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Persuasion Treaties

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PERSUASION TREATIES

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INTRODUCTION

ALL treaties, akin to contracts between nations, formalize the promises of their parties.[1] Yet the contents of those promises differ, with important consequences.[2] One particular difference is underappreciated and divides treaties into two fundamentally different categories. In one category of treaty, nations agree that they themselves will act, or refrain from acting, in certain ways.[3] For convenience, I call these "resolution" treaties because they demand that states resolve to act. In the second category, nations make promises they can only keep if nonstate third parties also act or refrain from acting.[4] These are what I term "persuasion" treaties because they require states to persuade third parties to do something differently, through regulatory or other means. Significantly, each type

[1] See Vienna Convention on the Law of Treaties art. 34, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 341 (entered into force Jan. 27, 1980) (establishing that treaties create obligations only on consenting state parties); see also The Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations . . . . [It] is carried into execution by the sovereign power of the respective parties to the instrument."). See generally Robert E. Scott & Paul B. Stephan, The Limits of Leviathan: Contract Theory and the Enforcement of International Law (2006) (proposing that insights from contract theory illuminate how and when international law is made and enforced).

[2] See Kal Raustiala, Form and Substance in International Agreements, 99 Am. J. Int'l L. 581 (2005) [hereinafter Raustiala, Form and Substance] (analyzing the relationship between different types of treaty commitment—differences include whether the agreement is binding or nonbinding, whether the agreement gives jurisdiction to any institution to monitor or enforce compliance, and to whom rights of enforcement are afforded).

[3] See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In the United States, complications arise from constitutional separation-of-powers and federalism constraints. See, e.g., Medellin v. Texas, 552 U.S. 491, 504–06 (2008) (considering whether the State of Texas was bound by a judgment of the International Court of Justice). Nevertheless, for many resolution treaties, the conduct the treaty anticipates is largely within executive branch power.

[4] For example, under the terms of the Montreal Protocol, signatory states comply only when they reduce certain emissions to benchmark levels. See Montreal Protocol on Substances That Deplete the Ozone Layer, opened for signature Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3, 31–33 (entered into force Jan. 1, 1989). In order to meet their international commitments under the Protocol, states must successfully ensure that private entities within their borders reduce emissions. Environmental treaties serve as a leading example of persuasion treaties, though persuasion treaties are not limited to the environmental arena.

of treaty carries a unique set of execution and compliance problems. Persuasion treaties are both distinctly important and distinctly challenged. Identifying the difference between these types of treaty commitment provides conceptual clarity that organizes treaty critiques, clarifies conditions for treaty success, and helps resolve critical persuasion treaty pathologies.

There is a pressing need for a new approach to treaty problems. In vital areas such as international environmental law, we are failing to conclude effective treaties, and the treaties we do conclude fail to garner compliance.[5] For example, diplomats from nearly two hundred countries gathered in Durban, South Africa in November 2011 to renew climate change commitments under the Kyoto Protocol and start designing a Kyoto successor.[6] But they accomplished almost nothing.[7] The headlines out of Durban reported not the agreement but the mess: sleepless nights, heated debates, and minute gains.[8] Ultimately, treaty parties simply "kicked the can down the road," producing only a tepid agreement to agree in the future.[9]

Responding to recent treaty failures, the literature asks whether, in a world in which the private sector wields substantial global influence, the traditional state-based tools of international law are adequate to coordinate global conduct.[10] To put this another way, how can agreements be-

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[5] See, e.g., Sungjoon Cho & Claire R. Kelly, Promises and Perils of New Global Governance: A Case of the G20, 12 Chi. J. Int'l L. 491, 497 & nn.13–14, 498 & nn.15–17 (2012) (collecting literature on multilateral treaty failures and identifying why treaties are ineffective at coordinating global financial regulations).

[6] The Durban talks constituted a Conference of the Parties to the 1992 U.N. Framework Convention on Climate Change. See United Nations Framework Convention on Climate Change, Q&A with UNFCCC Executive Secretary Christina Figueres: The UNFCCC and the UN Climate Change Conference in Durban (Nov. 2011), available at http://unfccc.int/files/press/fact_sheets/application/pdf/expectations_for_cop17.pdf [hereinafter Figueres Q&A].

[7] For further discussion, see infra Section I.A.

[8] See Editorial, Beyond Durban, N.Y. Times, Dec. 17, 2011, at A24.

[9] Id.; see also Kristin Choo, Washed Away: As Sea Levels Rise, Island Nations Look to the Law to Fend off Extinction, A.B.A. J., Mar. 1, 2012, available at http://www.abajournal.com/magazine/article/washed_away_as_sea_levels_rise_island_nations_look_to_the_law (noting that, according to Professor Michael Gerrard, the Durban talks "kicked the can down the road" even though, "for some of the island nations, there is no road left").

[10] See, e.g., Cho & Kelly, supra note 5, at 497 (critiquing treaties as an ineffective way to coordinate global regulation); Dan Danielsen, How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance, 46 Harv. Int'l L.J. 411, 422–24 (2005) (examining significant private business roles in global governance); Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 Colum. J.

tween national governments effectively govern a vast and empowered private business sector?[11] This critique—which I label the "privatization" critique—arises out of two connected developments: first, multilateral treaty failures, and second, the emergence of transnational regulatory networks that seemingly replace the regulatory role treaties once played.[12] At the same time, even the treaty critics often acknowledge that treaties are indispensable.[13] Treaties facilitate international coordi-

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Transnat'l L. 389, 392–95 (2005) (noting that "in an ideal world" governments might—on the prompting of civil society groups—issue more stringent regulations to control the behavior of multinational corporations, but in the actual world civil society groups often do not press for these more stringent regulations; moreover, some governments are "unwilling or unable" effectively to constrain multinational corporations through regulation).

[11] See Carlos M. Vázquez, Direct vs. Indirect Obligations of Corporations under International Law, 43 Colum. J. Transnat'l L. 927, 930 (2005) [hereafter Vázquez, Direct vs. Indirect Obligations] (noting the "general rule" that international law obligations rest on states and international organizations alone; to the extent that international law governs corporate or other private behavior, it does so by requiring states to regulate those nonstate actors).

[12] See Kenneth W. Abbott & Duncan Snidal, Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit, 42 Vand. J. Transnat'l L. 501 (2009) (describing and advocating a transnationally linked and voluntarily promulgated system of regulatory norms); Cho & Kelly, supra note 5, at 497 (advocating regulatory networks supervised by the G20); Robert V. Percival, Global Law and the Environment, 86 Wash. L. Rev. 579, 582, 633–34 (2011) (recommending a focus on "global law," which encompasses various governmental and nongovernmental methods of enhancing the transparency of multinational corporate acts). In fact, Professor José Alvarez characterizes as a central assumption of liberal theory the proposal "that the future of effective international regulation lies not with traditional treaties . . . but with transnational networks of government regulators." Jose E. Alvarez, Interliberal Law: Comment, 94 Am. Soc'y Int'l L. Proc. 249, 251 (2000) [hereinafter Alvarez, Interliberal Law]. Professor Anne-Marie Slaughter, one of the pioneers of this work, asserts that "law that has a direct impact on individuals and groups"—such as private voluntary agreements, transgovernmental agreements, or what Slaughter terms "traditional transnational law"—"will . . . have the greatest impact on international order" and be "more likely to get at the root of the problem" than traditional public international law. See Anne-Marie Slaughter, A Liberal Theory of International Law, 94 Am. Soc'y Int'l L. Proc. 240, 245–46 (2000) [hereinafter Slaughter, A Liberal Theory]. A separate literature also notes the "vast increase in the reach and forms of transgovernmental regulation" and other forms of transnational governance that might be characterized as "administrative," and analyzes these forms of coordination under the rubric of "global administrative law." See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, The Emergence of Global Administrative Law, 68 Law & Contemp. Probs. 15, 15, 42 (2005) (outlining the theory and collecting literature).

[13] See, e.g., Slaughter, A Liberal Theory, supra note 12, at 243 ("Although much of the literature on this growing body of rules and norms treats them as entirely 'private,' the state is never far away."); see also Raustiala, Form and Substance, supra note 2, at 614 ("[E]ven a networked world will require explicit agreements."); Dinah Shelton, Normative Hierarchy in International Law, 100 Am. J. Int'l L. 291, 317 (2006) (noting that due to globalization and the increasing interdependence of states, many modern problems cannot be solved in a pure-

nation, have important signaling functions, and, crucially, play a structural role within which nontreaty mechanisms are successful.[14] In short, because we cannot do without treaties in this regulatory realm—either conceptually or practically[15]—we need new means of understanding and curing their failures.

This Article seeks to unearth the execution and compliance problems that drive the privatization critique, analyze the nature of those problems, and identify means of ameliorating them. I propose that the answers turn on identifying and understanding the class of treaties to which the problems inhere.

"Persuasion" treaties anticipate domestic implementation through regulation of private actors.[16] Of course, governments sign these treaties, and governments are responsible for compliance with them.[17] But persuasion treaties demand changes in private-sector conduct. In contrast,

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ly consensual system and require formal international agreement, "rules that require strict compliance," and mechanisms to influence the conduct of outlier states).

[14] For further discussion, see infra Section I.A.

