1 INTRODUCTION

If a covenant be made, wherein neither of the parties perform presently, but trust one another; in the condition of mere nature, which is a condition of war of every man against every man, upon any reasonable suspicion, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void. For he that performeth first, has no assurance the other will perform after; because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power.

Thomas Hobbes, LEVIATHAN (1651)

We are determined to work at all levels to tackle global terrorism and stem the weapons of mass destruction. To this end, we will promote relentlessly the dialogue among civilizations and contribute uncompromisingly to strengthening the institutions of global governance and expanding the reach of international law.

Athens Declaration on the Signing of the Treaty of Accession on the Enlargement of the European Union, April 16, 2003

RECENTLY, A CANADIAN COMPANY AND ITS PRINCIPAL STOCKHOLDER put the civil justice system of the United States on trial. Outraged by a huge punitive damages award that drove the company into bankruptcy, they claimed that a Mississippi lawsuit violated their fundamental rights. Remarkably, the victims based their suit on international law, and brought it before an international tribunal empowered to issue a monetary award against the United States. [1]

[1] The Loewen Group, Inc. v. United States, Final Award (Jun. 26, 2003) (egregious misconduct in civil trial leading to enormous damages manifestly a denial of justice subject to Chapter 11; no relief available because victim failed to seek appellate review). The United States is a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 52, 17 U.S.T. 1270, 575 U.N.T.S. 159 (1985), which obligates it to respect the awards

In Europe, vindicating rights derived from international law through an international tribunal is nothing new, as the language of the Athens Declaration quoted earlier suggests. Anyone who believes someone has infringed an interest protected by the European Community's Treaty of Rome, to which twenty-five states now adhere, can both demand that domestic courts hear the claim and obtain review of these decisions in the European Court of Justice in Luxembourg. Using these tools, women in Northern Ireland have forced the British government to hire them as police officers; foreign beer producers have overturned Germany's restrictions on their sales; and professional soccer players have obtained free agency.[2] A victim of human rights violations by any of forty-five European states can sue in the European Court of Human Rights, based in Strasbourg, and obtain both a determination of the rights in question and a damages award. In recent years, the Strasbourg court has confronted issues that, in the U.S. context, provoke great passion. It has, for example, vindicated the right to die, forbidden discrimination against the transgendered, and mandated the inclusion of homosexuals in the armed forces.[3] Many European states also authorize their domestic courts to enforce the same body of human rights law. The statute empowering British courts to do so functions something like a Bill of Rights, the first in British history.

In the United States, the Supreme Court in *Sosa v. Alvarez-Machain* recently endorsed the idea that federal courts can entertain suits under international law, even in the absence of a treaty or statute explicitly authorizing the litigation.[4] For nearly a quarter-century in advance of this decision, some lower courts had been doing this. Federal litigation based on international law has challenged the employment policies, environmental records, and mining and drilling

of these tribunals. *See* 22 U.S.C. §§1650, 1650a (2001). *Cf.* 28 U.S.C. §2414 (2001) (obligating Secretary of Treasury to pay awarded after confirmation by federal court pursuant to 22 U.S.C. §1650a). For a general discussion, see Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365 (2003).

[2] Union Royale Belges des Sociétés de Football Association v. Bosman (Case C-415/93), [1995] E.C.R.-I 4921 (soccer free agency); Commission v. Germany (Case 178/84), [1987] E.C.R. 1227 (beer purity standards); Johnston v. Chief Constable (Case 222/84), [1986] E.C.R. 1651 (sex discrimination).

[3] For representative cases, see Lopez Ostra v. Spain, 20 Eur. H.R. Rep. 277 (1994) (solid waste treatment plant located near home violates right to privacy); Maria Guerra v. Italy, 26 Eur. H.R. Rep. 357 (1998) (serious environmental pollution violates right to privacy); Jordan v. United Kingdom, 37 Eur. H.R. Rep. (2001) (deficiencies in police investigation of homicide constitute a violation of European Convention's right to life); Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1 (2002) (right to die); I. v. United Kingdom, 36 Eur. H.R. Rep. 53 (2002) (failure to give legal recognition to sex change violates right to privacy); E. v. United Kingdom, 36 Eur. H.R. Rep. 31 (2002) (failure by social services to exercise due diligence in supervising children endangered by home environment violates European Convention).

