investment in compliance, treaties—even prospective ones—improve reputational markets for social compliance.

The process begins with some type of triggering event for a transnational corporation: a product accident, financial scandal, or media exposure of unsocial practices (see Figure 1). This event creates information effects concerning the conduct of a corporate actor (Step 1). Those information effects are translated into reputational judgments by stakeholders of the corporation; when those reputational judgments are negative, the corporation sustains reputational damage (Step 2). The corporation will attempt to repair its reputation, including through association with other organizations that possess greater levels of perceived legitimacy than itself (Step 3). The corporation will take steps to demonstrate its association with that organization, including adopting and complying with institutions associated with that organization (Step 4).

171 *Id.* at 1669.

172 *See id.* at 1670.

Figure 1: Compliance as a Result of Exchanging Legitimacy for Influence




*Step 1.* The dynamic begins with a triggering event (accident, scandal, or other type of crisis) that releases information about the conduct of the corporation. One of the most important information intermediaries is the media that serves an important agenda-setting function: "The day-to-day selection and display of news by journalists focuses the public's attention and influences its perceptions. The specific ability to influence the salience of both topics and their images among the public has come to be called the agenda-setting role of the news media."[173] The media's coverage of a firm and its activities contributes to the public agenda because "the prominence of elements in the news influences the prominence of those elements among the public."[174]

*Step 2.* Information effects can result in a downgrade of an organization's reputation, resulting in reputational damage. Revelations of poor regulatory compliance, financial misconduct, or other harmful practices can compromise a business's reputation in the eyes of the public.[175] Reputational damage can lead to financial and nonfinancial consequences as vari-

173 Craig E. Carroll & Maxwell McCombs, *Agenda-Setting Effects of Business News on the Public's Images and Opinions About Major Corporations*, 6 Corp. Reputation Rev. 36, 36 (2003).

174 *Id.* at 36–37; *see* Timothy G. Pollock & Violina P. Rindova, *Media Legitimation Effects in the Market for Initial Public Offerings*, 46 Acad. Mgmt. J. 631, 632 (2003) ("Therefore, in performing its functions of informing, highlighting, and framing, the media presents market participants with information that affects impression formation and the legitimation of firms.").

175 *See, e.g.*, Lucinda Shen, *The 10 Biggest Business Scandals of 2017*, Fortune (Dec. 31, 2017), https://fortune.com/2017/12/31/biggest-corporate-scandals-misconduct-2017-pr/. One study found that Wells Fargo could lose almost $100 billion in deposits and another $4 billion in revenue over the next two years as a result of the scandal as consumers switch to other banks. cg42, Wells Fargo Mini-Study 3 (Oct. 2016), http://cg42.com/wp-content/uploads/2016/12/cg42-Wells-Fargo-Mini-Study-102016vF.pdf.

ous stakeholders reconsider their interactions with the affected business.[176] These reputational effects can prime a transnational corporation for organizational change by rendering it vulnerable to criticism.[177] However, the extent of vulnerability to criticism and change varies among corporations depending on a number of factors

> relating to company, product(ion) and home state characteristics: the risk of being targeted by consumer boycotts which may vary with the location in the supply chain, the visibility and prestige of a product, or the size of the company; the dependency on certain areas of operation, such as the location of natural resources or the amount of sunk costs through previous investments; and the risk of litigation or regulation by the home state.[178]

Another important factor affecting vulnerability is the desire for (a) social membership in a particular group of actors,[179] (b) improved social stand-

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176 *See* Iacobucci, *supra* note 121, at 192–93. *See generally* Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION, *supra* note 18, at 363. Companies often experience market sanctions that exceed government penalties when the conduct concerns consumer fraud. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 758 (1993) ("[W]e present evidence that the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud."); *see also* Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008). However, while the market punishes firms for financial misconduct, evidence suggests that the market is not as swift to condemn environmental transgressions. Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 671 (2005) ("Thus, unlike such other types of corporate wrongdoing as criminal fraud and product safety problems, reputational concerns are not a sizeable deterrent to environmental violations. Rather, the primary deterrence occurs through regulatory and legal penalties."). One explanation for the variance is that environmental violations, however, "impose costs on parties other than those with whom the polluting firm does business." *Id.* at 656. Exchange partners are not directly affected by the firm's misconduct and are therefore less likely to sanction the firm. *See id.* at 656–57; Polinsky & Shavell, *supra* note 18, at 1490 ("[M]arket forces will not induce firms to increase safety if those at risk are strangers.").

177 Risse & Sikkink, *supra* note 16, at 14 ("In the area of human rights, persuasion and socialization often involve processes such as shaming and denunciations, not aimed at producing changing minds with logic, but on changing minds by isolating or embarrassing the target.").

178 Deitelhoff & Wolf, *supra* note 131, at 228–29 (explaining that corporations are particularly vulnerable to consumer boycotts when they produce for end consumers and when the underlying issues are understandable to the average consumer: "Their success depends heavily on the possibility of translating complex problems into neat story lines that can dramatically highlight responsibility and guilt."); *see id.* at 230 (discussing the importance of brand value for social vulnerability of corporations); Sikkink, *supra* note 16, at 823 (discussing the emotionally charged salience of issues concerning breast-milk substitutes and infant deaths and the effect of that salience on corporate vulnerability and NGO strategies).

179 *See* Risse & Ropp, *supra* note 132, at 20 ("Social vulnerability refers to a particular actor's desire to be an accepted member of a social group or a particular community."); Mwangi et al., *supra* note 164, at 211 ("Large firms not only have the resources to engage

ing,[180] and (c) the extent that stakeholders important to the corporation care about the issues necessitating organizational change.[181]

*Step 3.* Following a crisis, some corporations will engage in organizational change in order to repair its image. Organizational change occurs because of problems that corporations confront regarding *legitimacy* and *signaling*.

After sustaining reputational damage, a corporation will seek reputational repair.[182] To do so, it needs to counteract the information effects of the crisis with information of its own that helps to manage or repair the reputational damage associated with the crisis. A reputational crisis can levy many different costs on a corporation's assets. One such asset is legitimacy, which refers to the " 'socially constructed system of norms, values, beliefs, and definitions' of what society considers 'desirable, proper, or appropriate.' "[183] Legitimacy is also an asset that a corporation, like any other organization, needs in order to survive.[184] When a corporation fails to "meet society's expectations, then it must act to re-establish its legitimacy to fend off social sanctions."[185] One means of reestablishing legitimacy is through voluntary information disclosure. Therefore, we may expect that corporations will voluntarily disclose information in response to a reputational crisis.[186]

All this tells us is that we may expect increased information from a corporation when it is in crisis. But there are many ways for a corporation to transmit favorable information about itself into society: press releases, press

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in these types of activities, but also have more interest in proactively engaging these issues, in particular in a transnational context where business success depends on dealing with a variety of governmental and non-governmental actors.").

180 *See* Risse & Ropp, *supra* note 132, at 21 ("States with insecure identities or those that aspire to improve their standing in the international community may be more vulnerable to pressures.").

181 *See id.* ("[T]he application of social pressure works, because actors care about their standing in a social group. And the more the relevant community cares about human rights, the more the target is vulnerable to external (and internal) pressures to comply with these norms.").

182 *See* Hess & Dunfee, *supra* note 24, at 8 ("If a firm fails to meet society's expectations, then it must act to re-establish its legitimacy to fend off social sanctions.").

183 *Id.* (quoting Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995)).

184 *See* Deegan, *supra* note 24, at 293; DiMaggio & Powell, *supra* note 17, at 70; Meyer & Rowan, *supra* note 17, at 340.

185 Hess & Dunfee, *supra* note 24, at 8.

186 *See* Sylvie Berthelot et al., *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCT. LITERATURE 1, 18 (2003) (providing literature review on reasons for voluntary mandatory disclosure and explaining that legitimacy theory predicts that the "socio-political context drives differences in environmental disclosure across firms and over time"); Craig Deegan et al., *Firms' Disclosure Reactions to Major Social Incidents: Australian Evidence*, 24 ACCT. F. 101, 103–04 (2000) (summarizing research on how industries experiencing a "legitimacy crisis" following a crisis increase corporate disclosures); Hess & Dunfee, *supra* note 24, at 9–10 ("[T]he impetus behind many corporate disclosures may be a legitimacy-threatening event, such as a crisis faced by the firm or the industry involving negative press coverage, or revelations of poor environmental and social performance.").

conferences, philanthropic giving, and other forms of crisis management are all key strategies for reestablishing legitimacy in the wake of a crisis.[187] Why would we expect a corporation to engage in institutional change rather than opt for a lower-cost alternative? The answer is signaling: a press release signals something different than a multistakeholder initiative. This postcrisis information problem is another variant of the "lemons problem" in which sellers of high-quality products face challenges with credibly distinguishing their own goods from low-quality products in the market; therefore, they often enlist the aid of reputational intermediaries to help verify their information to potential consumers.[188]

Corporate social disclosure following a crisis is also subject to information asymmetries between the public and the corporation; the public does not know whether the social information submitted by the corporation gives an accurate representation of the corporation's practices or is simply "greenwashing."[189] In other words, any corporation can engage in "cheap talk." This has two consequences: First, it reduces the likelihood that the public will take postcrisis social information disclosure seriously. Empirical studies suggest that many individuals mistrust corporate communications, even preferring to receive corporate information from the news media.[190] Second, as a result of this mistrust, a corporation confronts difficulties in trying to reestablish its legitimacy through disclosure of social information.[191] These reasons also explain why socially responsible corporations encounter difficulties in distinguishing themselves in the marketplace from socially irresponsible corporations and run the risk that the public will discount social disclosures from all corporations.[192]

Given this problem of credibility, a corporation may want to rely on signaling in order to help its information disclosure "stand out" among all the

187 *See* William L. Benoit, *Image Repair Discourse and Crisis Communication*, 23 PUB. REL. REV. 177, 178 (1997); W. Timothy Coombs, *An Analytic Framework for Crisis Situations: Better Responses from a Better Understanding of the Situation*, 10 J. PUB. REL. RES. 177, 182 (1998) [hereinafter Coombs, *An Analytic Framework for Crisis Situations*]; W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUTATION REV. 163, 166 (2007) [hereinafter Coombs, *Protecting Organization Reputations*].