[15] See Alvarez, Interliberal Law, supra note 12 ("There is no sign that states are entering into fewer formal treaties," and "the age of intergovernmental institutions aspiring to universal participation is not past."); see also Scott Barrett, Rethinking Global Climate Change Governance, 3 Econ.: Open-Access, Open-Assessment E-J., no. 5, 2009, at 2 (stating that international coordination will be needed to address the climate change problem and, "to deter free riding and prevent leakage," that coordination should be formalized as a treaty or "system of treaties"); Cass R. Sunstein, Irreversible and Catastrophic, 91 Cornell L. Rev. 841, 896–97 (2006) (advocating, on the basis of an "Irreversible Harm Precautionary Principle," a global agreement that would cap and then steadily reduce greenhouse gas emissions).

[16] The distinction this Article introduces does not relate to a treaty's execution status. In other words, persuasion treaties can be self-executing or non-self-executing. In the United States, the distinction depends upon whether the United States has existing regulatory tools to accomplish the ends the treaty anticipates. See generally Lori Fisler Damrosch, The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, 67 Chi.-Kent L. Rev. 515, 516 (1991) (stating that self-executing treaties are "treated as directly effective and immediately applicable in private lawsuits or otherwise," whereas non-self-executing treaties "require implementing action by the political branches of government or . . . are otherwise unsuitable for judicial application"); Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995) [hereinafter Vázquez, Four Doctrines] (analyzing U.S. law on treaty execution status). In other constitutional systems, the rules regarding self-execution vary. For a helpful comparative study, see Duncan B. Hollis, A Comparative Approach to Treaty Law and Practice, *in* National Treaty Law and Practice 1, 3 (Duncan B. Hollis et al. eds., 2005).

[17] See sources cited supra note 1. While treaty obligations bind state parties, sometimes international organizations and other third parties also play a role in treaty drafting, ratification, or enforcement. See José E. Alvarez, Governing the World: International Organizations as Lawmakers, 31 Suffolk Transnat'l L. Rev. 591, 591–92 (2008) [hereinafter Alvarez, Governing the World].

treaties concerning principally governmental conduct are not as dependent on private-sector cooperation. For convenience, I call these latter treaties "resolution treaties."[18] Persuasion treaties deserve special attention because they are increasingly necessary to solve emerging global coordination problems, and the relationship between private and public entities with respect to persuasion treaties is particularly complex.

I use the term "persuasion" to draw attention to the nature of that complex public/private relationship. In short, in order for states rationally to enter into a treaty that concerns principally private conduct—and for such a treaty ultimately to succeed—the state must be able to secure the compliance and cooperation of those private-sector entities whose conduct the treaty seeks to control.[19] To regulate effectively, a govern-

[18] Resolution treaties may reach private conduct under limited exceptions, such as when private actors act on behalf of the state and those private acts are attributed to the state. See Vázquez, Direct vs. Indirect Obligations, supra note 11, at 932–34. Moreover, a growing literature addresses the question whether private corporate entities may be held directly accountable for violations of human rights laws. See, e.g., John Gerard Ruggie, Business and Human Rights: The Evolving International Agenda, 101 Am. J. Int'l L. 819, 820, 824 (2007) (evaluating and critiquing attempts by the international community to engage business on human rights issues; one draft set of norms both acknowledges that "states are the primary duty bearers in relation to human rights," and stipulates that private business entities "within their 'spheres of activity and influence,' have corresponding legal duties"); see also Kiobel v. Royal Dutch Petroleum, SCOTUSblog, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum (last visited Jan. 29, 2013) (collecting commentary, analysis, and briefing related to a pending U.S. Supreme Court case that considers, inter alia, whether corporations may be held liable under the Alien Tort Statute for violations of international law); U.N. News Centre, U.N. Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights, Jun. 16, 2011, http://www.un.org/apps/news/story.asp?NewsID=38742 (endorsing the Guiding Principles for Business and Human Rights, developed by Professor Ruggie, which outlines how states and business entities share responsibility for protecting human rights). But see Vázquez, Direct vs. Indirect Obligations, supra note 11, at 933–34 (noting the very limited nature of direct corporate accountability under international law). Finally, treaties can be evaluated provision by provision, and, like treaties that are partially self-executing and partially non-self-executing, or treaties that are partially binding and partially nonbinding, treaties may fall at all points on a persuasion/resolution continuum.

[19] This conclusion assumes that a state's capacity to comply with its commitments will have some bearing on the state's decision whether to commit to a multilateral treaty, but it does not assume that a state's decision to commit will precisely correlate with ultimate compliance. The assumption is thus weaker than that asserted by Professors Abram Chayes and Antonia Handler Chayes. See Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 3–9 (1995) (proposing that states are generally inclined to comply with their international agreements; a state will not tend to enter into an agreement with which it does not anticipate the capacity to comply). There is, of course, a longstanding debate in the literature regarding whether and how international law constrains state behavior. For significant recent contributions, see Thomas M.

ment must secure tacit acquiescence from its regulatory subjects through an effective threat of enforcement or other means.[20] Unless the relevant business entities have been successfully persuaded to comply, either there will be no treaty, or any treaty that is concluded will fail.

To be sure, the state does not always bear the burden of persuasion. In some cases, industry interests will coincide with treaty requirements naturally. This is likely to be rare, however, as it is reducing negative consequences of unfettered industry that is often the object of the treaty in the first place. In other cases, actions by foreign or nongovernmental entities can serve to align business support behind treaty ends. In any case, the important fact is that persuasion treaty success requires that by some means the relevant business entities become willing to cooperate with treaty goals.

The persuasion treaty theory builds upon, and contributes to, a growing literature on the interaction between public and private sources of

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Franck, Fairness in International Law and Institutions 7–9 (1995) (states will comply with regimes they perceive to be legitimate); Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005) (analyzing compliance through rational choice theory and proposing that states comply with international law only for instrumental reasons); Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 Calif. L. Rev. 1823, 1825 (2002) (noting that states comply to preserve reputations and avoid informal and formal sanctions); Robert O. Keohane, International Relations and International Law: Two Optics, 38 Harv. Int'l L.J. 487, 500 (1997) [hereinafter Keohane, Two Optics] (reasoning that institutions facilitate compliance with international law by shaping reputations); Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599, 2603 (1997) [hereinafter Koh, Why Do Nations Obey?] (reviewing Chayes & Chayes, supra, and Franck, supra) (arguing that compliance arises from internalization of legal norms).

[20] As any driver who has exceeded the speed limit on the highway knows, the existence of regulation does not in itself ensure compliance. The problem of whether rules that are not obeyed without enforcement are in fact legal rules will be familiar to those versed in late twentieth-century legal philosophy. See generally H. L. A. Hart, The Concept of Law 6–7 (2d ed. 1994) (distinguishing law and legal systems from a gunman's threats; law persists through time, while the gunman's threats have force only as long as the weapon is drawn); Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory, at xvii (2001) (noting debates over the role of incorporation in legal authority; that is, the idea that law acquires legal force when law's subjects incorporate it as a reason for action); Joseph Raz, Practical Reason and Norms 80–84 (Princeton Univ. Press 1990) (1975) (stating that, according to the "normal justification thesis," law is authoritative only if subjects adopt its ordering of reasons for behavior). This Article sets aside the question whether noninternalized rules have the force of law, adopting the assumption that the mere existence of regulatory rules is insufficient to ensure compliance unless regulatory subjects internalize those rules.

power in the domestic sphere.[21] That literature seeks to understand the ways corporations become deeply enmeshed in the process of regulating. The scholarship shows that corporations and industry groups possess expertise, political power, and enforcement capital upon which regulatory regimes depend.[22] Deep interdependence between public and private actors "shatters the notion of 'public' power."[23] Regulation is not exclusively top-down.[24] Rather, the public and private sectors negotiate their relationships, and the nature of that negotiation determines the content and success of regulatory goals.[25]

I submit that the nature of those domestic regulatory negotiations determines the success or failure of multilateral treaty regimes. Private-sector choices, either to cooperate with or to impede domestic regulatory regimes, are significant on the international stage. Business choices affect whether a state will be able to comply with its treaty obligations and also whether a state may rationally sign on to those obligations in the first place.[26] Persuasion treaty regimes that do not garner the support of relevant private-sector entities will fail, either ex ante (because they will not secure international agreement) or ex post (because they will not achieve results). Conversely, persuasion treaty success depends on whether private-sector entities align their interests with treaty goals.[27]

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[21] See, e.g., Danielsen, supra note 10, at 411 (tracing the corporate role in transnational governance); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 547 (2000) (noting the "deep interdependence among public and private actors in accomplishing the business of governance"); Lesley K. McAllister, Co-Regulation in Mexican Environmental Law, 32 Utah Envtl. L. Rev. 181, 181 (2012) (asserting that while public/private co-regulation has become commonplace in industrialized countries, it is now also emerging in response to regulatory shortcomings in developing countries).

[22] See Danielsen, supra note 10, at 412; Freeman, supra note 21 ("Private participation in governance is neither marginal nor restricted to the implementation of rules and regulations." Rather, the private role is "pervasive[]" and "operates symbiotically with public authority." Private actors "perform 'legislative' and 'adjudicative' roles, along with many others, in a broad variety of regulatory contexts. They set standards, provide services, and deliver benefits. In addition, they help implement, monitor, and enforce compliance with regulations. Nongovernmental organizations exert, in the context of a larger network of relationships, coercive power.").

[23] Freeman, supra note 21.