[4] 542 U.S. 692 (2004) (dismissing claim that arbitrary arrest of Mexican national by Mexican police constituted a violation of international law for which a damages remedy was available).

practices of a host of prominent multinational firms.[5] A recent spate of litigation has asserted the obligation of U.S. courts to obey a decision of the International Court of Justice regarding the rights of aliens arrested in the United States, a position that a majority of the Supreme Court did not reject and that four justices seemed to embrace.[6] Legislation in the United Kingdom, Canada, and other large and important jurisdictions has opened up domestic courts to claims based on international law. Finally, in *Roper v. Simmons* the Supreme Court, hesitantly and controversially, seems to have embraced international law as a tool for interpreting the more elastic clauses of the Constitution.[7]

What these phenomena embody is a new approach to the enforcement of international law. Traditionally, states contracted for obligations, which they undertook to enforce through methods ranging from diplomatic protests to economic pressure to armed attack. Informal sanctions, largely involving effects on reputation and threats of retaliation, did most of the day-to-day work of ensuring compliance. International law was soft, in the sense that there existed no Hobbesian Leviathan to sanction default. The new approach, in contrast, allows private enforcement, employs independent tribunals and courts to do the enforcing, and empowers those tribunals and courts to wield the same array of tools that domestic courts traditionally use to compel compliance with their decisions. International law has become hard law, with its own Leviathan.

[5] For a representative sample of the cases, see Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F. 3rd 1242 (11th Cir. 2005) (lawsuit by Guatemalan trade unionists against plantation owner for physical abuse); Alperin v. Vatican Bank 410 F.3d 532 (9th Cir. 2005) (lawsuit against bank for assisting in human rights violations during World War II); Ungaro-Benages v. Dresdner Bank AG, 379 F.3rd 1227 (11th Cir. 2004) (lawsuit against banks for assisting Nazi takeover of Jewish-owned companies); Flores v. Southern Peru Copper Corp., 343 F.3rd 140 (2nd Cir. 2003) (lawsuit against mining company for pollution-related injuries); Doe v. Unocal, 395 F.3rd 932 (9th Cir. 2002) (lawsuit against energy company for slave labor compelled by local military on behalf of company); Aguinda v. Texaco, Inc., 303 F.3rd 470 (2nd Cir. 2002) (lawsuit against energy company for environmental damage); Bano v. Union Carbide Corp., 273 F.3rd 370 (2nd Cir. 2001) (lawsuit against chemical company for release of toxic gas); Bigio v. Coca-Cola Co., 239 F.3rd 440 (2nd Cir. 2000) (lawsuit against companies that rented or purchased property that had been seized by Egypt from Jewish owners); Wiwa v. Royal Dutch Shell Corp., 226 F.3rd 88 (2nd Cir. 2000) (lawsuit against energy company for complicity in suppression of critics of its relations with Nigerian government); Beanal v. Freeport-McMoran, Inc., 197 F.3rd 161 (5th Cir. 1999) (lawsuit against mining company for environmental abuses and genocide); Hamid v. Price Waterhouse, 51 F.3rd 1411 (9th Cir. 1995) (lawsuit by depositors in collapsed bank against business associates of bank). According to press reports, the Unocal lawsuit resulted in a substantial settlement in 2004, after the Supreme Court decided *Sosa*, although the amount of the defendant's payment remains undisclosed.

[6] Medellin v. Dretke, 544 U.S. 660 (2005) (dismissing lawsuit in light of presidential order seeking to implement ICJ decision); *id.* at 672 (O'Connor, J., dissenting) (asserting jurisdiction to hear suit).

[7] 543 U.S. 551 (2005). The Supreme Court currently has before it a joined case that might allow it to address these issues yet again. Sanchez-Llamas v. Oregon, No. 04-10566, and Bustillo v. Johnson, No. 05-51, argued March 29, 2006. One of us (Stephan) filed a brief *amicus curiae* in support of the respondents in those cases.

In the case of the dispute over civil justice in Mississippi, for example, the tribunal had the authority to issue an award of damages against the United States, which U.S. law required the government to honor.

Throughout this book, we will use the term *formal enforcement* to distinguish legalized, institutionally based, privately initiated mechanisms from the traditional informal means of enforcement that remain subject to state control. The key characteristics of the formal enforcement process are the promulgation of nondiscretionary rules governing the behavior of affected parties and the existence of a body with both the authority and the capacity to consider claims brought by a representative range of interested parties and to grant relief through direct imposition of preannounced and salient sanctions for noncompliance. When we say "a representative range of interested parties," we do not mean that standing to initiate proceedings has to extend to all interested persons, but only that it is not limited solely to states. When we talk about "direct imposition" of sanctions, we mean to exclude cases where a body can only call on states to carry out its judgment. Throughout, our focus is on the formality of enforcement and not the formality of dispute resolution. International law has many tribunals with the capacity to hear complaints and deliver pronouncements. We are concerned with the limited (but growing) number of cases in which a disinterested dispute resolver (not necessarily exercising state power) has the capability directly to impose costs on rule breakers.