188 *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 676–77 (1984) (discussing information asymmetries in the securities markets); Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 LA. L. REV. 1165, 1171 (2002) ("Potential creditors might not trust information transmitted directly by debtors and rarely will have the opportunity or expertise to evaluate even credible information."); *see also* Brian Galle, *Self-Regulation of Social Enterprise*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 26 (Benjamin Means & Joseph W. Yockey eds., 2018).

189 *See* Galle, *supra* note 188, at 32–33; Hess & Dunfee, *supra* note 24, at 17–20.

190 *See* Hess & Dunfee, *supra* note 24, at 17–20.

191 *Id.*

192 *Id.*

other corporate disclosures.[193] Here, a high-quality actor will want to take on some form of costly activity that a low-quality actor cannot or will not replicate.[194]

Organizational change is a form of costly postcrisis information disclosure that allows a corporation to reestablish its own legitimacy.[195] Legal institutions also help businesses signal the quality of their postcrisis organizational change. For example, article 5 of the BHR treaty establishes a normative baseline for the types of organizational features that are needed for a robust human rights due diligence program.[196] By establishing that baseline, the treaty allows stakeholders to evaluate different forms of postcrisis organizational change by businesses and distinguish between those that meet the baseline from those that do not. This differentiation between businesses helps firms with robust social compliance programs stand out from their peers, thereby increasing the odds that the reputational markets will reward their investment in costly compliance programs.

Intermediaries, often associated with legal institutions, also help to signal costly organizational change. In order to signal the quality of its postcrisis information disclosure, a corporation may gravitate toward another actor that can endorse or verify the information the corporation puts out into the public.[197] The actor that a corporation gravitates toward will need to be an organization that the public will take seriously regarding the type of information conveyed. For example, companies selling securities often obtain the services, or "endorsements," of third-party intermediaries in order to signal the quality of their disclosures to prospective purchasers and differentiate their disclosures in the market.[198] Reputational intermediaries "signal the value of disclosures to investors" by "lend[ing] their reputations to

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193 *Id.*

194 *Id.*

195 *See* SIMMONS, *supra* note 16, at 119–20 (explaining that "high ex ante costs send a credible signal of intentions" and that states use treaty ratification processes to credibly signal their commitment to a treaty).

196 *See* Revised Draft, *supra* note 13, art. 5.

197 *See* Easterbrook & Fischel, *supra* note 188, at 675; Galle, *supra* note 188, at 6–9.

198 Easterbrook & Fischel, *supra* note 188, at 675–77; Gillette, *supra* note 188, at 1171 (explaining that potential creditors will "attribute high reputational quality to firms that are willing to present the information to third parties (the rating agencies) that presumably have the expertise to evaluate debt and that have the capacity to transmit the information to a broader population, some members of which will be able to evaluate quality"). Trade associations, guilds, and other types of business associations can also serve as intermediaries providing reputational information in situations of information asymmetry. For example, Avner Greif explained that a merchant of the Maghribi coalition knew certain things about a member agent simply by virtue of the latter's membership in the coalition: (a) the agent had a good past record of transactions (or else he would have been kicked out), and (b) the agent would enter a transaction with the knowledge that dishonesty would lead to his future ostracism from the coalition. Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857, 868 (1989).

issuers that want additional credibility for their disclosures."[199] Reputational intermediaries help one firm's information stand out among other available information in the marketplace.[200]

When we are talking about social information, a reputational intermediary is an organization that possesses a strong reputation in the social area at issue (labor rights, gender issues, etc.). Corporations will turn to these organizations in order to help signal the quality of their social information disclosure. They turn to these organizations because these actors can verify the quality of that information in a manner that the relevant audience will find credible.

*Step 4.* During this final stage, a corporation adopts the institutions promoted by the organization whose association it desires. A corporation may do so for several reasons. First, an organization, such as an NGO, may refuse to associate with a corporation unless the latter agrees to adopt the institutions associated with that organization (such as a code of conduct) or to cooperate with that organization in order to develop new institutions appropriate for that corporation. Additionally, a disgraced corporation may benefit educationally from adopting the institutions of the other organization because of the latter's expertise in a policy area. Institutional transfer can lead a disgraced corporation to adopt the attributes that provides its associated partner with public legitimacy by adopting the organizational attributes that stakeholders admire and respect, thereby allowing it to establish its legitimacy independent of its association with another organization.[201]

For example, several years ago, Nestlé entered into an agreement with one of its own NGO critics after this NGO had orchestrated a consumer boycott campaign against Nestlé because of its marketing practices in the developing world for breast-milk substitutes.[202] This campaign had drawn significant international attention to the risks of the products and Nestlé's involvement, creating significant reputational risks to the latter's image.[203] On January 25, 1984, Nestlé agreed to abide by a voluntary code of conduct

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199 Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 746 (2004); *see* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 290 (1984) ("The intermediary is paid only because its reputation renders it trustworthy in circumstances when a party to the transaction could not be trusted."); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 620 (1984) (describing the role of an investment banker as a reputational intermediary who "represents to the market (to whom *it*, and not the issuer, sells the security) that it has evaluated the issuer's product and good faith and that it is prepared to stake its reputation on the value of the innovation").

200 *See* Gilson & Kraakman, *supra* note 199, at 619–20 (explaining how the reputation of a seller can assure prospective buyers that the quality of the information it provides to them ex ante is high).

201 Risse & Sikkink, *supra* note 16, at 12 (discussing instrumental adaptation of human rights by state actors subject to NGO activism regarding human rights practices); *see* DiMaggio & Powell, *supra* note 17, at 66–67.

202 Sikkink, *supra* note 16, at 815.

203 *Id.* at 826–30.

developed three years previously by the World Health Organization (WHO) regarding the marketing of breast-milk substitutes.[204] In exchange, the NGO called off a seven-year international consumer boycott of Nestlé products.[205]

1. Illustrative Example: Disney, Shareholders, and "Project Kaleidoscope"

In the 1990s, a number of prominent brand companies came under public scrutiny for "sweatshop practices" in their supply chains.[206] The following discussion explains how media exposure of labor practices in supply chains helped one group of Disney's shareholders pressure Disney to change its own practices (Figure 2). The shareholders first acted through resolutions to encourage Disney to change (Step 1).[207] The reputational risk associated with their activism and media coverage[208] (Step 2) encouraged Disney to participate in a multistakeholder initiative called "Project Kaleidoscope" designed to improve compliance at factories that produced Disney goods in China (Step 3).[209] As a result of the project, Disney piloted a systems-level compliance program at ten factories in China that produced its goods (Step 4).[210]

204 *Id.* at 815.

205 *Id.* at 835.

206 *See supra* note 6 and accompanying text.

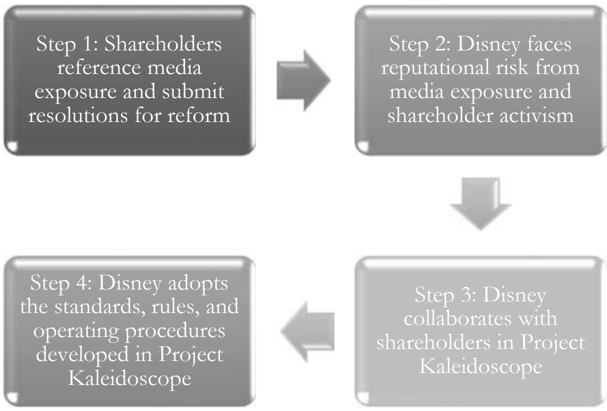
207 *See infra* notes 211–16 and accompanying text.

208 *See, e.g.*, Michelle Faul, *Low-Wage Labor Is Haiti's Biggest Asset and Biggest Liability*, Associated Press (Apr. 16, 2017), https://www.apnews.com/142462030e4090c3616240bbb32792d6; Walt Disney Co., Definitive Proxy Statement (Form DEF 14A) 44 (Jan. 6, 2005) (quoting a shareholder proposal from New York Retirement Systems on China labor standards, which posited that "human rights abuses in the overseas subsidiaries and suppliers of U.S. corporations can lead to negative publicity, public protests and a loss of consumer confidence, which can have a negative impact on shareholder value").

209 Project Kaleidoscope Working Grp., Project Kaleidoscope: A Collaborative and Dynamic Approach to Code of Conduct Compliance, Final Report 5 (2008) [hereinafter Project Kaleidoscope Final Report] (describing how shareholders interacted with Disney's board through proposed and withdrawn shareholder resolutions that resulted in several rounds of meetings and, subsequently, a collaboration between the parties).

210 *Id.* at 2.

FIGURE 2: COMPLIANCE AS A RESULT OF EXCHANGING LEGITIMACY FOR INFLUENCE (DISNEY)




In the 1990s, a group of Disney's shareholders introduced shareholder resolutions to address working conditions at Disney's supply chains.[211] The General Board of Pension and Health Benefits of the United Methodist Church (the "General Board") submitted one such resolution, stating that the "public is concerned about the conditions under which clothing and goods they purchase are produced" and the "media has made people aware that more companies are contracting with independent producers for goods and services outside of the United States."[212] The resolution requested that the board of directors "report on its contract supplier standards, and review compliance mechanisms for vendors, subcontractors and buying agents in the countries where it sources" and that the review should include a "[s]ummary of current company policies regarding supplier standards of conduct" and the "[e]stablishment of procedures for internal compliance and external monitoring," among other topics.[213]

Disney's board recommended that shareholders vote against this resolution.[214] It is interesting to note, however, that the resolution did result in Disney's board providing greater information about its model of outsourcing and the steps it had taken to address human rights compliance issues in its supply chain.[215] This was not an isolated shareholder resolution. The Gen-

211 Walt Disney Co., Definitive Proxy Statement (Form DEF 14A) (Jan. 9, 1997).

212 *Id.* at 27.

213 *Id.*

214 *Id.* at 28.