[24] See id. at 547–48.

[25] See id. at 548.

[26] Again, this conclusion does not assume that states will only sign on to treaties with which they intend to comply, but it does assume that capacity to comply may inform willingness to commit. See sources cited supra note 19 and accompanying text.

[27] For an example of persuasion treaty success, see infra Part III, which examines circumstances surrounding the signing of the Montreal Protocol and its ultimate success.

Clarifying the nature of these problems guides our analysis of possible solutions. Corporate opposition might be overcome through incremental regulatory migration and networking. Treaty designers should seek to capitalize on regulatory network successes, and states should design regulatory regimes that are exportable. Advocates should seek to neutralize resistance by putting corporate choices in the public eye. Transnational litigation, corporate responsibility measures, and public information campaigns all may have a role.[28]

Part I outlines the privatization critique and explains why it merits our attention; Part II constructs and defends the persuasion treaty theory; Part III illustrates the theory with preliminary empirical support; and Part IV shows how the theory frames problems and identifies possible solutions.

I. BACKGROUND

A. The Demise of the "Grand Bargain"

"Are big international climate conferences useless?" So the *Washington Post* editorial board queried in December 2011 after such a conference in Durban, South Africa.[29] In the press, as in the academic literature, treaties are under siege.

For anyone interested in addressing climate change through the multilateral treaty process, the Durban conference presented a fleeting opportunity: the last chance to extend Kyoto Protocol commitments before Kyoto's expiration in 2012 and an important chance to begin crafting a Kyoto successor.[30] Durban was instead chaotic and all but fruitless. After harried negotiations "marked by exhaustion and explosions of temper," where Canada pulled out of Kyoto altogether, and negotiators experienced all-nighters and days of overtime,[31] the conference offered few

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[28] See discussion infra Part IV.

[29] Editorial, Haze in the Forecast, Wash. Post, Dec. 15, 2011, at A30 [hereinafter Editorial, Wash. Post]. Others opined that a big multilateral agreement is not the place to look for progress on the climate front. See Editorial, Beyond Durban, N.Y. Times, Dec. 17, 2011, at A24 [hereinafter Editorial, N.Y. Times].

[30] More precisely, all existing commitments to reduce greenhouse gas emissions under the Kyoto Protocol expired in 2012. See United Nations Framework Convention on Climate Change, Kyoto Protocol (2012), available at http://unfccc.int/kyoto_protocol/items/2830.php. The Kyoto Protocol is the world's only legally binding agreement on climate change. See Figueres Q&A, supra note 6, at 2.

[31] See, e.g., John M. Broder, Climate Talks Yield Limited Agreement to Work Toward Replacing Kyoto Protocol, N.Y. Times, Dec. 12, 2011, at A9; Geoffrey Lean, Climate Change Conference: Durban Deal Gives the World a Chance, Telegraph, Dec. 12, 2011,

results: a tepid agreement to agree in some areas and, in others, "an 'agreement' Europe has made with itself."[32]

After Durban, the press expressed what many onlookers were likely thinking: the multilateral treaty process is ineffective and out of touch with reality.[33] As a *New York Times* editorial put it, "Startling new evidence that global carbon dioxide emissions are rising faster than ever did little to increase the urgency. . . . Once again, the world's negotiators kicked the can down the road."[34] For real progress on climate change, the *Times* editorial board observed, the world "cannot keep waiting for a grand bargain."[35]

A growing body of academic literature echoes the critique in the press. For example, a recent piece by Professors Sungjoon Cho and Claire R. Kelly critiques treaties on the ground that the process of concluding them demands extensive negotiation among parties, who are beset by lobbies from private entities and groups as they work to finalize

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http://www.telegraph.co.uk/earth/environment/climatechange/8950144/Climate-change-conference-Durban-deal-gives-the-world-a-chance.html (discussing a "third consecutive all-night session" and noting that the conference ended thirty-six hours late).

[32] Editorial, Global Warming Wash Out, Wall St. J., Dec. 13, 2011, at A20 [hereinafter Editorial, Wall St. J.] (justifying the characterization by the facts that the United States never ratified the Kyoto Protocol in the first place, Canada did not join the Durban agreement—instead it withdrew from Kyoto entirely—Russia and Japan did not agree to the Durban extensions, and "Australia is wavering"). As for the substance of the agreement to agree, conference parties agreed simply to establish a legal instrument of some sort by 2015 and to implement it by 2020. Id.; see also Broder, supra note 31 (quoting Council on Foreign Relations fellow Michael Levi as saying that "[t]he reality is that there is no more agreement on the future of the climate talks than there was when negotiators first convened two weeks ago"). Not everyone shares such a pessimistic view of the progress at Durban. Successes that some champion include progress on a "green fund" to help developing countries adapt to climate change and an agreement by China and India to relinquish the principle of differentiated responsibility that has previously allowed them to assume lesser responsibilities for emissions reductions. See, e.g., Editorial, N.Y. Times, supra note 29; see also United Nations Framework Convention on Climate Change, Durban Climate Change Conference – November/December 2011, available at http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php (celebrating progress at Durban as a "breakthrough on the international community's response to climate change").

[33] See, e.g., Editorial, Wall St. J., supra note 32 ("U.N.-inspired causes and conferences, like comets tracing highly elliptical orbits, operate on their own momentum even when far from the sun.").

[34] Editorial, N.Y. Times, supra note 29; see also Editorial, Wall St. J., supra note 32 (observing that the conference in Durban "was, by common consensus, a wash out").

[35] Editorial, N.Y. Times, supra note 29 (characterizing the meeting at Durban as "the 17th in a series of habitually quarrelsome and mostly unproductive gatherings" since the original Rio climate change conference in 1992).

treaty texts.[36] Cho and Kelly observe that international agreement is difficult for three reasons: negotiators are alert to changing global circumstances and are loath to eliminate their future flexibility by making concrete commitments; treaties are often accompanied by reservations and other party-specific caveats that minimize the treaty's effectiveness; and the treaty amendment process is "tortuous," such that treaties cannot adapt quickly to rapidly evolving global regulatory needs.[37] The authors propose, instead, that governments should coordinate their regulatory efforts, and that, in the context of economic regulation, a centralized group such as the G20 might assist them in doing so.[38]

Cho and Kelly are not alone in their assessment of treaties. Professor José Alvarez characterizes as a central assumption of liberal theory the proposal that "the future of effective international regulation lies not with traditional treaties . . . but with transnational networks of government regulators."[39] Indeed, Professor Anne-Marie Slaughter, a central thinker in liberal legal theory, has long asserted that one of the "most important and effective" means of global governance is not top-down international treaty law but "direct regulation of private actors . . . with deliberate transnational or global intent."[40]

In addition to transnational regulatory networks, Slaughter also lauds the spread of "private regimes" arising from corporate codes of conduct or industry association norms that take on transnational effect.[41] Others also champion voluntary law over traditional forms: Professors Kenneth Abbott and Duncan Snidal, for example, criticize the "persistent regulatory inadequacies" of treaty-based "international 'Old Governance'" and encourage states and intergovernmental organizations to focus attention on promoting voluntary networks, which might fill governance gaps.[42]

The move away from treaties is both explicit and implicit. In the environmental arena, for example, a number of scholars propose various

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[36] See Cho & Kelly, supra note 5, at 497.
[37] See id. at 498.
[38] See id. at 497.
[39] Alvarez, Interliberal Law, supra note 12, at 250.
[40] Slaughter, A Liberal Theory, supra note 12, at 245.
[41] Id. at 243. In Slaughter's conception, there are two forms of "directly" regulating law, and both are more effective at structuring private behavior and "get[ting] at the root of the problem" than public international law, which affects private conduct only through the intermediation of the state. Id. at 245–46. These two forms are voluntary norms with transnational effect created by business and industry groups, and national regulations that reach across national borders to govern extraterritorially. Id. at 245–46.
[42] See Abbott & Snidal, supra note 12, at 510.

forms of decentralized, transgovernmental, non-treaty regulatory systems and simply do not address the role of treaties in global governance.[43]

But the era of treaty-based governance is not over. Even those who are most skeptical about treaty power acknowledge that private, nonlaw governance mechanisms take place in the shadow of law's influence.[44] As José Alvarez observes, many of the nontraditional modes of global governance are "nestled within traditional treaty regimes."[45] Moreover, the nontraditional governance mechanisms acquire some of their legitimacy from those traditional treaty regimes, since treaties are usually products of agreements between democratically legitimate governments.[46] Thus, as Professor Kal Raustiala points out, formal agreements will still be needed even if transgovernmental networks evolve into the dominant means of global coordination in the twenty-first century.[47]

For many reasons, climate change is an unfair example of multilateral treaty failures. The complexity of the problem is notorious, and the notoriety is well-earned.[48] But climate change serves as a pointed example of

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[43] See, e.g., Percival, supra note 12, at 624 (focusing on efforts to increase the transparency of multinational corporate actions that affect the environment); see also Abbott & Snidal, supra note 12, at 509–10 (advocating "Transnational New Governance," a system of voluntary and soft-law transnational norms intended to compliment traditional state regulation and fill gaps left by treaty-based international law).

[44] See, e.g., Slaughter, A Liberal Theory, supra note 12, at 243 ("Although much of the literature on this growing body of rules and norms treats them as entirely 'private,' the state is never far away.").