Formal enforcement, in sum, is more than a centralized system of dispute resolution: It entails independent authority by a legal body to take up a matter and the capacity directly to impose meaningful sanctions. As we explain more fully in this book, our concept of formal enforcement embraces private commercial arbitration and a private group's centralized enforcement of its membership rules as well as state-created adjudicative bodies. The key distinction is not between private and public adjudication but between, on the one hand, ex ante legalization with centralized enforcement and, on the other hand, informal sanctions for noncompliance imposed ex post without much coordination.

A long-standing conversation among international legal scholars involves the distinction between hard and soft law. Hard law creates a clear obligation, although these scholars rarely specify what kinds of enforcement mechanisms are entailed. The model, however, is domestic law, which courts enforce with a variety of sanctions at their direct disposal. Soft law expresses hopes rather than commitment, and by its terms entails no direct enforcement. Without taking sides in the debate about the definition and significance of hard and soft law, we will appropriate the term for our discussion of enforcement. We regard international law that is enforced formally to be hard law, and the

growth of formal enforcement constitutes a hardening of international law. We recognize that for some specialists the hard/soft distinction refers only to the content of an obligation, and not the enforcement mechanisms attached to it.[8] We are persuaded, however, that a functional analysis of any set of legal rules, international law most of all, must give a central role to enforcement mechanisms.

Elements of our argument challenge conventional understandings about the enforcement of international law. First, the significance of formal enforcement of international law by independent courts and tribunals remains controversial. Mainstream international law scholars mostly see international law as, at best, weakly enforced, and discount the power and influence of the enforcement institutions that do exist.[9] A widespread, and in our view erroneous, belief holds that international law enjoys no formal enforcement. Accordingly, many scholars bemoan the ability of individual states, first and foremost the United States, to frustrate the enforcement of international law and call for strengthening existing formal mechanisms and adding new ones. In particular, those who aspire to more hardening of international law dominate the legal academy.

A dissident strain of scholarship argues that the already existing institutions represent an intolerable threat to national sovereignty. Critics on the left attack the tribunals that enforce investment protection treaties as illegitimate impediments to necessary national environmental, labor, cultural, and social regulation. Critics on the right complain that the International Criminal Court, the European economic and human rights courts, and the increasing willingness of domestic courts to fashion rights and remedies based on international law all represent a threat to liberty and democratic self-governance.

Both the mainstream scholarship and the dissident strands miss crucial points. The mainstream scholars do not appreciate how much formal enforcement already exists in the international system and how it has become more significant in recent years. Its expansion undermines concerns about its weakness: The trend is clearly away from impotence. International law, because of the growth of formal enforcement, has become a real force with direct and material consequences for a wide range of actors. The institution may not wield

[8] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance* in Legalization and World Politics 37 (Judith L. Goldstein, Miles Kahler, Robert O. Keohane, & Anne-Marie Slaughter, eds. 2001). For a recent discussion of these concepts that proposes to substitute "legal" and "nonlegal" for "hard" and "soft," see Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 81–100 (2005).

[9] For recent instances, see Anupam Chander, *Globalization and Distrust*, 114 Yale L.J. 1193 (2005); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 Am. J. Int'l L. 510 (2003).

the full extent of power associated with Hobbes's Leviathan, but its capabilities are considerable and growing.

The dissidents, in contrast, do not overstate the extent of formal enforcement so much as draw the wrong inferences about what it does. It is not plausible that a phenomenon of sufficient breadth to alarm both the left and the right results from a covert and illegitimate usurpation of national sovereignty. Formal enforcement has grown because it bolsters otherwise valuable cooperation, not because it represents a power grab by unaccountable actors.

Methodology

This book draws on several scholarly discourses in the course of establishing its claims. We recognize that the switching among fields required by interdisciplinary work makes demands on our readers, but we try to lighten that burden by providing sufficient background for each. We of course address international lawyers, both scholars and other policy makers, who continue to search for ways of grounding their discipline in robust theory and convincing empirical analysis.[10] We hope to persuade them that modern contract theory provides an important new perspective for understanding both what international law does and what society should ask it to do. We also draw heavily on the work of political scientists who specialize in international relations and seek to extend their insights. Our core methodological commitment, however, remains with law and economics, the discipline that has most influenced contract theory over the last three decades. Our underlying purpose is to convince international lawyers and international relations experts of the value of this methodology as a tool for understanding their fields.