215 *See id.* at 29 ("During fiscal 1996, the Company took further steps to strengthen its efforts in reviewing the performance of licensees and manufacturers and monitoring their compliance with the Company's standards. As noted above, the Company has increased its use of third-party investigators, both domestically and internationally. In addition, the Company has organized an International Labor Standards Group to review existing policies and practices and to consider means of strengthening their effectiveness, including increased monitoring of compliance. . . . In this connection, the Company has retained

eral Board of the United Methodist Church, along with Domini Social Investments and other socially minded shareholders, brought a number of similar resolutions against Disney in subsequent years to introduce meaningful institutional change.[216]

A few years later, these shareholders changed their tactics. Beginning in 2002, they started to work with Disney (and one of its licensees, McDonald's) in a collaborative multistakeholder initiative called "Project Kaleidoscope."[217] The project's objective was to "to create a verifiable, replicable model that results in sustained compliance in supplying factories."[218] In the collaboration, Disney and one of its licensees, McDonald's, partnered with a number of faith-based shareholders that had pressured it to change in the past through shareholder resolutions. Other members of the collaboration were organizations that had a "long history of engaging and working with companies to address social compliance challenges in global supply chains."[219] The makeup of this collaboration illustrates Step 4 of the framework where a shamed organization associates itself with one or more organizations more reputable than itself in the problem issue area (social compliance). Part of the explanation for why Disney turned toward these organizations is that the latter can serve both the educational and endorsement function: these organizations had experience and expertise with social compliance and could help rebuild Disney's reputation regarding social compliance because of their own reputations in this area.

These organizations collaborated with Disney as part of a project in which Disney agreed to organizational change in its supply chain. Specifically, they agreed to work together on a pilot project involving ten factories in China that produced toys, footwear, and apparel.[220] The project's organizers sought to produce a systems-based approach that was inclusive by "utilizing a multi-stakeholder approach whereby the factories (workers, supervisors, management and owners) become more active participants in the compliance process."[221] The project's organizers sought "to transfer the systems approach and methodology to other industries and geographic locations" once a system was producing verifiable consistent measurements.[222] The program sought to ensure compliance by integrating policies into daily operations, utilizing periodic assessments, identifying and correcting noncompliance, establishing and communicating performance requirements,

Price Waterhouse LLP to assist the Group in its review. The Group will report on the results of its review to the Company's senior management on an ongoing basis, and provide a forum for efforts to strengthen the Company's performance.").

216 *See, e.g.*, Walt Disney Co., Definitive Proxy Statement (Form DEF 14A) (Jan. 2, 1998); Walt Disney Co., Annual Report (Form DEF 14A) (Jan. 4, 1999).

217 PROJECT KALEIDOSCOPE FINAL REPORT, *supra* note 209, at 1.

218 PROJECT KALEIDOSCOPE INTERIM REPORT, *supra* note 27, at 3.

219 PROJECT KALEIDOSCOPE FINAL REPORT, *supra* note 209, at 5.

220 *See* PROJECT KALEIDOSCOPE INTERIM REPORT, *supra* note 27, at 1.

221 *Id.* at 3.

222 *Id.*

and utilizing active training.[223] By the end of the project, the factories involved reported that the systems-based approach improved the following: code-of-conduct compliance efforts, including identification of issues; monitoring and communications; manager-worker relations; working and living conditions; and management capacities.[224]

If these organizations had simply loaned their names without anything in exchange, then this story may be more vulnerable to public relations strategy. But the association was part of a project that involved institutional design and change at a number of Disney's factories, complete with monitoring, auditing, and reporting procedures. While certainly not perfect (or over), these efforts illustrate how reputational risk can lead to associational governance strategies that then lead to institutional change.

### *B. Legal Institutions as External Mechanisms*

In the previous example, the process for institutional change began with information effects associated with a crisis—media exposure of labor violations. The crisis is important because it threatens a corporation's reputation and primes it to seek out a partner that can help it rebuild its reputation or protect it from future risk. It is the crisis and associated reputational threat that provides the party with leverage over the corporation concerning institutional change.

In the Disney example, the crisis was caused by a nonlegal triggering event: media exposure of the labor practices of Disney and its peers. But a similar process of institutional change can also begin with a triggering event associated with a legal institution that creates a reputational crisis for a corporation.[225] We are familiar with the information effects of legal institutions that have explicit disclosure functions. However, our legal institutions also offer a variety of informal information disclosure functions that are often incidental to functions that these institutions are designed to serve. For example, news of a criminal conviction informs us of illegal conduct by individuals or organizations. Even news of a government investigation or indictment puts us on notice of harmful practices that could place us at risk. Civil lawsuits also inform us of particular misdeeds or patterns of misdeeds that potentially jeopardize others besides the plaintiff.[226] Legislative or adminis-

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223 *Id.*

224 PROJECT KALEIDOSCOPE FINAL REPORT, *supra* note 209, at 31. *But see* CHINA LABOR WATCH, CODE OF CONDUCT IS NO MORE THAN FALSE ADVERTISING, DISNEY SUPPLIERS CONTINUE EXPLOITING CHINESE WORKERS (2010); David Barboza, *Despite Law, Job Conditions Worsen in China*, N.Y. TIMES (June 22, 2009), https://www.nytimes.com/2009/06/23/business/global/23labor.html.

225 Scott Baker & Albert H. Choi, *Reputation and Litigation: Why Costly Legal Sanctions Can Work Better than Reputational Sanctions*, 47 J. LEGAL STUD. 45, 47 (2018) (finding that "litigation can be a catalyst for the imposition of reputational sanctions").

226 *See, e.g.*, Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1196 (2016); Letter from Senator Patrick Leahy et al., to John Stumpf, Chief Exec. Officer, Wells Fargo 1–2 (Sept. 23, 2016),

trative action similarly create information effects, particularly by drawing attention to a problem with the status quo.[227]

As in the Disney example, the media still plays an important role by sharing the information that the legal institution releases. Journalists' verification methods often privilege legal documents, increasing the likelihood that a lawsuit, for example, may receive media attention.[228] Together, legal institutions and the news media transmit information about individual or organizational behavior. The institutional change process then proceeds very similarly to the one discussed in Part IV except that we are now dealing with two types of institutions: the *focal* institution and the *external* institution. The focal institution provides the substantive rules that we want corporations to uphold. The external institution creates reputational effects for corporations that make that compliance more likely. The corporation is reacting to the incentives each one creates.[229] In other words, it occupies a common institutional environment inhabited by both types of institutions and oscillates between the two. The oscillation occurs because the external institution creates reputational harm that drives the corporation toward the focal institution, which offers reputational rehabilitation.[230]

The remainder of the process works similarly to the one described above: The external institution releases information effects about a corporation's conduct (Step 1). Stakeholders of the corporation convert these information effects into reputational judgments of the corporation, potentially creating reputational risk for the corporation (Step 2). The corporation pivots to an organization that possesses greater legitimacy than itself in the policy area in which it is shamed and associates with this organization to redeem reputation or manage future reputational risk (Step 3). This organization participates in the association if the corporation adopts the institutional practices that the organization promotes (Step 4).

https://www.leahy.senate.gov/imo/media/doc/9-23-16%20Wells%20Fargo%20Letter%20re%20arbitration%20FINAL.pdf ("[T]he ability to force customers into secret arbitration proceedings allowed Wells Fargo to continue its outrageous practices with impunity for far too long. Wells Fargo customers have attempted to sue Wells Fargo in open court over the sham accounts, including a case filed more than three years ago. . . . If either of the lawsuits had been able to proceed in court, countless Wells Fargo customers might have been saved from being charged their hard-earned dollars for unauthorized accounts." (footnote omitted)).

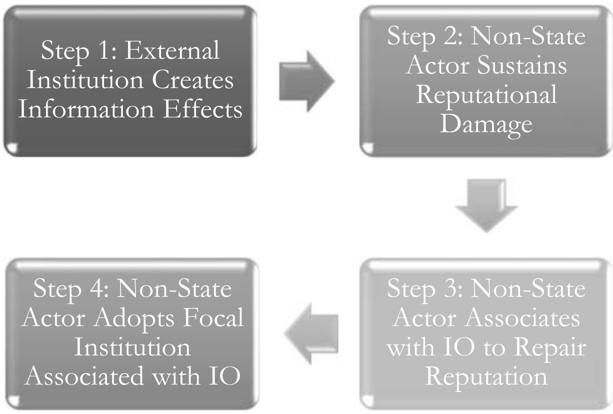
227 *See, e.g.*, Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1378 ("Agencies continue to issue publicity primarily to inform, to warn, or to sanction.").

228 *See* Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL'Y REV. 171–80 (2018).

229 NORTH, *supra* note 17, at 7, 81 (explaining that institutions create incentives for behavior within a society and organizations emerge and adapt in response to those incentives).

230 PFEFFER & SALANCIK, *supra* note 17, at 43.

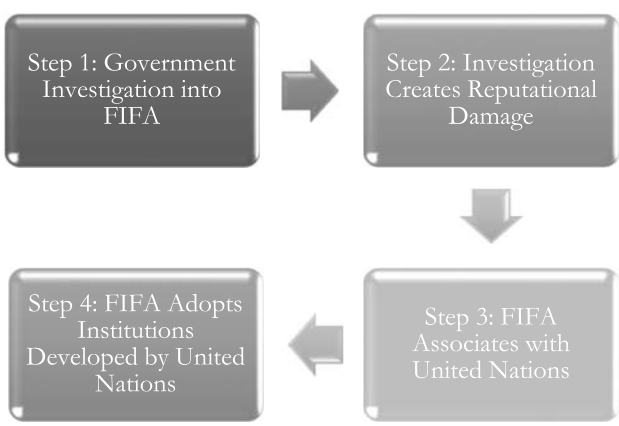
FIGURE 3: COMPLIANCE AS A RESULT OF EXCHANGING LEGITIMACY FOR INFLUENCE (LEGAL INSTITUTIONS)




1. Illustrative Example: Fédération Internationale de Football Association and the UN Guiding Principles on Business and Human Rights

This subsection applies the framework from the previous discussion to the recent reputational crisis experienced by the Fédération Internationale de Football Association (FIFA). Figure 4 and the discussion below explains how reputational damage caused by a legal institution—domestic government investigation—creates a need for reputational repair (Steps 1 and 2) that leads business actors to associate with international organizations (Step 3) and adopt the nonbinding institutions of those organizations (Step 4). This example does not involve a transnational corporation but an organization that also responds to many of the incentives associated with business corporations, so this example provides useful lessons for the operation of external mechanisms.