[45] Alvarez, Interliberal Law, supra note 12, at 250.

[46] See id.

[47] Raustiala, Form and Substance, supra note 2, at 614 ("[E]ven a networked world will require explicit agreements.").

[48] See Richard J. Lazarus, Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future, 94 Cornell L. Rev. 1153, 1159 (2009) (pointing out that drafting climate change laws is "extraordinarily difficult" even after one resolves the debate as to whether climate change is occurring and worth addressing). Lazarus categorizes climate change as a "super wicked" public policy problem: first, climate change is classically "wicked," because it is characterized by "interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution"; second, it is "super" wicked because it presents an additional set of confounding problems including the costliness of time, the fact that the global actors that caused the problem lack sufficient incentive to solve it, and the lack of a supranational government to coordinate lawmaking and enforcement. See id. at 1159–60. Perhaps unsurprisingly, given these challenges, the Kyoto Protocol was remarkably unsuccessful. See Barrett, supra note 15 (analyzing the Kyoto Protocol's "enforcement deficit"); see also Scott Barrett, Towards a Better Climate Treaty, 3 World Econ. 35, 35–36 (2002) (noting that the Kyoto Protocol is plagued by "poor incentives for participation and compliance"—requiring, for example, that states bear the respon-

the reason full international agreements are still necessary: some global commons problems demand nothing less.[49] Among others, Professor Cass Sunstein argues that nothing short of a worldwide climate change agreement would be prudent; such agreement would be difficult to construct absent a treaty.[50]

Moreover, treaties have coordination and standard-setting functions. Treaties can help prevent the "divergent convergence" of regulatory standards that can occur when regulations migrate.[51] As some in the social science literature point out, when states adopt foreign regulatory standards they often modify those standards to optimize them for local regulatory preferences.[52] While the regulatory policy may spread global-

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sibility to punish their own noncompliance—and, at bottom, "is an example of how *not* to construct a treaty"); John K. Setear, Learning to Live with Losing: International Environmental Law in the New Millennium, 20 Va. Envtl. L.J. 139, 141 (2001) (asserting that events subsequent to Kyoto's signing revealed "a debacle of unparalleled proportions . . . the decisive failure of an ambitious, laboriously negotiated, and comprehensive approach to an important international environmental problem").

[49] See generally Geoffrey Palmer, New Ways to Make International Environmental Law, 86 Am. J. Int'l L. 259, 282–83 (1992) (arguing that environmental commons issues require binding international standards, which would ideally be issued by a new U.N. institution possessing enforcement power); Shelton, supra note 13, at 317 (arguing that a regime with formal international agreements is a matter of necessity because "many modern international problems" cannot be resolved without them).

[50] See Sunstein, supra note 15 (discussing the "Irreversible Harm Precautionary Principle," under which "regulators, including those who make environmental policy, should find it worthwhile to invest resources to preserve flexibility for the future," and arguing that the best approach to climate change is a full international agreement).

[51] Elizabeth Fisher, The 'Perfect Storm' of REACH: Charting Regulatory Controversy in the Age of Information, Sustainable Development, and Globalization, 11 J. Risk Res. 541, 555 (2008) (citing social science literature that uses the term "divergent convergence" to refer to the phenomenon that regulatory reform movements often result in regulations of many different forms in different jurisdictions, which serves as an irritant to open markets). A robust debate focuses on the effects and normative desirability of transnational regulatory externalization. An older literature expressed concern over the specter of the "races to the bottom" that might occur as global markets opened; more recent scholarship asserts that the contrary is also true—some powerful regulators set regulatory standards to which global industry adapts in order to maintain market position, paving the way for similarly strict regulations in diverse jurisdictions. For a review of the literature and an exploration of how the European Union is able to set global regulatory standards through market-generated regulatory migration, see, generally Anu Bradford, The Brussels Effect, 107 Nw. U. L. Rev. 1 (2012); Beth A. Simmons, The International Politics of Harmonization: The Case of Capital Market Regulation, 55 Int'l Org. 589 (2001) (exploring political, market-based, and institutional factors that that drive harmonization of regulations across global jurisdictions).

[52] See Fisher, supra note 51, at 554–55 (noting that regulations in one jurisdiction can "act as catalysts for regulatory reform in other jurisdictions but the nature of that reform is dependent upon the unique circumstances of that other culture").

ly, the implementing regulations are often inconsistent, causing irritation to the free flow of markets and transnational industry.[53] Multilateral treaties do not necessarily standardize laws, as they often leave many implementation choices open to signatory states, but they can have a standardizing influence and ease irritation.[54]

Multilateral agreements also set minimum standards that can prevent the races to the bottom, or "leakage," that result from inconsistent regulatory approaches.[55] Moreover, some point out that corporate responsibility measures can never substitute entirely for globally coordinated regulation because industry will never make choices that are divorced entirely from profit-maximization.[56]

Finally, while a full defense of multilateral treaties is beyond the scope of this Article, it is clear that the international community has not abandoned them.[57] If we omit multinational treaties from our normative

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[53] See id. at 555 (noting that through "divergent convergence" migrating regulatory standards may cause irritation to markets).

[54] For example, in the chemicals arena, an international agreement standardizing global chemicals testing would ensure that a testing regime begun in one country is useful elsewhere. See Commission of the European Communities, White Paper: Strategy for a Future Chemicals Policy, at 9, COM (2001) 88 final (Feb. 27, 2001) [hereinafter White Paper], available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0088:FIN:EN:PDF (noting the usefulness of the "globally harmonised testing methodology" developed under the auspices of Agenda 21 adopted by U.N. Conference on Environment and Development at the Earth Summit in Rio).

[55] See discussion infra Section IV.A (noting California's concerns that stringent regulations in the European Union would result in "dumping" of more dangerous noncompliant products in California); see also Percival, supra note 12, at 599–600 ("[G]lobalization has not entirely halted the export of unreasonably dangerous products from developed countries to the developing world."). For example, when the Canadian asbestos industry feared losing its U.S. market due to more stringent asbestos regulations in the United States, the Canadian industry trade association temporarily persuaded the World Bank to encourage increased asbestos use in developing countries. Id.

[56] See Neil Gunningham, Corporate Environmental Responsibility: Law and the Limits of Voluntarism, *in* The New Corporate Accountability: Corporate Social Responsibility and the Law 476, 498 (Doreen McBarnet et al. eds., 2007) (finding that corporations choose to engage in voluntary corporate responsibility arrangements "for essentially pragmatic reasons" and often justify that choice as a means to manage risk; these corporate responsibility ventures are often "a calculated response to external pressures rather than an expression of any internal moral or philanthropic commitment"); see also James Gustave Speth, The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability, 165, 166–69 (2008) (identifying features of the corporate form that prevent corporations from making uneconomic choices).

[57] Alvarez, Interliberal Law, supra note 12 (stating that "[t]here is no sign that states are entering into fewer formal treaties" and that "the age of intergovernmental institutions aspiring to universal participation is not past").

vision, we have to find ways to explain the fact that our global diplomats are still busy about the task of constructing multilateral treaty architecture, presumably because we maintain faith in the possibility of treaty effectiveness. Either this lawmaking activity is meaningless—"ineffective, obsolete and inconsequential"[58]—or we still do give some credence to the treaty system.

If we need effective and successful treaties but seem unable to make them, there is analytic work to be done. What are the factors that contribute to and challenge multilateral treaty-making success?

The difficulties presented at the Durban conference focus a set of intuitions about lurking challenges. One set of intuitions relates to the fact that treaties require agreement between a large number of differently situated states. This problem, which was colorfully on display in Durban,[59] receives significant and justified academic attention.[60] The legal literature on treaty making and compliance is now heavily influenced by international relations scholarship, as this Article outlines further in Section I.D, and international relations factors also drive many existing critiques of treaty law.[61]

A second set of intuitions arises from a troubling question lingering in the background: if states were to construct an effective climate treaty,

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[58] Stephen Tully, Corporations and International Lawmaking 6 (2007) (citing Myres S. McDougal, International Law, Power and Policy: A Contemporary Conception, 82 Recueil des Cours 133, 162 (1953)).

[59] Indeed, official accounts of the failure of multilateral climate change agreements focus on political negotiations between state parties. For example, the United States justified its refusal to ratify the Kyoto Protocol on the ground that the Protocol incorporated the principle of "common but differentiated responsibility," leaving China, India, and other developing countries without any significant responsibility for emissions reductions. See Thilo Kunzemann, The Past and Future of the Kyoto Protocol, Allianz, Nov. 27, 2011, http://sustentabilidade.allianz.com.br/?131 (stating that U.S. politicians were angered by the fact that the Kyoto Protocol gave major economic competitors a "free ride"). Canada echoed these complaints when it withdrew from the Kyoto Protocol at the Durban conference. See Canada to Withdraw from Kyoto Protocol, BBC News, Dec. 13, 2011, http://www.bbc.co.uk/news/world-us-canada-16151310. The Chinese delegation at Durban "accused developed countries of hypocrisy," Broder, supra note 31, and news accounts decried the complications arising from too many state participants, see, e.g., Editorial, Wash. Post, supra note 29 (stating that the conference was weighed down by "scores of small, poor nations, which produce little pollution and don't really need to be in the room").

[60] For a review of the rich literature that bridges international legal theory and international relations scholarship, see Oona A. Hathaway & Harold Hongju Koh, Foundations of International Law and Politics (2005).