A related goal is to normalize international law scholarship. In spite of the rise of formal enforcement and the consequent intrusion of international law claims into a growing number of domestic public policy debates, international law specialists tend not to engage much with other members of the legal academy. Some of the traditional barriers between the discipline and other approaches to law have begun to come down, partly as a result of a growing collaboration between international lawyers and political scientists, partly because the public policy issues have attracted the interest of leading public law scholars, and partly

[10] When we speak of "other" policy makers, we mean to suggest that, for international lawyers, scholars count as policy makers. For insiders to international law, the term "publicist" does this work. It refers to persons who propound international law in an authoritative manner. For example, Article 38(1)(d) of the Statute of the International Court of Justice refers to "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

because a handful of private law scholars with an interdisciplinary bent have become interested in the subject.[11] We seek to build on these developments by demonstrating that insights originally developed to elucidate a core legal subject – contract law – also extend our understanding of the function of international law.

We will spell out our informal model of optimal enforcement later in this book, but a few general methodological observations are necessary here. The foundation of our model comes from contract theory, which draws on economic science for its key assumptions and methodology. In particular, because the enforcement of international law entails costs, both directly through the monitoring of behavior and the imposition of sanctions and indirectly through the opportunities foreclosed to actors seeking compliance with the rules, we assume that states seek to attain a level of enforcement that maximizes the benefits from compliance net of enforcement and compliance costs. Again, we recognize that ascribing to states the same welfare maximizing motivations that are assumed to apply to private firms requires some justification. We will seek to persuade the reader that the similarities between the behavior of states and that of private entities are sufficient to make this analytical exercise worthwhile.

It should be obvious in any case that optimal enforcement is not maximum enforcement. To take a hypothetical example inspired by the dispute between the United States and the European Community (EC) over genetically modified food, suppose that multinational enterprises had the right to sue states for injuries to their business caused by food safety restrictions that lack a sound scientific basis and therefore violate an international agreement on trade barriers. Further suppose that the rule of compensation requires states to pay some multiple of actual injury to increase deterrence against wrongful regulation. It seems plausible that, for a sufficiently large multiplier and a sufficiently high level of controversy about the science underlying a potential health threat, the supercompensation mechanism will deter states from implementing objectively desirable regulation. Overdeterrence of the proscribed

[11] On collaboration between political scientists and international law scholars, see Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 Am. J. Int'l L. 367 (1998). For representative work by public law scholars, see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995). For a recent review of the impact of law and economics scholarship on international law, see Alan O. Sykes, *International Law*, in Handbook of Law and Economics (Mitchell Polinsky & Steven Shavell eds. 2006).

behavior – here spurious regulation designed to protect domestic producers from import competition – can deter valuable conduct – here beneficial health and safety rules – that might be mistaken for the proscribed behavior.

Isolating the issue of optimal enforcement might strike some as ignoring the elephant in the room. Not all international cooperation is beneficial. A producer cartel such as the Organization of the Petroleum Exporting Countries, for example, benefits its members by restricting the supply of its product at a low level to attain monopoly rents. Under most conventional analyses, the loss to consumers from the high prices more than exceeds the producers' excess profits. Is it possible to talk about optimal enforcement without considering the optimality of the underlying cooperative project?

We acknowledge that there exist many perspectives from which one might launch indictments of some or all of international law. Critics on the left argue that international economic law reflects the interests of multinational firms to the detriment of workers and consumers; voices from the developing world argue that international law constitutes an extension of the colonialist project intended to redistribute wealth and power from the third world to the first; and some on the right contend that much of international law represents an effort to perpetuate socialist and statist programs that have largely failed on the national level.[12] But we do not think it necessary to grapple with these critiques to expound a model of optimal enforcement.

It is enough to show that the analysis of optimal enforcement can be independent of the assessment of the underlying objectives of a cooperative product. If this is true, and if it is conceivable that some instances of international cooperation can be valuable, even if the cases we see in the present world incite controversy, then a model of optimal enforcement has value. The large body of scholarship devoted to the theory of the firm, for example, focuses on the agency costs associated with particular forms of organization and does not consider the underlying social costs or benefits produced by particular enterprises.[13] Analytically, we do exactly the same thing: We consider only the question of how to optimize the value of a given cooperative project under conditions of costly enforcement.

[12] From the left, see Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. Davis L. Rev. 1451 (2000). For the perspective of third world scholars, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. J. Int'l L. 201 (2001). From the right, see Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges (2003); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?* 1 Chi. J. Int'l L. 273 (2000).