FIGURE 4: COMPLIANCE AS A RESULT OF EXCHANGING LEGITIMACY FOR INFLUENCE (FIFA)



FIFA is the international governing body for organized soccer. FIFA's global operations have raised significant concerns over human rights risks, especially concerning its bidding and selection process for the men's World Cup that is criticized for bribery and inadequate attention to the human rights records of prospective host countries.[231] For example, in recent years, FIFA was criticized for its decision to award the 2018 and 2022 World Cup tournaments to Russia and Qatar respectively; these choices attracted controversy because of the poor human rights records of these countries.[232] Other potential human rights abuses involve population displacement and land acquisition for stadiums and other tournament space, labor abuses in construction projects for soccer tournaments, the working conditions in supply chains of licensees of FIFA (such as apparel, sporting goods, and electronics), human trafficking in the hospitality and accommodation sectors, and excessive force by security providers.[233] And those are just the risks associated with the men's World Cup; these and other human rights risks may also arise concerning FIFA's other tournaments and activities.[234]

Despite these risks and criticisms, FIFA lacked an explicit commitment to human rights in its practices and policies. However, in 2015, a number of external mechanisms helped prime FIFA for change on the human rights front. The first external mechanisms were the government investigations brought by U.S. and Swiss authorities.[235]

The investigation by U.S. authorities, the enforcement cooperation provided by foreign governments, and the combined fury of the world's soccer

231 JOHN C. RUGGIE, "FOR THE GAME. FOR THE WORLD.": FIFA AND HUMAN RIGHTS 21 (2016).

232 *See* Charles Maynes, *Between Sochi and the World Cup, Putin Built Up a Resistance to Western Criticism over Human Rights*, PUB. RADIO INT'L (June 14, 2018), https://www.pri.org/stories/2018-06-14/between-sochi-and-world-cup-putin-built-resistance-western-criticism-over-human; Rod Nordland, *Corruption Claims Cast Cloud on Qatar's World Cup Bid*, N.Y. TIMES (June 9, 2014), https://www.nytimes.com/2014/06/10/world/middleeast/british-seek-penalties-against-world-cup-bid-winner-qatar.html. In June 2014, the London newspaper, the *Sunday Times*, claimed that it had voluminous documents indicating that Mohamed bin Hammam paid a total of USD $ 5 million to football officials in exchange for their support for the Qatar bid. Jonathan Calvert & Heidi Blake, *Plot to Buy the World Cup*, SUNDAY TIMES (June 1, 2014), https://www.thetimes.co.uk/article/plot-to-buy-the-world-cup-lvxdg2v7l7w. At the time of the vote, bin Hammam was a member of FIFA's executive committee, which, until 2011, decided which country would host the World Cup. *Id.* Bin Hammam was ultimately banned from FIFA and an internal investigation also led to the suspension of several members of the executive committee. Kurt Eichenwald, *FIFA Can Still Save Itself: Release the Garcia Report*, NEWSWEEK (June 2, 2015), https://www.newsweek.com/fifa-can-still-save-itself-release-garcia-report-338215.

233 RUGGIE, *supra* note 231, at 22–24.

234 *Id.* at 24.

235 Press Release, U.S. Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and.

fans created a crisis of legitimacy for FIFA.[236] According to FIFA, it experienced "the worst crisis of its history" and suffered significant damage to its reputation as a result.[237] This legitimacy crisis fueled a financial crisis that provided a second external reputational mechanism that primed FIFA for change. Corporate sponsors had shamed FIFA in the past for other corruption issues,[238] but this time the sponsors backed up threats with financial sanction.[239] Coca-Cola, Adidas, McDonald's, Visa, and Anheuser-Busch Inbev wrote an open letter to the FIFA Executive Committee in December 2015 demanding significant cultural change to reflect values of "[t]ransparency, accountability, respect for human rights, integrity, leadership and gender equality."[240]

It was against this backdrop that FIFA turned to the Guiding Principles. As a nonbinding institution, the Guiding Principles cannot compel FIFA to adopt or adhere to its norms. But the legitimacy and financial crises of 2015–2016 helped to prime FIFA for change. Specifically, the criminal investigations attracted media attention, creating reputational damage for FIFA. Actions taken by some of these sponsors also created a second round of reputational damage, such as the open letter issued in December 2015 by sponsors and media reports of FIFA's financial situation. Finally, the decision to award the upcoming World Cups to Russia (2018) and Qatar (2022), states with notable human rights abuses, exposed FIFA to public criticism and brought attention to its human rights practices.

Therefore, it is not surprising that when FIFA is criticized for its practices, including its human rights practices, it should pivot toward the United Nations advocate for global human rights to improve its practices and redeem its image. Following the DOJ's May announcement of charges, FIFA announced that it would "recognise the provisions of the UN Guiding Principles on Business and Human Rights and will make it compulsory for both

236 FÉDÉRATION INTERNATIONALE DE FOOTBALL ASS'N, 2016 FIFA REFORM COMMITTEE REPORT 1 (2015) ("FIFA is currently going through the worst crisis of its history."), https://img.fifa.com/image/upload/mzzxqw0dabgx8ljmhxwr.pdf.

237 *Id.*; Owen Gibson, *Fifa's Existence at Risk If Reforms Are Rejected, Warns Issa Hayatou*, GUARDIAN (Feb. 25, 2016), https://www.theguardian.com/football/2016/feb/25/fifa-reforms-issa-hayatou.

238 Thomas Barrabi, *FIFA Corruption Reform, Independent Oversight Committee Unlikely Despite Sponsor Criticism*, INT'L BUS. TIMES (July 24, 2015), https://www.ibtimes.com/fifa-corruption-reform-independent-oversight-committee-unlikely-despite-sponsor-2024030.

239 *Fifa Suffers £67m Loss After Crisis Takes Its Toll on Governing Body*, GUARDIAN (Dec. 2, 2015), https://www.theguardian.com/football/2015/dec/02/fifa-67m-loss-crisis-governing-body; Brian Homewood, *FIFA Faces $108 Million Deficit for 2015—Finance Overseer*, REUTERS (Feb. 25, 2016), https://www.reuters.com/article/us-soccer-fifa-finance/fifa-faces-108-million-deficit-for-2015-finance-overseer-idUSKCN0VY2UK; Rebecca R. Ruiz, *FIFA's Financial Disclosures Show That Scandal Has Affected Its Bottom Line*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/sports/soccer/fifas-financial-disclosures-show-that-scandal-has-affected-its-bottom-line.html (reporting $62 million in legal fees).

240 *Open Letter to the FIFA Executive Committee*, COCA-COLA COMPANY (Dec. 1, 2015), https://www.coca-colacompany.com/press-center/company-statements/open-letter-to-the-fifa-executive-committee.

contractual partners and those within the supply chain to comply with these provisions."[241]

Later that year, FIFA requested that John Ruggie, UN Special Representative for Business and Human Rights, advise it on how it could "embed respect for human rights across its global operations."[242] FIFA made its request to John Ruggie in December 2015—a time when its legitimacy and financial crises were particularly acute.[243] In the following years, FIFA took a number of concrete steps to adopt the Guiding Principles. In its February 2016 reform, it included a new statutory provision addressing human rights.[244] In April 2016, Ruggie issued his report providing recommendations to FIFA on how it can manage and address the human rights risks of its operations.[245] These recommendations were based on the Guiding Principles and included the suggestion that FIFA adopt an explicit human rights policy.[246] In May 2017, the FIFA Council adopted a new human rights policy that incorporates many provisions of the Guiding Principles.[247] Article 1 of the policy reads: "FIFA is committed to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs)."[248] Under article 3, FIFA commits to performing human rights due diligence in order to prevent "adverse human rights impacts" and to address those impacts if they should occur, all in accordance with the Guiding Principles.[249] Additionally, under article 11, FIFA commits to providing remedies and to evaluating potential mechanisms for providing remedies according to the effectiveness criteria identified under the Guiding Principles.[250]

241 Press Release, Fédération Internationale de Football Ass'n, FIFA Executive Committee Sets Presidential Election for 26 February 2016 and Fully Supports Roadmap for Reform (July 20, 2015), https://www.fifa.com/about-fifa/who-we-are/news/fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448.

242 Ruggie, *supra* note 231, at 4.

243 *See* Press Release, U.S. Dep't of Justice, Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption (Dec. 3, 2015), https://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption.

244 Fédération Internationale de Football Ass'n, FIFA Statutes, art. 3, at 11 (2019) ("FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.").

245 *See generally* Ruggie, *supra* note 231.

246 *Id.* at 29.

247 *FIFA Publishes Landmark Human Rights Policy*, FIFA (June 8, 2017), https://www.fifa.com/about-fifa/who-we-are/news/fifa-publishes-landmark-human-rights-policy-2893311.

248 Fédération Internationale de Football Ass'n, FIFA's Human Rights Policy 5 (2017).

249 *Id.*

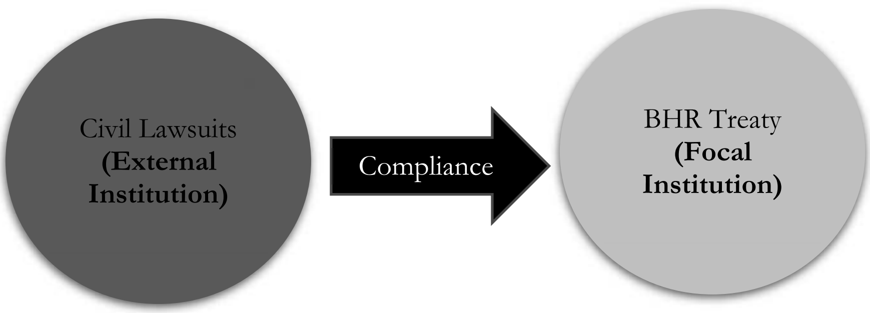
250 *Id.* at 9.

### C. *External Reputational Mechanisms: Lessons for the BHR Treaty*

#### 1. BHR Treaty as a Focal Institution

One possibility is that an external legal institution—one unconnected to the BHR treaty—nonetheless encourages compliance with it. Here, an external legal institution creates information effects with reputational consequences for a transnational corporation; the corporation then gravitates toward a more reputable organization that conditions its association with the corporation on the latter's conformity with provisions of the BHR treaty. Or the corporation may voluntarily comply with the BHR treaty provisions in order to signal its steps toward organizational change (see Figure 5). Either way, the process works similarly to the example of FIFA in which a separate legal institution creates incentives for compliance with the BHR treaty.