[61] See generally id.; see also Cho & Kelly, supra note 5, at 497–98 (critiquing treaties on the ground that it is difficult for states to agree on treaty texts).

would they have the domestic power to satisfy the commitments such a treaty would require? Is their failure to commit somehow related to lack of enforcement power over domestic constituencies? An accord that set out to attain even the targets that Kyoto set over a decade ago would have far-reaching impacts on private economic activity.[62] Corporate actors, we know, have economic and political power. While corporate actors had no explicit negotiating power in Durban, it seems inescapable that those negotiations took place in the shadow of their influence.[63] This Article proposes that we need a better account of the nature of that shadow.

B. The Privatization Critique

The privatization critique is the observation that private entities have a functional role in global governance that is not fully explained by their legal status. This critique has its roots in observations about the rise of corporate power and the role of corporations within the international system. The critique responds to the fact that, quite simply, business is big.[64] As Professor Philippe Sands observed a decade ago, some global corporations have "annual operating budgets vastly in excess of most states."[65] In 2010, the six largest companies on the *Fortune* Global 500 list had a combined dollar-value revenue that exceeded the United Kingdom's Gross Domestic Product ("GDP").[66] By comparing revenue to

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[62] See Barrett, supra note 15, at 2 (noting that any agreement would require parties to "change their behavior substantially" and, absent full compliance, would affect business competitiveness).

[63] See, e.g., John H. Cushman Jr., Intense Lobbying Against Global Warming Treaty, N.Y. Times, Dec. 7, 1997, at 28 (describing lobbying by "powerful business interests" against the climate change accord). The fact that there was no corresponding uproar over Durban might be explained by the fact that "nobody had expected great progress from Durban" anyway. Editorial, N.Y. Times, supra note 29.

[64] The Democratic Leadership Council ("DLC"), a partisan research group, offered this observation together with some illustrative numbers. See DLC, The World's Top 50 Economies: 44 Countries, Six Firms, July 14, 2010, http://www.dlc.org/ndol_cie5ae.html?kaid=108&subid=900003&contentid=255173.

[65] See Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. Int'l L. & Pol. 527, 541 n.39 (2001) (comparing Microsoft's annual revenue and operating expenses with that of nation states); see also Speth, supra note 56, at 166 ("On a global scale, the thousand largest corporations produce about 80 percent of the world's output.").

[66] See DLC, supra note 64. The six firms included Walmart, Royal Dutch Shell, ExxonMobil, BP, Toyota, and Japan Post, and their combined dollar-value revenue was $2.34 trillion. By contrast, the UK's GDP was $2.22 trillion. As the DLC acknowledges, the two

GDP, those six companies would rank among the world's fifty largest economies; moreover, almost half of the world's one hundred largest economies would be private companies.[67]

As international law scholars predicted in the 1970s, and have recently begun to note again, economic power corresponds with other kinds of global influence.[68] Some of this is expressed through traditional international law mechanisms, and some of it is extra-legal.

In the late 1990s, private entities began seeking and obtaining various rights to participate in international institutions, which had previously only been available to states.[69] The World Trade Organization ("WTO") began accepting submissions from corporations and industry groups.[70]

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numbers were calculated by different means and thus are not as comparable as the bare numbers would suggest. See id. For older calculations with similar results, see Sarah Anderson & John Cavanagh with Thea Lee and the Institute for Policy Studies, Field Guide to the Global Economy 69 (rev. ed. 2005) (using data from the World Bank, World Development Indicators online, and *Fortune* magazine to find that the top 100 global economies included fifty-two corporations and forty-eight countries); Paul de Grauwe & Filip Camerman, How Big are the Big Multinational Companies?, 47 Tijdschrift voor Economie en Mgmt. 311, 315–16 (2002), available at https://lirias.kuleuven.be/bitstream/123456789/266744/1/2002-3_311-326p.pdf (finding that thirty-seven of the world's largest one hundred economies are corporations).

[67] DLC, supra note 64 (forty-two of the one hundred largest economies would be private companies).

[68] After some attention in the 1970s, attention to this problem diminished, but it has emerged again recently among those who propose private network systems of global governance or those who seek to hold corporations directly accountable for human rights violations. See Ruggie, supra note 18, at 819 ("The United Nations first attempted to establish binding international rules to govern the activities of transnationals in the 1970s," but after a decade of negotiations, the project was abandoned; more recently, "soft law" approaches have gained prominence.); see also Raymond Vernon, Sovereignty at Bay: The Multinational Spread of U.S. Enterprises (1971) (providing an account of the future wherein powerful multinational power would grow at the expense of state power); Raymond Vernon, Sovereignty at Bay: Twenty Years After, *in* Multinationals in the Global Political Economy 19, 19–22 (Lorraine Eden & Evan H. Potter eds., 1993) (noting that after a brief period of attention to the topic in the 1970s, academic attention faded); Abbott & Snidal, supra note 12, at 503–05 (noting that industry has "vigorously resisted" regulation, whether binding or nonbinding, by state and international bodies).

[69] See Sands, supra note 65, at 544–47.

[70] The WTO originally did not anticipate that nonstate actors of any sort (business or otherwise) would play roles in WTO processes, and negotiations between state delegates occurred in private. See id. at 543–44. Then the WTO Appellate Body ruled that WTO members could select "whomever they wished to represent them, from the government or outside," which created possibilities for various members of civil society and industry groups to participate in WTO processes. Id. at 544–45. Soon environmental groups asked the WTO to consider whether it would accept amicus briefs from nonstate entities. Once the WTO agreed, major industry groups quickly followed suit. See id. at 545–46.

The European Court of Human Rights also offered access to nonstate entities.[71] In addition, hundreds of business and industry groups hold formal consultative status with the United Nations.[72] Though corporations are not treaty-making parties, they have begun to exert substantial influence at treaty conventions.[73]

The private and corporate sectors shape law not only by participating in formal international lawmaking processes, but also in a whole range of less formal ways. Most obviously, industry representatives show keen interest in the outcome of multinational negotiations by lobbying national governments.[74] Corporate actors also in practice "create or shape the content, interpretation, efficacy, or enforcement of legal regimes."[75] Professor Dan Danielsen offers a "typology of specific modes" by which corporations do this:[76]

> Sometimes corporations contribute through interpretations of or reactions to a legal rule scheme. Sometimes they supply rules where none exist. Sometimes they shape the rule scheme through direct political or economic pressure on regulators. Sometimes they shape it by evading the rule scheme and doing business elsewhere. Sometimes, to satisfy other business purposes, they adopt more stringent practices than the applicable rules require. Sometimes they act on their own to get a market edge or exploit an opportunity. Sometimes they act in groups to create a harmonized regulatory environment or to prevent regulation. These diverse forms of corporate actions and decisions are relat-

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[71] See id. at 546–47.

[72] See Tully, supra note 58, at 7 (stating that in 2001 approximately two hundred of the nonstate actors holding UN consultative status "were business or industry-related associations").

[73] See Sands, supra note 65, at 547 ("[I]t is quite normal nowadays . . . for the negotiating room to be half filled with representatives of industry and NGOs, for governments to find themselves sitting alongside British Petroleum and Friends of the Earth."); see also Tully, supra note 58, at 175–76 (describing participation by nonstate actors at treaty conventions and noting that at one convention "the U.S. delegation met with national industries four times over two weeks and hosted a bilateral event with the host government together with local firms"); Sands, supra note 65, at 547 n.57 (noting that 211 nongovernmental organizations had been granted observer status at the Fifth Conference of the Parties to the UN Framework Convention on Climate Change).

[74] See, e.g., Cushman, supra note 63 (describing business lobbying in connection with the Kyoto Protocol).

[75] Danielsen, supra note 10, at 412.

[76] Id.

> ed to both the applicable legal rules and the acts and decisions of regulators, but they are not wholly determined by them.[77]

These various means of corporate intervention in global governance have resulted in a system where, as Abbott and Snidal observe, the traditional state-based and treaty-based mechanisms of international law are no longer capable of controlling the global conduct of economic actors.[78] Both traditional domestic regulation and international treaty law administered by international organizations are pitted directly against "evolving structures of global production."[79]

In sum, what I call the "privatization" critique observes that the world is increasingly privatized, and private corporate entities rival states in exercising global power. While more traditional international relations-influenced theories of treaty making and compliance leave the privatization critique largely unaddressed, it substantially motivates the recent interest in private and regulatory network governance models and the liberal strain of international relations theory.

C. Disaggregated Global Governance

In part in response to the privatization critique, private and quasi-private regulatory network models of global governance suggest engaging the private sector directly. These models are either pessimistic about the power of treaty law to structure private behavior or simply do not address treaty law, focusing instead on disaggregated and non-hierarchical means of coordinating global conduct.

In many private network governance accounts, the state functions as a chaperone rather than a manager. For example, Sands observes that the rise of the private and corporate sector has pushed back the state's sphere of sovereignty both at the domestic and international levels.[80] The

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[77] Id.; see also Tully, supra note 58, at 165 (noting that corporations seeking to influence negotiations between states "lobby governments, frame issues in economic terms, submit proposals, distribute position papers, organize side events and raise issues for deliberation"); Freeman, supra note 21, at 551–55 (cataloging private roles in domestic governance).