[13] The seminal works include R. H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976); Oliver E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, and Relational Contracting (1985).

Our model for the enforcement of international law rests on several assumptions that we will specify and support later in the book. We assume that people who represent states in the making of international law – principally, but not exclusively, the architects of international agreements – act rationally, in the sense that they seek to optimize certain values based on preferences that remain consistent. We further assume that a process of natural selection operates, at least weakly, so that over time representatives who make wrong guesses about what choices will maximize their preferred values, or whose preferences undermine their capacity to act as an agent of a state, will be replaced by representatives who guess better and whose preferences bolster their capacity to act as an agent. The analysis, in other words, is at some level Darwinian, although certainly not social Darwinist. We further believe that these selective pressures operate to some degree on all kinds of representative structures, dictatorships as well as democracies, although we concede that different structures may respond to these pressures with various degrees of immediacy and rapidity. These assumptions suggest that the long-term trend in the enforcement of international law may be in the direction of optimality, and also that there exist conditions under which short-term trends might lead to reduced welfare.

The remainder of our model draws on the economics of information, in particular the analysis of private knowledge and obstacles to verifying certain states of the world, and on theories of informal enforcement of obligations based on reputational effects and the threat of retaliation. We link this literature to the work of experimental economists who have uncovered evidence of a widely held but not universal preference for reciprocity on the part of individuals. The results of this research is consistent with the work of experimental anthropologists and evolutionary theorists who find substantial evidence for a theory of cultural selection of norms of reciprocity. These allied methodologies provide the basis for our prediction that formal and informal enforcement often operate as rivals rather than as complements and that, within its separate domain, each one dominates the other in motivating socially beneficial cooperation.

Formal and Informal Enforcement of International Law

We can illustrate formal enforcement of international law by both what it is and what it is not. For much of the twentieth century, states have had the ability to invite international tribunals to resolve their disputes. The League of Nations had its Permanent Court of International Justice, the United Nations has its International Court of Justice (ICJ), the General Agreement of Tariffs and Trade (GATT) facilitated arbitration of trade disputes, and the World Trade Organization (WTO) has its Dispute Settlement Body (DSB). But though their

proceedings are legalized and thus represent instances of formal dispute settlement, these institutions do not involve formal enforcement as we understand the concept. First, only interested states have the capability to initiate proceedings, which means that states control access to the process and can exercise this power for reasons besides vindication of particular legal interests. Second, none of these bodies has the authority to impose sanctions directly on those who violate international law obligations. At most, they can invite others to impose sanctions, as the WTO does when it authorizes an aggrieved member to retaliate against a transgressor.[14]

Informal enforcement, as in the case of the ICJ and the WTO DSB, is by no means nonenforcement. Informal enforcement occurs when one or more actors (perhaps states, but also firms, nongovernmental organizations, political parties, and others) imposes costs on a rulebreaker in the absence of centralized coordination and control. A regime responsible for torture and repression at home and terrorism abroad, for example, can become an international pariah and thus lose valuable opportunities to transact with other states, even if no central authority brands the regime as outlaw. Informal enforcement employs informal sanctions, namely *retaliation* (as in trade disputes), *diminished reputation* (which affects the propensity of other actors to transact with the violator), and *manifestations of reciprocity* (a preference for rewarding law abiders and punishing law breakers, which can exist independently of whatever direct payoffs an actor can get for dishing out rewards and punishments).[15]

The conventional wisdom holds that *only* informal enforcement applies in international law. Because international bodies lack armies or other traditional means of coercion, scholars have thought that law enforcement necessarily has depended on the uncoordinated cooperation of influential actors, principally states. As a result, contemporary discussion of the legalization of international law neglects the question of enforcement. The conventional definition of international law focuses on *opinio juris*, the idea that a practice arises from a sense of legal obligation rather than as a matter of naked preference.[16] So framed, the

[14] For a fuller discussion of the WTO DSB as an informal enforcement mechanism, see Kyle Bagwell & Robert W. Staiger, The Economics of the World Trading System 95–110 (2002).

[15] The economist Thomas Schelling and the political scientist Robert Axelrod pioneered the study of informal enforcement mechanisms in international relations. Thomas C. Schelling, The Strategy of Conflict (1963); Robert Axelrod, The Evolution of Cooperation (1984). Regime theorists also explore the incentives for international cooperation in the presence of exclusively informal enforcement. *E.g.*, Stephen D. Krasner, International Regimes (1983); Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984); Robert O. Keohane, International Institutions and State Power: Essays in International Relations Theory (1989).

[16] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).