FIGURE 5: REPUTATIONAL EFFECTS OF CIVIL LAWSUITS ENCOURAGES COMPLIANCE WITH BHR TREATY




We can think of several possible legal institutions that may trigger this process. One is a civil lawsuit against one or more transnational corporations that concern human rights practices in supply chains. For example, in October 2018, the United States Court of Appeals for the Ninth Circuit reversed a dismissal of a case against Nestlé and Cargill involving "claims they approved the use of child slaves on Ivory Coast plantations and bribed slave masters to get cheap cocoa."[251]

Not only does this lawsuit shine an unfavorable light on Nestlé and Cargill but it also keeps attention on conditions in the cocoa supply chains—an issue repeatedly reported in the media—and Nestlé's peer companies.[252] These and similar legal institutions create information effects concerning the human rights practices of transnational corporations and catalyze these corporations to gravitate toward the BHR treaty norms. Critically, corporations may gravitate toward the BHR norms even if the relevant state actor does not

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251 Helen Christophi, *Ninth Circuit Revives Child Slave Labor Case Against Candy Makers*, COURTHOUSE NEWS (Oct. 23, 2018), https://www.courthousenews.com/ninth-circuit-revives-child-slave-labor-case-against-candy-makers/.

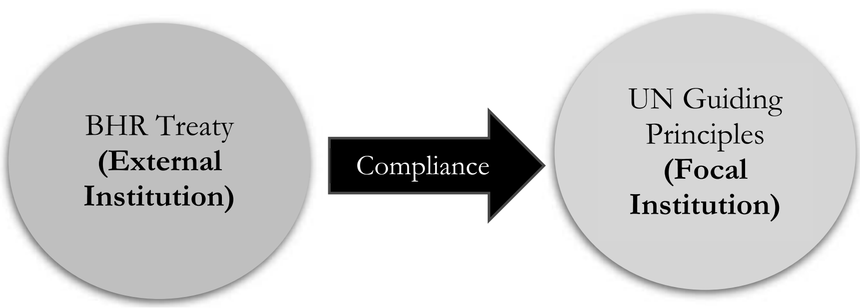
252 *See, e.g.*, Brian O'Keefe, *Bitter Sweets*, FORTUNE, Mar. 1, 2016, at 55.

incorporate those norms into domestic legislation. Here, the treaty's norms are not directly binding on the corporation, but it complies with these norms in order to signal a meaningful organizational response that can address its reputational risk. This signal potentially means more when the treaty norms are not incorporated into domestic legislation because now the corporation is doing something that it is not otherwise obligated to do; following the law signals something different than voluntarily complying with norms an organization is not otherwise obligated to obey. This signal also holds if the BHR treaty does not even enter into force and remains a nonbinding set of norms. Corporate compliance with these norms similarly signals that a corporation is going beyond what it is required to do—a signal that may do more work for reputational repair than adhering to legal obligations.

2. BHR Treaty as an External Institution

A second possibility is that the BHR treaty process does not lead to an actual treaty but creates information effects of its own—effects that create reputational risk and encourage corporations to gravitate toward another institution. Unlike in subsection III.C.1 of this Article, the BHR treaty process functions as an external institution encouraging compliance with yet another institution, such as the UN Guiding Principles. After all, this treaty process is also a legal institution that creates its own information effects.

FIGURE 6: REPUTATIONAL EFFECTS OF CIVIL LAWSUITS ENCOURAGES COMPLIANCE WITH BHR TREATY




We can expect at least three different types of information effects associated with such a treaty process: preemption, coordination, and noise.[253] *Preemption effects* occur when corporations engage in voluntary organizational change or institutional development to illustrate why a treaty is not necessary; this is the familiar self-regulation that occurs in the prelude to enhanced regulation.[254] *Coordination effects* occur when two or more corporations act together in response to a treaty—either because they really like it or, more

253 Kishanthi Parella, *Treaty Penumbras*, 38 U. PA. J. INT'L L. 275, 292–303 (2017).

254 *See id.* at 293; *see also, e.g.*, Berthelot et al., *supra* note 186, at 17–18 (providing literature review on theories suggesting that corporations voluntarily disclose information

often, because they do not.[255] But this resistance is productive because it can draw public attention to the battle lines and the issues underlying those disagreements. Resistance can also grab attention and create pressure for reform. This is particularly true when organizations offer an alternative institutional arrangement as a substitute for the potential treaty. Finally, *noise effects* refer to the attention that a treaty process can attract.[256]

We can witness many of these dynamics in the reactions of the global business associations to the BHR treaty process. Potentially cognizant of reputational damage, global business associations couched their concern regarding the BHR Treaty with their commitment—and the commitment of their millions of members—to voluntary regulation under the Guiding Principles.[257] In subsequent comments to the treaty process, industry associations such as the International Chamber of Commerce (ICC) and International Organisation of Employers (IOE) reiterated that the "treaty should strengthen the implementation of the UN Guiding Principles on Business and Human Rights."[258] The comments emphasized that "[h]uman rights are a high priority for the international business community" and that "[e]ach of the[ ] representative organizations have endorsed the UN Guiding Principles on Business and Human Rights and continue to be active in promoting and disseminating the UN Guiding Principles and related implementation guidance among their membership and associated networks."[259] According to these actors, "[m]uch progress has been already achieved in the

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following ecological accidents in order to prevent new regulations or actions by environmental lobby groups).

255 *See* Parella, *supra* note 253, at 293.

256 *See id.*

257 *See* INT'L CHAMBER OF COMMERCE ET AL., UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: RESPONSE OF THE INTERNATIONAL BUSINESS COMMUNITY TO THE "ELEMENTS" FOR A DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS 2 (2017) ("[O]ur opposition to the 'elements' paper does not diminish our commitment to helping to advance the business and human rights agenda. We continue to endorse, promote and disseminate the UNGPs . . . among our members and networks. We also actively help businesses of all sizes to meet their responsibility to respect human rights in line with the UNGPs . . . ."); *ICC Disappointed by Ecuador Initiative Adoption*, INT'L CHAMBER COM. (June 30, 2014), https://iccwbo.org/media-wall/news-speeches/icc-disappointed-by-ecuador-initiative-adoption/.

258 INT'L CHAMBER OF COMMERCE ET AL., UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: FURTHER CONSIDERATIONS BY THE INTERNATIONAL BUSINESS COMMUNITY ON A WAY FORWARD 1 (2016), http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2016-09-29__IOE-ICC-BIAC-WBCSD_Paper_on_further_considerations_re_the_UN_TREATY_PROCESS_ON_BUSINESS_AND_HUMAN_RIGHTS_final.pdf; Linda Kromjong, *Intergovt. Working Group on Proposed Treaty Needs to Have an Inclusive & Consultative Process*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/intergovt-working-group-on-proposed-treaty-needs-to-have-an-inclusive-consultative-process# (last visited Dec. 2, 2019) (arguing that "[t]he UN treaty process should strengthen the implementation of the UN Guiding Principles," especially concerning the obligations of state actors).

259 INT'L CHAMBER OF COMMERCE ET AL., *supra* note 258, at 1.

last five years with regards to the up-take of the UN Guiding Principle at the political level and the company level . . . , and BIAC, ICC, IOE, and WBCSD will continue to promote further up-take and implementation of the UN Guiding Principles."[260]

These statements have two independent effects: *preemption* and *validation*. One interpretation of these statements is that business associations are attempting to obviate the need for a new international (binding) institution by demonstrating the effectiveness of an existing, nonbinding one ("there is no regulatory problem that needs fixing").[261] A second interpretation is that these same actors are legitimizing their role in business and human rights by demonstrating how well they and their members have implemented the Guiding Principles ("we are not the problem").[262] While these tactics facilitate resistance to the BHR treaty, they also push the treaty's opponents even closer to the UN Guiding Principles.

### *D. Reputational Mechanisms and Preventative Organizational Change*

By improving reputational markets for social compliance, treaties not only incentivize *postcrisis* organizational change but also *preventative* organizational change by corporations. Both types of voluntary organizational change depend on surmounting the signaling issue. If the primary benefit of compliance comes from reputational benefits, then those providing those benefits must be able to distinguish between corporations that invest in low-level versus high-level compliance. If they cannot, then they will treat both corporations similarly, with the result that the corporation that invests in greater compliance will receive the same reputational benefits as the one that does not. Under these circumstances, the first corporation may face little incentive to do more than the second if it will be treated the same in the reputational markets.

Consider a hypothetical that explains this signaling problem. Company *A* produces a flashy brochure that lists its various core values and company policies on its website. Company *B* invests in a similar statement of values and an accompanying set of company policies, but also publicly discloses plans to integrate those policies into operating procedures, develops metrics to track and evaluate effectiveness of those policies, and regularly communicates with stakeholders concerning the evaluation and plans for improvement. Company *B*'s program is certainly more costly than the one used by company *A*. So, it is likely that company *B* will only invest in it if it receives

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260 *Id.* at 6.

261 *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 38–40 (1992); John W. Maxwell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583, 584 (2000).

262 Coordination through resistance can create reputational issues for business actors, including their ostracism from further policy developments. For example, some delegations wanted the treaty process for the BHR treaty "to be protected from the commercial and vested interests of the business sector." Report on the Fourth Session, *supra* note 103, at 6; *see also* Parella, *supra* note 128, at 949 (discussing policy sanctions).

payoffs greater than enjoyed by company *A* for its lower-level compliance program. If not, company *B* takes a net loss and will likely scale back its investment in sustainability to align with company *A*; after all, if stakeholders reward the two companies the same, why should company *B* do more?

The reason that stakeholders may treat the two companies the same is because of the familiar signaling problem where "superior social performers" appear similar enough to "inferior social performers" that both receive similar market benefits, making the former program more difficult to justify on a cost basis. Given comparable payoffs ex post, it may be difficult for a company, such as company *B*, to justify ex ante a compliance program more costly than company *A*'s approach.[263]

This is where a treaty can help. By establishing a focal point for best practices in social compliance, a treaty helps company *B*'s investment in compliance stand out from company *A*'s efforts. This differentiation is similar to the market separation discussed in Sections IV.A–C. However, instead of differentiating postcrisis organizational change, a treaty helps distinguish one company's ex ante compliance practices from another. Treaties improve reputational markets by allowing stakeholders to spot the difference between the two.