[78] See Abbott & Snidal, supra note 12, at 504–05; see also Murphy, supra note 10, at 392–93 (observing that governments are often "unwilling or unable" to constrain effectively multinational corporate behavior through traditional regulation).

[79] Abbott & Snidal, supra note 12, at 504–05.

[80] See Sands, supra note 65, at 541 (observing that features like "the deregulation of capital flows, the promotion of direct foreign investment, [and] the increase in global trade" have all triggered a rise of "private enterprise and ownership as a dominant feature of societal struc-

private governance accounts respond to that diminution by focusing on private—often voluntary—mechanisms that engage private multinational entities directly, such as industry association standards, corporate social responsibility ventures, and transparency initiatives.[81] Abbott and Snidal dub this collection of voluntary mechanisms "Transnational New Governance."[82] In this new governance model, private actors such as industry groups, corporations, and investor groups collaborate internationally to create norms for business conduct.[83] Sometimes they interact with traditional standard-setting entities—Non-Governmental Organizations ("NGOs"), states, or international institutions—but they do so on substantially "equal footing" with public entities.[84]

Private governance methods include private standard setting by individual firms or industries, accountability and certification programs set by NGOs and designed to enlist private-sector support, and some public/private collaborations to set and enforce regulatory norms.[85] In the private network model, the state assists private transnational regulatory activity by transferring information between industry actors, assisting to set standards, playing a background role by threatening to regulate, and granting or withholding legal licenses.[86] NGOs participate by publicizing private industry acts using transnational litigation, boycotts, and oth-

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ture, with the emphasis increasingly on the public sector playing a residual role in a deregulated society").

[81] See Abbott & Snidal, supra note 12, at 508–10; Amiram Gill, Corporate Governance as Social Responsibility: A Research Agenda, 26 Berkeley J. Int'l L. 452, 453–54 (2008) (noting that corporations have begun to create various mechanisms of voluntary "corporate self-regulation" to demonstrate their sensitivity to "broader ethical considerations" and accountability to constituencies beyond shareholders); Percival, supra note 12, passim (noting the emergence of many forms of corporate transparency initiatives); Slaughter, A Liberal Theory, supra note 12, at 243 (same).

[82] Abbott & Snidal, supra note 12, at 509.

[83] See id. at 505–06.

[84] Id. at 506.

[85] See generally id. at 505–12 (identifying a diversity of forms of "Transnational New Governance").

[86] See David Scheffer & Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 Berkeley J. Int'l L. 334, 334–35 (2011) (explaining the factors that motivate private industry to undertake corporate responsibility ventures); see also Gunningham, supra note 56, at 476–500 (same; introducing the concept of varied "licences to operate" that inspire and motivate corporate social responsibility ventures).

er transparency measures to enlist public and state support for better industry practices.[87]

Firm and Industry Standards. Abbott and Snidal note that in the 1980s, NGOs, in an attempt to fill "domestic and international regulatory gaps," began to encourage corporations to adopt private global governance schemes.[88] That NGO activity motivated firm and industry actors to adopt codes of conduct to govern issues of social or environmental import.[89] Early efforts by The Body Shop and Gap led to a "cascade" that influenced multinational corporations in all quarters; by the late 1990s, corporate responsibility measures had become "de rigueur," and there are now thousands of these ventures,[90] which usually involve codes of conduct and set procedures to monitor compliance.[91] In a related trend, multinational corporate retailers often attempt to exert control over their supply chains.[92]

NGO or Public-Private Standards. Another type of private network governance consists of NGO standard-setting, where NGOs set conduct standards and private industry voluntarily agrees to comply in order to receive the NGO's stamp of approval.[93] The Fairtrade Labeling Organization is among the most famous of these cooperative ventures, but other examples include the Alliance for Water Stewardship, the Roundtable on Sustainable Biofuels, and the Sustainable Tourism Stewardship Council.[94] Some of these cooperative regulatory ventures enlist state assis-

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[87] See, e.g., Joanne Scott, From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction, 57 Am. J. Comp. L. 897, 920–28, 940 (2009) (showing how NGOs took a role in the transnational spread of the REACH regulations by publicizing industry use of dangerous chemicals); see also Gunningham, supra note 56, at 488–89 (explaining how industry CSR ventures are responsive to public reputation factors); David B. Hunter, The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making, *in* Adjudicating Climate Change: State, National, and International Approaches 357, 357–74 (William C.G. Burns & Hari M. Osofsky eds., 2009) (proposing that transnational litigation is a meaningful strategy to prompt public awareness and private accountability for climate change even if the litigation is ultimately unsuccessful); Scheffer & Kaeb, supra note 86, at 335 (noting that reputational pressures contribute to development of CSR regimes).

[88] Abbott & Snidal, supra note 12, at 519.

[89] See id. at 517–19.

[90] Id.

[91] See id. at 517 n.50 (noting that these codes may also be "linked to broader corporate structures for addressing business ethics and stakeholder concerns" (citing Gill, supra note 81, at 466–68)).

[92] See Abbott & Snidal, supra note 12, at 517.

[93] See id. at 517–18.

[94] See id. at 518 & nn. 55–57, 519.

tance, for example, by incorporating state regulatory standards,[95] but the state's role is usually minimal.

In transnational regulatory network accounts such as that championed by Slaughter, the rise of private power does not correlate with the diminution of state power in a zero-sum game; instead, private power and state power may develop simultaneously.[96] Public and private entities can each check the power of the other as they each gather added force by networking across national borders.[97] This cross-border networking at all levels became possible due to a "radically expanded communications capacity"; now various subgovernmental units—such as courts, administrative agencies, and legislative bodies—can easily coordinate approaches to common problems, at the same time as corporations and other private entities form global links.[98] Slaughter imagines that the subgovernmental transnational coordination will lead to regulatory convergence and "the harmonization of national law."[99]

Professor Harold Koh's transnational legal process theory directs attention to the reasons why these transnational networks arise and function.[100] In Koh's account, public and private entities—including government officials, NGOs, "transnational moral entrepreneurs," and private business entities—form "epistemic communities."[101] These communities interact to generate patterns of activity, which lead to the articulation of conduct norms that formalize those patterns; then, finally,

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[95] See id. at 518.

[96] See, e.g., Anne-Marie Slaughter, The Real New World Order, 76 Foreign Aff. 183, 184 (1997) [hereinafter Slaughter, New World Order] (providing an early account of the rise of "disaggregat[ed]" transgovernmental regulatory networks).

[97] See id.; see also Kal Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 Va. J. Int'l L. 1, 12 (2002) [hereinafter Raustiala, Networks] (observing that new means of rapid travel and immediate contact, such as the Internet, have "progressively made long-distance communication, and thus networks, far easier and . . . more prevalent").

[98] Slaughter, New World Order, supra note 96.

[99] See id. at 196.

[100] See Koh, Why Do Nations Obey?, supra note 19; see also Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181, 183–84 (1996) [hereinafter Koh, Transnational Legal Process] (introducing the term "transnational legal process" to denote "the theory and practice of how . . . nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals . . . make, interpret, enforce, and ultimately, internalize rules of transnational law").

[101] Koh, Why Do Nations Obey, supra note 19, at 2648, 2656.

executive, legislative, and judicial actions serve to absorb the norms domestically.[102]

The disaggregated views are normative in that they propose that global governance by private or regulatory networks may accomplish goals that the current system cannot. These views do not propose that private governance should mature into international law, but that the private and regulatory networks are independent ends. For instance, Abbott and Snidal assert that states and intergovernmental organizations should cultivate the voluntary networks because they hold at least some potential to "ameliorate the persistent regulatory inadequacies of international 'Old Governance.'"[103]

The disaggregated governance accounts contain useful proposals as to how to accomplish social goods in the interstices of traditional treaty law, and in arenas where it has been impossible to conclude an effective treaty, but they leave open the question how traditional treaty law may function effectively in light of those forces of globalization and privatization, or how treaty law might escape the "persistent regulatory inadequacies" the accounts identify.

D. International Legal Theory

While private and regulatory network theorists address the privatization critique by turning to nontreaty methods of global coordination, legal scholars who address conditions of treaty making and compliance do not sufficiently address the critique's challenges to treaties. There are two reasons for this omission: First, states alone are parties to treaties, and so corporations are structurally irrelevant to discussions of treaty making and compliance.[104] Any private corporate responsibilities under

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[102] See id. at 2656–57. In Koh's account, transnational legal process explains how "international law acquires its 'stickiness.'" Id. at 2655; cf. Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 Duke L.J. 621, 626 (2004) (noting that international law affects state behavior through a process of "acculturation" in which various actors feel compelled to assimilate through interaction with other actors). By participating in this repeating process of "interaction, interpretation, and internalization," states begin to see compliance with international law as within their self-interest. Koh, Why Do Nations Obey?, supra note 19, at 2655. In this way, "[d]omestic institutions . . . enmesh international legal norms, generating self-reinforcing patterns of compliance." Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1935, 1961 (2002) [hereinafter Hathaway, Human Rights Treaties].

[103] See Abbott & Snidal, supra note 12, at 510.

[104] See Vienna Convention on the Law of Treaties, supra note 1 (establishing that treaties create obligations only on consenting state parties); see also Vázquez, Direct vs. Indirect Ob-

treaties are usually indirect and derivative to that of states.[105] Second, the literature has developed in response to a different set of questions, principally relating to whether and why, in the absence of a global sovereign, sovereign states will subject themselves to binding agreements.[106] Borrowing fruitfully from international relations scholarship, the literature thus principally inquires how state relationships and behavior with respect to each other give rise to agreements, and when and why those agreements become effective.[107] While this literature does not directly engage the privatization critique, the legal literature that borrows from liberal international relations theory provides a helpful structure to frame the problem.

The leading rationalist theories include realism, institutionalism, and liberalism.[108] Realism treats states as "rational unitary actors" and the

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ligations, supra note 11, at 930 (noting the "general rule that international law directly imposes obligations only on states and supra-national organizations"; insofar as international law governs corporate or other private behavior, it does so by requiring states to regulate those non-state actors); sources cited supra note 1. There are some exceptions, including circumstances in which private entities act on behalf of the state and those private acts are attributed to the state. See Vázquez, Direct vs. Indirect Obligations, supra note 11, at 933–34.

[105] See Vázquez, Direct vs. Indirect Obligations, supra note 11.

[106] See Danielsen, supra note 10, at 411 (noting lack of attention by international law scholars to the role of private multinationals in global governance); see also Tully, supra note 58, at 5 (noting that because "[c]orporations are, by definition, national legal creatures conducting territorially focused commercial activities," they are virtually ignored in international legal theory); Philip Alston, The Myopia of the Handmaidens: International Lawyers and Globalization, 8 Eur. J. Int'l L. 435, 444 (1997) (arguing that international lawyers are out of touch with the forces of globalization, while a new transnational global community characterized by "privatization, deregulation and state minimalization" is forming); Fleur Johns, The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory, 19 Melb. U. L. Rev. 893 (1994) (arguing that corporations are "invisible" in international legal theory). See generally sources cited supra note 19 (debating whether and why international law might constrain state behavior).

[107] See, e.g., Hathaway, Human Rights Treaties, supra note 102, at 1943 (explaining that the two disciplines have increasingly traded insights); Keohane, Two Optics, supra note 19, at 487–93 (reviewing the literature); Anne-Marie Slaughter, Liberal International Relations Theory and International Economic Law, 10 Am. U. J. Int'l L. & Pol'y 717, 718–19 (1995) [hereinafter Slaughter, Liberal IR Theory] (suggesting that productive insights for international lawyers may be gained by exploring the assumptions of international relations theory).

[108] See Slaughter, Liberal IR Theory, supra note 107, at 721–31; see also Hathaway, Human Rights Treaties, supra note 102, at 1944, 1955–62 (characterizing the three rationalist accounts as "interest-based," unlike "norm-based" accounts such as the "managerial model" proposed by Chayes and Chayes, the "legitimacy" theories proposed by Thomas Franck and others, and Harold Koh's transnational legal process theory); Kal Raustiala, Form and Substance, supra note 2, at 582 (selecting these three international relations accounts as those that explain international legal choices by nation-states). With the exception of Koh's trans-

relevant units of analysis in the international system.[109] States fundamentally seek power, and must secure it in order to carry out their international preferences.[110] From the realist perspective, when states interact, they seek to consolidate and increase their power on the international stage.[111] The configuration of the international system is thus the product of competing plays for power. According to the realists, states comply with international law only when that law coincides with their preexisting ends; international law itself does not have coercive power.[112] International lawyers borrow from realist international relations theory the idea that states are the relevant units of analysis and are both the generators and subjects of international legal rules.[113] Their normative and descriptive accounts do not accord any relevance to either substate or nonstate actors, or to the construction of state interests at the domestic level.[114] Although the realist critique persists in various forms,[115] scholars in the 1980s noted that states sometimes seem to cooperate in ways that classic realism could not cogently explain.[116]

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national legal process theory, the norm-based accounts also focus on the state as the relevant unit of analysis, and thus do not offer a robust account of the role of nonstate actors. See generally Hathaway, Human Rights Treaties, supra note 102, at 1955–62 (reviewing the literature).

[109] Slaughter, Liberal IR Theory, supra note 107, at 722. For a classic and a revised realist account, compare Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1948) (classic version), with Kenneth N. Waltz, Theory of International Politics (1979) (presenting a "neorealist" formulation which assumes that states are "unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination").

[110] See Slaughter, Liberal IR Theory, supra note 107, at 722–23.

[111] See id.

[112] See Hathaway, Human Rights Treaties, supra note 102, at 1945 (explaining that international law is "largely epiphenomenal" in the realist account).

[113] See Slaughter, Liberal IR Theory, supra note 107, at 723.

[114] See id.

[115] For a review of the evolution of the realist critique, see Oona A. Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 U. Chi. L. Rev. 469, 470–71, 477–83 (2005) [hereinafter Hathaway, Power and Principle] (noting that the realist critique gained momentum after World War II when "widespread dismay over the failure of earlier institutions to prevent the collapse of order prompted a wave of attacks on the Wilsonian ideal of an international system founded on global legal order"; responses to this critique by international lawyers have not fully satisfied realism's "concerns about the field's validity").

[116] See Hathaway, Human Rights Treaties, supra note 102, at 1945–46.

Institutionalism seeks to explain this cooperation, specifically as it is on display in the rise of international institutions.[117] As with realism, states are the relevant units of analysis.[118] Institutionalism explains that international institutions serve coordination functions, assisting states to share information and pursue common ends; by doing so, these institutions "ameliorate[] the conditions of conflict" that would otherwise thrust states into the power plays the realist account observes and predicts.[119] Thus, for institutionalists, international law provides a means of achieving outcomes that are only possible when states coordinate their behavior.[120] This coordination arises and becomes elaborated in regimes because rational, self-interested states know that coordinating their behavior with other states will further their interests; they then comply with international law "as long as the reputational costs and direct sanctions that would result from noncompliance outweigh the costs of continued compliance."[121]

Liberal theory "opens the black box of the state,"[122] articulating the insight that a state's international behavior is shaped by both its vertical relationships with domestic constituencies and its horizontal relationships with other transnational actors.[123] Liberal theory diverges from realism and institutionalism in its belief that what matters most to global legal affairs is not the relative distribution of power (realism) or infor-

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[117] See, e.g., Robert O. Keohane, International Institutions and State Power: Essays in International Relations Theory 7–16 (1989) (coining the term "neoliberal institutionalism" and distinguishing this from other interest-based international relations theories); Keohane, Two Optics, supra note 19, at 490 (explaining the institutionalist account as arising from the intuition that states sometimes "forgo the short-term advantages derived from violating [those] rules" in order to maintain the international system (quoting Phillip R. Trimble, International Law, World Order and Critical Legal Studies, 42 Stan. L. Rev. 811, 833 (1990))).

[118] See Slaughter, Liberal IR Theory, supra note 107, at 726.

[119] Id.

[120] See id.; see also Keohane, Two Optics, supra note 19, at 489–91, 499–500 (explaining that institutions "perform valuable functions for states" by setting agendas, sharing information between regime participants, and shaping and characterizing the presentation of issues).

[121] Hathaway, Human Rights Treaties, supra note 102, at 1950–51 (citing Guzman, supra note 19); see also Chayes & Chayes, supra note 19 (distinguishing their approach from institutionalist accounts but nevertheless suggesting that state compliance with international law leads to harmonious and ultimately helpful interstate relationships); Goldsmith & Posner, supra note 19, at 1114–15 (using a rational choice model to provide an account of why states develop and comply with international law).

[122] Hathaway, Human Rights Treaties, supra note 102.

[123] See Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 Int'l Org. 513, 513 (1997).

mation and institutions (institutionalism), but how domestic and transnational constituencies construct state interests.[124]

Liberal theory thus provides the only rationalist account of the role of substate and nonstate actors in international law. States are not "monolithic," or single unitary actors.[125] Instead, state interests are the products of domestic political processes and interactions between individuals and groups.[126] Before bargaining on the international stage, "[s]tates first define preferences," a process that occurs domestically, and takes place through political interactions between the state and its constituencies.[127] Domestic constituents then use the nation-state as an instrument to accomplish their international goals.[128]

By recognizing the role of domestic politics in the construction of state interests, liberal theory provides a mechanism for understanding corporate influence with respect to international agreements. While the literature has not focused uniquely on corporations apart from other members of domestic and transnational society, the corporate place in the liberal account is not obscure: corporations are among the domestic constituencies that shape state interests, which are expressed internationally. To the extent that corporations are powerful domestic constituencies, they can dominate state preferences, and shape the bargains states are prepared to make. Corporations also play a role in the liberal account as part of the international society in which states are embedded. Corporations network across national boundaries just like other governmental and nongovernmental actors, to shape state interests by influencing domestic political systems.

Presumably, the absence of effective multilateral treaties in given areas arises from an insufficient number or insufficient strength of state preferences to conclude and comply with such treaties. To the extent that corporations are dominant domestic constituencies, they may be shaping state preferences against treaty making in the relevant areas. The liberal account ends there, however, and so does not, without more, answer the privatization critique. Liberal theory does not assist us in determining

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[124] Id.

[125] Slaughter, Liberal IR Theory, supra note 107, at 723, 727–29. See generally Moravcsik, supra note 123, at 544–45 (elaborating the theory).

[126] See Moravcsik, supra note 123, at 523–24.

[127] Id. at 544.