In theory, once stakeholders can tell the difference, they will reward the high compliance companies more than the low compliance ones. The incentive problem is addressed because greater investment in compliance leads to greater reputational benefits and attendant competitive advantages for those companies that do more.

## V. Implications for Global Human Rights Compliance: Spirals, Texture, and Torque

This Part examines implications of the reputational typology developed in this Article. Specifically, it addresses the risk of public relations, conditions for successful organizational change, and implications for future international institutional change.

### A. *Spirals: Is It Compliance or Public Relations?*

Perhaps the most obvious—and significant—challenge to the process outlined in Parts III–IV is that it describes public relations and not compliance: reputational shaming may lead to vague corporate pronouncements for better behavior in the future and even vaguer corporate codes of conduct—codes that are rarely monitored for compliance or enforced.[264] This

263 *See* Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. Mgmt. 39, 45 (2011) ("For signaling to take place, the signaler should benefit by some action from the receiver that the receiver would not otherwise have done (i.e., signaling should have a strategic effect); this usually involves selection of the signaler in favor of some alternatives.").

264 Doe v. Wal-Mart Stores, Inc., 572 F.3d 677, 680 (9th Cir. 2009) ("Plaintiffs allege that," despite supplier code of conduct, "Wal-Mart does not adequately monitor its suppli-

Section offers three reasons for how we can manage the risk of public relations and encourage meaningful organizational change: *institutionalization*, *intermediaries*, and *information disclosure*.

In managing the risk of public relations, we can borrow lessons from reputational strategies designed to improve state compliance with human rights. After all, state behavior is also vulnerable to the same criticism: Is it compliance or public relations? One way of managing this risk is *institutionalization*, whereby state actors become increasingly enmeshed within overlapping institutions that influence their behavior in a manner that is consistent with human rights norms.

In the "spiral model," processes of shaming state actors for their human rights practices can lead to three separate socialization processes that encourage state actors to internalize human rights norms and implement these norms domestically: (a) instrumental adaptation and strategic bargaining; (b) moral consciousness raising, argumentation, dialogue, and persuasion; and (c) institutionalization and habituation.[265] In this first stage of socialization, state actors may make some tactical concessions to international NGOs and other actors in response to a transnational campaign for instrumental and *not* ideological reasons.[266] Like organizational responses by business actors, these types of state responses are also vulnerable to the same criticism: Is it meaningful change or just public relations?

In the spiral model, the risk of public relations is addressed by explaining how states, that initially respond with tactical concessions, change their practices when international pressure engages them in the latter two stages of socialization involving argumentation and institutionalization.[267] The power of argumentation is that state governments get trapped by their own words—even words that they do not actually believe.[268]

These processes of argumentation and dialogue lead state governments to take action that institutionalizes human rights norms, such as ratifying relevant human rights treaties, incorporating human rights norms into domestic legislation and constitutions, and creating access to remedies for

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ers and that Wal-Mart knows its suppliers often violate the Standards. Specifically, Plaintiffs claim that in 2004, only eight percent of audits were unannounced, and that workers are often coached on how to respond to auditors."); Tim Bartley, *Standards for Sweatshops: The Power and Limits of the Club Approach to Voluntary Labor Standards*, *in* VOLUNTARY PROGRAMS 107, 128 (Matthew Potoski & Aseem Prakash eds., 2009) (explaining audit evasion strategies by managers of overseas factories); Richard M. Locke et al., *Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains*, 51 BRIT. J. INDUS. REL. 519, 526 (2012) (describing employment practices at overseas sites that increase the risk of abuse).

265 Risse & Sikkink, *supra* note 16, at 5.

266 *See id.* at 12.

267 *See id.*

268 *Id.* at 16, 28; *see also* SIMMONS, *supra* note 16, at 14 ("Treaties constrain governments because they help define the size of the *expectations gap* when governments fail to live up to their provisions.").

violations of these norms.[269] This institutionalization stage is critical because it sets up processes and relationships that help ensure that states act in ways that are consistent with their talk, irrespective of what members of state governments may truly believe concerning the value of these human rights norms.[270]

Similar socialization processes may also apply to business actors confronting transnational campaigns regarding their human rights practices. For corporations, institutionalization refers to the "accession to existing human rights initiatives on the regional, global or sectoral level" and "the adoption of company codes of conduct and the formation of specific CSR departments and management structures within the company making human rights become incorporated in the standard procedures."[271] It is true that corporations may initially respond to reputational shaming with tactical concessions intended to limit reputational damage and mollify critics; however, tactical concessions may be less effective for business actors because these concessions "serve as new anchors for the transnational networks to intensify their pressure."[272] And if NGOs and other actors can sustain pressure on corporations, then the latter may join institutions (or develop new ones) that ensure that corporations "walk the talk" regardless of the personal beliefs of the managers, directors, or employees of those corporations.

Institutionalization decreases the risk of public relations; *intermediaries* increase the odds of institutionalization. Intermediaries include international and local NGOs that remain actively engaged with a target actor—whether state or business actor—even after initial tactical concessions. These intermediaries can help sustain pressure on corporations and increase the odds that the latter will institutionalize their practices. For example, following media exposure and NGO campaigns, Nike responded in ways that institutionalized their new discourse on corporate responsibility by "establish[ing] an extensive code of conduct, point[ing] to many examples of improvement in its behavior, and establish[ing] a corporate responsibility department in the late 1990s."[273] Nike was not alone as other large transnational companies also responded to NGO exposure of human rights practices by changing both internal policies and management structures.[274]

Intermediaries not only facilitate institutionalization but also ensure that this institutionalization is effective in securing rule-consistent behavior by

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269 Risse & Sikkink, *supra* note 16, at 29.

270 *See id.* ("We are not that interested in the 'true beliefs' of actors, as long as they are consistent in their verbal utterances and their words and deeds ultimately match."); *see also* BRAITHWAITE & DRAHOS, *supra* note 17, at 554–56.

271 Deitelhoff & Wolf, *supra* note 131, at 236–37.

272 *See id.* at 230 ("In the case of Shell, such concessions even resulted in a number of lawsuits and a call by the UN special rapporteur for Nigeria to investigate the activities of Shell in the Niger Delta."); *see also* Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127, 131 (2010) (describing the role of precommitment).

273 Deitelhoff & Wolf, *supra* note 131, at 230.

274 *See, e.g.*, *id.* at 231 (discussing the example of Shell).

business actors. When Nike and Shell faced NGO criticism in the 1990s, they both responded with institutional changes, but "both companies remained under public scrutiny and NGOs were eager to reveal any misbehavior that would support the suspicion that the companies were only engaging in window dressing but did not significantly change their practices."[275]

Business actors can also become important intermediaries in their own right, establishing institutions that encourage other business actors to commit to human rights norms and comply with those practices.[276] Nicole Deitelhoff and Klaus Dieter Wolf refer to these practices as "norm-entrepreneurship" by business actors whereby one or more companies not only reform their own practices but champion similar reforms across the broader industry.[277] As such, companies can also play an important role in institutionalization of human rights norms—institutionalization that can reach other companies that may have been less vulnerable to NGO campaigns and therefore less likely to change their practices but for the institutional development of these companies. Companies do not engage in norm entrepreneurship for ideological reasons, necessarily, but because of competitive concerns. Namely, they may facilitate greater institutionalization of human rights norms through norm entrepreneurship in order to level the playing field among companies: "To reduce competitive losses, compliance with human rights is more likely the more competitors comply as well. This amounts to strong incentives for the more vulnerable companies to engage in norm-entrepreneurship."[278]

Another factor that encourages institutionalization relates to the "lemons problem" discussed in Section II.A: *information disclosure*. Following a reputational crisis, many corporations can engage in "cheap talk" with promises to act better in the future. The low cost of these statements and the inability to verify their veracity leads consumers, NGOS, regulators, and other public critics to downgrade the impact of these business responses to a reputational crisis involving human rights. The low cost of these statements also crowds the space as many companies issue such statements because of the low cost of duplication.

In order for a corporation's message to "stand out," it must be different; this means that it must be more difficult for another company to replicate. In other words, the message must be costly. Institutionalization increases the cost of messaging because corporations commit to actual policies and practices, thereby sorting the genuine CSR leaders from cheap talkers. The degree of sorting depends on the costliness of institutionalization. Some institutions ask more of corporations than others. Joining an institution that

275 *Id.*

276 *Id.* at 234.

277 *Id.*

278 *Id.*; *see also* Joint Committee on the Draft Modern Slavery Bill, *supra* note 93, ¶ 172 (UK) ("We were repeatedly told legislation could serve to 'level the playing field' and raise the standards of companies that failed to tackle modern slavery in their supply chains voluntarily.").

only asks for an annual report on progress is different—and less costly—than one that involves an audit by a third-party organization and accompanying suggestions for reform.

Institutions not only increase the cost of imitation, reducing the likelihood of duplication, but they can also improve the verification of changes claimed by a corporation. For example, an institution may require that corporations publicly disclose their human rights policies on an association's website or the company's own site; similarly, an institution may also require that companies publicly disclose their organizational structure and the departmental units responsible for human rights policies and compliance. These institutions decrease the risk of cheap talk by allowing the public to verify the supposed changes in practices that business actors claim following a crisis.

Intermediaries can also verify the changes that corporations make, thereby allowing their changes to "stand out" and addressing the postcrisis reputational problem. They also play another important role in information disclosure that relates to the external reputational mechanisms discussed in Part IV. Specifically, they raise the cost of association. A corporation may want to associate with an NGO in order to repair its reputation. However, the NGO may want the corporation to commit to certain institutions in order to benefit from association with itself. Here, it is the association with the NGO—and not the institution—that helps a corporation's postcrisis message stand out and thereby repair its reputation; it is the association that it is the costly signal and not the accompanying institution. But the institution is the price of the association and is another way that a corporation's need for postcrisis information disclosure leads to greater institutionalization of human rights.

### *B. Texture: Under What Conditions Will Change Occur?*

*Texture* refers to the conditions under which we might expect organizational change by business actors according to the processes discussed in Parts III–IV. It is called texture to illustrate that reputational mechanisms cannot operate in a vacuum; instead, certain conditions need to be in place for these processes to work—conditions concerning the value and vulnerability of a business's reputation, the reputation of its critics, nature of the crisis, information asymmetries concerning the underlying issue, information intermediaries, and information effects of the organizations in the business actor's environment.

First, the success of a reputational mechanism depends on the value of a reputation to a corporation and its vulnerability to reputational damage.[279] Some corporations derive most of their value from their brands; these companies are among the most vulnerable to reputational shaming tactics because consumers pay a premium for their good or service because of the

279 *See* Deitelhoff & Wolf, *supra* note 131, at 230 (discussing the importance of brand value for social vulnerability of corporations).

brand's value.[280] Information that tarnishes that brand creates a risk that consumers may no longer be willing to pay that premium. This risk becomes even more acute when more and more corporations are forging a socially responsible identity and engaging in social activism.[281] On the one hand, societal pressure may encourage corporations to adopt socially responsible positions or practices ("talk the talk"); on the other hand, however, this rhetoric may make them more vulnerable to reputational damage if and when their actions are exposed as inconsistent with their rhetoric.[282]

Second, it is not only the reputation of the corporation that matters. Instead, the success of reputational mechanisms also depends on the resources and reputations of the corporation's critics, which are often NGOs. Sikkink explains that one of the reasons that Nestlé's NGO critic was able to pressure Nestlé to abide by provisions of the WHO/UNICEF code was because "WHO['s] and UNICEF's reputations as technical agencies . . . created greater receptivity for the body of scientific data that tended to support regulation."[283] Additionally, "[w]hen the companies refused to change marketing practices, organizations such as the American Public Health Association, the Ambulatory Pediatrics Association, and the National Council for International Health became endorsers of the WHO process and the Nestlé boycott."[284]

Third, the type of crisis influences the reputational sanctions we can expect and the extent of reputational repair that a corporation will need to address. Two crisis factors are particularly important: emotional salience and attribution potential.[285] Some crises attract more attention than others and the difference often relates to which actors are implicated and what issues are involved. The consumer boycott of Nestlé products attracted attention because it concerned the health of some of the most vulnerable populations in the world.[286] Other issues may not attract as much attention or backlash, reducing the threat of reputational sanctions and the possibility of leverage in exchange for reform.

Another factor is the possibility of blame attribution. Crises can cause more reputational damage when it appears that the corporation was aware of the risk, could have prevented the harm, but chose to place its own interests above the those of the parties who were subsequently harmed.[287] In contrast, corporations may not suffer the same extent of reputational damage

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280 *See* Varian, *supra* note 131.

281 *See, e.g.*, Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists: A Playbook for Polarized Political Times*, HARV. BUS. REV., Jan.–Feb. 2018, at 78; Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1578 (2018).

282 *See* Risse & Ropp, *supra* note 132, at 21.

283 Sikkink, *supra* note 16, at 832.

284 *Id.* at 824.

285 *See* Polinsky & Shavell, *supra* note 18, at 1444–45; Sikkink, *supra* note 16, at 823.

286 *See* Sikkink, *supra* note 16, at 823.

287 *See* Coombs, *An Analytic Framework for Crisis Situations*, *supra* note 187, at 182; Coombs, *Protecting Organization Reputations*, *supra* note 187, at 168.

when they can claim that it was an accident or that they were also a victim of some third party's conduct.[288]

Fourth, the success of organizational change through reputational shaming also depends on the availability and quality of information.[289] Some issues are subject to the problem of information asymmetries: corporations have all the relevant information and are able to hide their misdeeds from the public. The processes discussed in Part IV begin with reputational damage that depends on the availability of information from either a legal institution, such as a court, or a nonlegal institution, such as the media. When there is no information, then there is no reputational sanction and, consequently, no organizational change along the processes described above.

Some jurisdictions attempted to level the playing field by mandating corporate information disclosure that is relevant to social practices, such as policies and procedures on human rights due diligence. For example, California requires that certain companies publish on their websites their internal policies for detecting and discouraging human trafficking in their supply chains.[290] However, even if this information is available, it is rarely meaningful without the aid of information intermediaries who collect, compare, analyze, and report on these information disclosures. After all, who is the audience for this information? It is likely an actor who possesses leverage to change the incentive structure for a corporation so that the latter will change its practices. One obvious audience is the corporation's consumer base. But it is doubtful whether consumers have the time, inclination, or expertise to review these policies and reward companies with "good practices" and sanction companies with "bad practices."[291] It is more likely that they cannot tell the difference between the two.

Enter the intermediaries.[292] It is these actors who cultivate expertise in the relevant policy areas so that they can meaningfully distinguish between the practices of companies and recommend action to consumers. Without these intermediaries, the disclosed information may have limited salience and impact on influencing consumer behavior and subsequent corporate response. As such, intermediaries are an important fifth condition because they analyze information that is already publicly available—thereby making it meaningful to consumers—or provide new information concerning conditions in supply chains.[293]

288 *See* Coombs, *Protecting Organization Reputations*, *supra* note 187, at 168.

289 Polinsky & Shavell, *supra* note 18, at 1445–48; *see also* Richman, *supra* note 18, at 337–38.

290 Cal. Civ. Code § 1714.43 (West 2019).

291 *See* Polinsky & Shavell, *supra* note 18, at 1448.

292 Intermediaries not only improve the effect of reputational sanctions by increasing access to information but also provide reputational sanctions of their own. *See* Mwangi et al., *supra* note 164, at 209 (describing the capacity-building and sanctioning roles of local networks in encouraging compliance with the Global Compact).

293 Kathryn Sikkink, *A Typology of Relations Between Social Movements and International Institutions*, 97 Am. Soc'y Int'l L. Proc. 301, 302 (2003).

The information provided and analyzed by intermediaries is important because it enables these stakeholders to bring their unique sources of leverage to bear on the corporation. For example, consumers relied upon information produced by other NGOs and nonprofits in lawsuits filed against Purina, Nestlé, Mars, and Hershey.[294] Similarly, investors relied upon information from NGO and media sources in shareholder resolutions filed against Disney in the 1990s demanding changes to working conditions in Nike's supply chains.[295]

Another related issue concerns the status of collective knowledge on an issue that enables a critic to say definitively and credibly that some practices are desirable and others are not. For example, Sikkink notes that one of the reasons that the NGO campaign against Nestlé worked to get the latter to adopt the WHO/UNICEF code was that the "high level of consensual scientific knowledge contributed to WHO/UNICEF action on the issue, swelling the ranks of industry critics with medical and scientific groups."[296]

Finally, even if these processes work for a time, what is to say that a corporation will keep improving its practices or even keep up with its current commitments? Institutionalization certainly reduces the risk of the former, as discussed above in Section V.A. However, a broader information environment is also important for sustaining pressure on a corporation for continuous improvement.[297] A corporation's actions are reactions to the environment in which it is situated and may depend on its supply of reputational incentives offered by actors with whom it interacts.[298] For example, Acme Corporation could face (a) treaty on business and human rights, (b) activist litigation concerning its mineral extraction practices abroad, (c) government investigation into the same, (d) mandatory disclosures regarding the same, and so on (Figure 6). Other members of the public may supplement these incentives with their own actions. Civil society organizations may have reacted to the information and organized a consumer boycott of Acme. Acme's investors, alarmed by the consumer reactions and regulatory threat, may add their own leverage for change.

294 *See supra* text accompanying note 48.

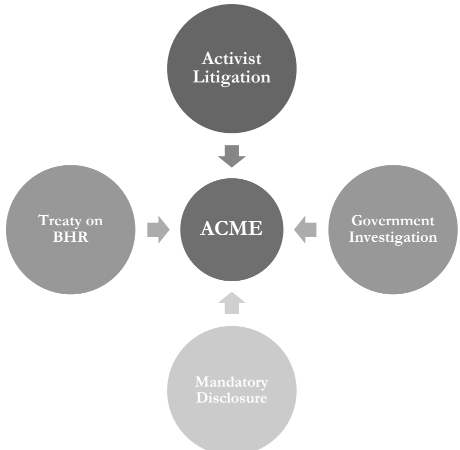
295 *See supra* notes 211–12 and accompanying text.

296 Sikkink, *supra* note 16, at 824.

297 *See* Risse & Sikkink, *supra* note 16, at 33.

298 Polinsky & Shavell, *supra* note 18, at 1454–55 ("[P]roduct liability litigation may result in publicity about product problems and thereby enhance market forces and spur regulation.").

FIGURE 7: EXTERNAL REPUTATIONAL MECHANISMS SUPPLIED BY A CORPORATION'S ENVIRONMENT




The addition of multiple actors contributes to a higher number of reputational incentives that leads to more *powerful* incentives (increased pressure), greater *variety* of incentives (different types of incentives produced by different actors), and incentives that are offered over a *longer time horizon.* In this way, the reputational incentives produced by each actor interacts and influences incentives created by another, producing a collective set of reputational incentives capable of cajoling a corporation toward better human rights compliance.[299] Collectively, these actors and their capabilities form the texture that determines the success of reputational mechanisms for encouraging organizational changes in corporations concerning their human rights practices.

### *C. Torque: How Much Change Is Possible?*

The processes outlined above describe organizational change by one target actor, such as a large TNC. As acknowledged, various factors limit the success of these efforts at reform through reputational mechanisms—particularly brand vulnerability. Not all TNCs are equally vulnerable to reputational sanctioning. Therefore, *if* the processes described above only work for a small swath of businesses, then the best hope for reform is to consider the ripple effects of organizational changes by that select group of businesses. We can imagine that broad organizational change in an industry or a region consist of two components: *interfirm reform* and *intrafirm reform.* If reputational sanctions, as described above, only work for a handful of firms, then the best hope for reform are the interfirm dynamics. Think of the process as a domino effect: the processes described in this Article explain what it may take to get that first domino rolling, but broad level change depends on

299 *See* Sikkink, *supra* note 293, at 303.

whether the other dominos in the set follow suit. Whether those other dominos will also follow depends on "torque."

This Article defines "institutional torque" as the magnification and globalization of institutional changes that, at first glance, appear very narrow and local.[300] Let's consider a couple of hypotheticals for illustration. Let's imagine that Acme, a brand company that sells luxury handbags, is targeted by an international NGO that draws public attention to the poor labor practices in the overseas factories that manufacture Acme's handbags. This NGO publishes regular reports documenting the labor abuses and secures sustained media attention to the issues. It also coordinates with other NGOs (global and local) to orchestrate a consumer boycott against Acme. Let's also imagine that this boycott has a negligible effect on Acme's sales but does draw unwanted attention to Acme and puts its brand value at risk at a time when its managers are considering a merger with another company.[301] Given the risk to its reputation, Acme concedes to the NGO's demands and enters into an agreement by which it agrees to a number of specific reforms. At first glance, this institutional arrangement seems to concern a narrow set of actors (Acme and its NGO critic) concerning a narrow set of reforms (outlined in the agreement) addressing a specific set of labor issues at a few supplier sites in a limited number of countries. However, as explained below, this institutional arrangement may undergo three separate magnification effects—*cross-market*, *geographic*, and *industry*—that extend its application to new actors in new places.

*Cross-market* magnification effects occur because Acme is a transnational corporation and sells goods other than handbags. As per its agreement with its NGO critic, Acme introduced a new human rights policy governing its global operations and created a new human rights compliance department identifying potential human rights impacts of its operations. Finally, the agreement stipulated that Acme would synchronize its human rights compliance department with its department for procurement and supplier management so that policies and guidelines developed by the former are integrated into the actions of the latter, thereby decreasing the risk of future violations. These institutional changes influence not only Acme's operations concern-

300 For example, in another area of corporate compliance, corporate prosecutions not only influence the behavior of the target firms but also the behavior of all the peer companies that are observing the prosecution. Griffith, *supra* note 10, at 2090–91 ("Companies track enforcement activity and heed the elements of compliance that enforcement authorities have either applauded or found lacking in peer firms. DPAs/NPAs thus have a strong signaling effect on firms not party to the immediate settlement, pushing them to adopt compliance mechanisms similar to those imposed upon their peers. The result can be thought of as 'compliance creep,' in which compliance features converge as a result of the precedential effect of settlements and the widespread mimicry of peer firms." (footnotes omitted)).

301 Sikkink, *supra* note 16, at 826–27 ("Nestlé eventually reached agreement with it[s] critics not only because its sales were directly hurt but also because a new senior management team wanted to turn its attention to more pressing business problems, in particular mergers and acquisition in the U.S. market.").

ing its handbags but also all the other goods it sells. This is cross-market magnification whereby "naming and shaming" practices in one market introduce norms in multimarkets because of the common denominator of the target corporation.

This type of magnification effect also leads to another: *geographic* magnification whereby human rights institutions developed in response to issues in one location lead to the globalization of these norms because of the global nature of the operations of the target corporate actor.

Finally, Acme's institutional arrangements may undergo yet another level of magnification (*industry* magnification) because of market competition. As discussed above, corporations that are targeted by NGO campaigns and subsequently engage in institutional reform may attempt to reduce competitive losses from those reforms by becoming "norm entrepreneurs" and attempting to bind competitors to those same practices.[302] In our hypothetical, Acme, bound to institutional arrangements because of its agreement with the NGO, may attempt to export those institutions to others by developing a new industry code of conduct or other initiative that it champions. This move has low costs for Acme because it is already bound to abide by these institutions because of its agreement; therefore, a new code of conduct that tracks the agreement's institutional arrangements offers limited new costs to Acme. It does, however, introduce new costs to its competitors so that Acme and the former would compete on a level playing field.

Through torque dynamics, norms disseminate across different institutions by different actors using a variety of institutions (Table 2). The NGO was the first agent of change which introduced norms through its agreement with Acme; Acme came to the negotiating table because of the NGO's "naming and shaming" tactics (mechanism). In the second phase, Acme became the agent of change by disseminating its practices throughout its global operations through its own policies. Finally, in the third phase, Acme is an agent of change concerning industry institutions that it attempts to change through "norm entrepreneurship."

TABLE 2: AGENTS AND MECHANISMS OF MAGNIFICATION EFFECTS

| Magnification Effect | Institution | Mechanism | Agent |
|---|---|---|---|
| **Original** | Contract | "Naming and shaming" | NGO |
| **Cross-market; Geographic** | Company policies | Internal compliance programs | ACME |
| **Industry** | Industry codes | Norm entrepreneurship | ACME |

It is important to note that institutionalization resulting from this last level of magnification occurs for different reasons than the initial institutionalization process that introduced the norms in the first place. Specifically, it all began with the agreement between Acme and the NGO: it is *this* institu-

302 *See supra* Section V.A.

tion that introduced the human rights practices. This institution resulted from Acme's social vulnerability to NGO tactics that had to do with its products and profile, among other factors.[303] But perhaps this same NGO could not use similar tactics against Acme's peers for several reasons: Acme's peers do not possess similar brand recognition; the NGO has limited resources; its peers were not involved in similar crises recently, reducing the likelihood of media coverage; and the human rights practices of its peers are not vulnerable to the types of emotional salience of crises involving Acme.

For these and other reasons, Acme's peers are not as vulnerable to the same NGO; as a result, it is unlikely that this NGO could have committed these peer companies to institutional reform using the same tactic it used with Acme—getting the companies to sign an agreement. But even if these peer companies are not vulnerable to the NGO, they could be vulnerable to *Acme* through associational affiliations, contractual arrangements, or other relationships. Acme then becomes the exporter of norms, not the NGO.[304] The latter has already set the processes in motion by using its leverage over Acme; Acme now uses its own leverage over its peers. Through these processes, what started as a set of institutional reforms for one industry and one actor (Acme) could potentially reach multiple markets in multiple countries and bind multiple actors. This is torque.

Torque can compensate for the limited vulnerability of many businesses to the "naming and shaming" techniques described above. *But torque reduces our reliance on not only reputational mechanisms but also legal institutions.* For example, we need to acknowledge the political moment in which we find ourselves: rising nationalist sentiment and growing wariness of international commitments hardly set the stage for yet another treaty, on human rights or anything else. In this day when the possibility of new multilateral treaty regimes seems remote, we may be able to accomplish much with very little through *torque*. The advantage of torque is that it reduces our reliance on one or more grand multilateral regimes that accomplishes it all. Instead, we can achieve similar effects through fragmented processes that rely on multiple institutions and multiple actors. Consider a second hypothetical: country *A* introduces new legislation that imposes both civil and criminal penalties on individual officers of foreign corporations that operate in the extractive industries in country *A*. Beta is a transnational corporation with headquar-

303 *See generally* Deitelhoff & Wolf, *supra* note 131, at 228–30; Sikkink, *supra* note 16, at 823.

304 *See* Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1016–17 (2017) ("[O]rganizations must often find mechanisms to adopt compliance reforms in order to engage in certain business relationships with other private parties. . . . This type of private pressure for the adoption of compliance programs is necessary because companies are 'increasingly accountable not only for their own compliance' but also that of their business partners, which motivates corporations to obtain contractual assurances that business partners are engaged in acceptable compliance practices." (quoting Scott Killingsworth, *The Privatization of Compliance*, *in* TRANSFORMING COMPLIANCE 33, 33 (2014))); Jonathan C. Lipson, *Promising Justice: Contract (as) Social Responsibility*, 2019 WIS. L. REV. (forthcoming).

ters in Canada and operations around the world. Its wholly owned subsidiary, Beta X, is incorporated under the laws of country *A* and engages in mining operations there. Beta X's management, alarmed by the new legislation, introduces new human rights policies and practices intended to address the risk that its officers may be subject to liability.

However, given Beta's organizational structure, Beta X's new policies and procedures do not only influence the behavior of the subsidiary's employees but also cycle back to the broader transnational corporation, Beta, that incorporates some or all of the new policy changes throughout its broader organization. Beta—as a transnational corporation—then exports those new policies and procedures to new locations besides country *A* because of the global nature of its operations; these policies influence the actions of Beta's employees (and the employees of its subsidiaries) in country *B* and country *C* and so on. Beta may also export these policies in its contractual arrangements with its suppliers or other contractual partners. Finally, Beta may export these policies to its peer companies to reduce its competitive losses. For example, perhaps its global competitor, Theta, does not operate in country *A*. Therefore, Theta has no pressure to adopt costly new human rights policies and procedures. However, Beta may engage in "norm-entrepreneurship" through the creation of new industry codes or initiatives that encourage its peers to adopt similar human rights policies (and publicly shame them if they do not). In this manner, domestic legislation in one country—that may be difficult to replicate at the international level or in a different country—achieves de facto global effects without the need for an international treaty arrangement; instead, similar effects are achieved by borrowing the organizational structure of the target actors—corporations—that already have a global footprint and using their own operations to disseminate human rights norms.

## Conclusion

While corporations respond to increased pressure for social responsibility, we regularly witness gaps between their rhetoric and conduct. This is especially true in the supply chains of transnational corporations. Here, corporations not only fail to "do good" but also introduce new harms of their own.

Government actors and NGOs, among others, attempt to improve human rights due diligence in the supply chain through domestic legislation, consumer boycotts, shareholder resolutions, and media exposure. The international treaty under development is the latest regulatory strategy attempting to reform the supply chain. However, there are reasons to doubt whether powerful states will support it: Many countries—especially the home jurisdictions of large transnational corporations—resisted development of the treaty.[305] Previous attempts to design mandatory international institutions

305 *See* H.R.C. Res. 26/9, *supra* 94.

addressing business and human rights failed.[306] Global industry associations have already issued objections to the text.[307] Finally, and perhaps most importantly, many of the grand international institutions that characterized the post–World War II era are under suspicion or threat, creating significant doubts about international cooperation regarding yet another new institution.

This Article's typology of reputational mechanisms offers regulators, NGOs, and other actors insight on how to incorporate reputational incentives into the draft treaty so that corporations may cooperate with its norms even if states do not. Specifically, better understanding of internal and external reputational mechanisms helps these actors include important "carrots and sticks" into the treaty's design, as well as identify important enforcement strategies that could encourage corporations toward better human rights compliance in their supply chains.

306 *See supra* notes 81–82 and accompanying text.
307 *See* INT'L ORG. OF EMP'RS ET AL., *supra* note 107.