[128] See id.; see also Raustiala, Form and Substance, supra note 2, at 595 (offering this point as one of the "core assumptions" of liberal theory).

with sufficient granularity how the corporate-state relationship functions or, normatively, how to make effective treaties despite powerful corporate constituencies. Moreover, liberal theory is subject to the critique that it does not predict when and why states subscribe to treaties.[129] To the extent that is true, liberal theory is also unhelpful in explaining the influence of private corporations on multilateral treaty making.

The liberal account thus serves to frame the questions posed by the privatization critique, which still stand: How might effective multilateral treaties be made when corporate power is sufficient to dominate the domestic politics of multiple states, and thus shape their international preferences? What happens when corporations "capture" those who would be transgovernmental norm builders, thwart domestic regulation, and prevent regulatory convergence?[130]

* * *

Answering the privatization critique is both a descriptive and a normative project. Descriptively, we need a treaty classification that identifies those agreements to which corporate influence is most relevant. Normatively, we need an account that proposes the conditions under which treaties subject to corporate influence might be successful. We need a theory that both fully accounts for the significant impact of large transnational corporations and proposes law-based global governance—that is, a theory that recognizes the importance of treaties.

II. NEW TREATY TAXONOMY

Identifying the agreements to which corporate influence is relevant requires new treaty taxonomy. As outlined in the previous Part, the existing literature examines a variety of modes by which corporations are linked to multilateral treaties, including corporate lobbying of national

[129] As Professor Oona Hathaway has observed, liberal theory does little to explain why states might subscribe to treaties, or account for the fact that some treaties are successful and some are not. See Hathaway, Human Rights Treaties, supra note 102, at 1954–55.

[130] In our *Citizens United v. FEC* era, it is notable that while the power of large corporate interests is under scrutiny in the domestic realm, theories of the development and enforcement of international law lag behind. See 130 S. Ct. 876 (2010) (holding that the First Amendment prohibits the federal government from placing limits on independent spending for political purposes by corporations and unions); see also Room for Debate: How Corporate Money Will Reshape Politics, N.Y. Times, Jan. 21, 2010, http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ (presenting the views of seven academics regarding the impact of *Citizens United*).

governments and participation in the domestic political process, corporate attendance at treaty conventions and side events, corporate engagement with international bodies such as the WTO, and, specifically in the human rights arena, direct enforcement of treaty provisions against corporations.[131] Although each of these modes of interaction forms part of a complete account of the relationship between states, corporations, and international agreements, we also need an account of how, why, and for which treaties corporate influence might alter treaty outcomes—that is, whether a treaty is signed and effectively enforced. This Part provides a structural account.

A. Persuasion and Resolution Treaties

Treaties may be classified as either "persuasion" or "resolution" treaties. Corporate influence will be principally relevant to the former. This Section, however, temporarily sets aside the question of corporate influence in order to outline the proposed distinction. The classification divides treaties according to *whose behavior the treaty seeks to govern*. Clearly, with some small exceptions, states alone are treaty signatories.[132] Moreover, with another small set of exceptions, treaties govern solely state behavior.[133] The distinction I seek to make is this: some treaties anticipate that states will regulate the conduct of private citizens, while others seek to alter principally state conduct. The former are what I call "persuasion" treaties,[134] while the latter are "resolution" treaties.[135]

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[131] See Section I.B and accompanying citations. In addition, sometimes corporations proactively refer to treaty provisions to justify their conduct. See Natasha Affolder, The Market for Treaties, 11 Chi. J. Int'l L. 159, 159 (2010) (noting that because private corporations face increasing scrutiny and seek to "define acceptable standards of environmental and social behavior," they have begun to refer to treaty standards to justify their behavior).

[132] Vienna Convention on the Law of Treaties, supra note 1 (establishing that treaties create obligations only on consenting state parties); see also sources cited supra note 1.

[133] See Vázquez, Direct vs. Indirect Obligations, supra note 11, at 933–34. A growing literature addresses the question whether private corporate entities may be held directly accountable for human rights laws. See Ruggie, supra note 18, at 819–20 (evaluating these efforts); see also Kiobel v. Royal Dutch Petroleum, supra note 18 (collecting commentary, analysis, and briefing related to a pending U.S. Supreme Court case that considers, inter alia, whether corporations may be held liable under the Alien Tort Statute for violations of international law).

[134] Persuasion treaties are like any other treaty in that they require international agreement, conclusion, and entry into force. For the principal source of the law of treaties, see Vienna Convention on the Law of Treaties, supra note 1. A state's capacity to comply will of course depend upon more than its capacity to regulate effectively. For example, in the United States, the President must seek the advice and consent of the Senate prior to ratifying a trea-

Persuasion treaties include, for example, treaties governing agricultural sanitary standards, disposal of waste in international waters, and control over the manufacture and use of ozone-depleting chemicals. These treaties reach inward to the domestic affairs of the state's citizens.[136] In order for a state to satisfy its international commitments in these arenas it must endeavor to persuade its citizens to maintain sanitary farms, its shipping companies to refrain from dumping waste inappropriately, and its chemical corporations not to produce and sell prohibited substances. In a sense, the Kyoto Protocol is the capstone persuasion treaty, because to enforce it—and thus to live up to its international commitments—a signatory state must ensure that its natural and corporate citizens alter a whole range of behaviors in order to reduce the state's total greenhouse gas emissions.

In liberal democracies the state usually sets about to change private behavior through regulation. Thus, these also could be titled "regulatory" treaties. I instead use the term "persuasion" because it focuses attention on the fact that the state's ultimate goal in issuing regulations is to persuade private citizens to alter their conduct. Regulation is neither a necessary nor a sufficient condition for changing private behavior. Instead, regulation is a tool (granted, the most common tool) for achieving private acquiescence. I explore the implications of this distinction later in this Part. For the purposes of shorthand, however, persuasion treaties are treaties that anticipate domestic regulation of private actors.[137]

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ty, U.S. Const. art. II, § 2, and treaties are subject to constitutional limitations that apply to all exercises of federal power, see Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution"). See generally Louis Henkin, Foreign Affairs and the United States Constitution 185–88 (2d ed. 1996) (providing an account of how treaties gain the force of law in the United States).

[135] A note at the outset: this conceptual framework is an oversimplification. It does not address many aspects of a state's obligations under a treaty, and those it does address are oversimplified. The simplicity, however, is useful: it focuses attention on the distinctive treaty features that are relevant to unraveling the privatization critique. Because this distinction has not received systematic attention, even the basic framework illuminates important treaty features and frames existing questions.

[136] This is in a different way, however, than the "reaching inward" of human rights treaties, which typically govern state behavior.

[137] Whether a treaty is classified as a persuasion treaty does not depend upon whether it is self-executing or non-self-executing. In the United States, persuasion treaties may be either self-executing or non-self-executing, depending upon whether existing U.S. legislation is sufficient to carry out treaty obligations. See Medellin v. Texas, 552 U.S. 491, 491, 505 n.2 (2008). "Self-executing" treaties have "automatic domestic effect as federal law upon ratifi-

In the second, and perhaps more classic, form of treaties, a state may comply with the treaty by resolving to do so.[138] Of course, things are not always quite this simple. Sometimes, due to federalist or other domestic governance structures, states may make international obligations with which they cannot comply even when those commitments appear to bind only state actors.[139] Nevertheless, resolution treaties concern the state's own behavior, governing such things as alliances, borders, the conduct of war, conclusion of peace, and treatment of diplomats and foreign nationals. A state may comply by providing instructions and guidance to those notionally under its control. For example, a state may comply with a resolution treaty by instructing its military to cease hostilities, or its police forces to refrain from arresting diplomatic officials. The resolution treaty may require a change in behavior (cease hostilities), or it may merely require maintenance of the status quo (no new tariffs). In either case, accomplishing the ends the treaty demands requires principally that the state decide, or resolve, to do so.

All treaties require state resolve in that all treaties are contracts between state parties, entered into between states, and committing the state

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cation," whereas "non-self-executing" treaties do not automatically create federal law that is enforceable domestically. Id. In the United States, a non-self-executing treaty has domestic effect only after Congress passes implementing legislation. See id.; see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (articulating the treaty execution rule: when the United States agrees in a treaty "to perform a particular act . . . the legislature must execute the contract before it can become a rule for the court"). It is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. See *Medellin*, 552 U.S. at 505.

[138] Though I describe resolution treaties as the "classic" form, there are certainly newer resolution treaties such as the Geneva Convention (civilians in wartime), the Genocide Convention (state-sponsored genocide), and the Nuclear Non-Proliferation Treaty.

[139] The *Medellin* saga in the United States courts is a ready example. A judgment by the International Court of Justice ("ICJ") required Texas to reconsider the convictions and sentences of fifty-one Mexican nationals. See *Medellin*, 552 U.S. at 497–98. The Supreme Court, on its second review of the case, granted that under the U.N. Charter, the United States "undertakes to comply" with the ICJ judgment. Id. at 509 n.5. Nevertheless, the Supreme Court held that because the U.N. Charter obligation did not create self-executing law, and the U.S. Congress did not pass implementing legislation, the treaty did not have the "force and effect of domestic law sufficient" to bind Texas. See John R. Crook, Contemporary Practice of the United States Relating to International Law, 102 Am. J. Int'l L. 860, 862 (2008). Texas ultimately executed Medellín despite an explicit request by the Bush administration that Texas comply with the ICJ judgment. See id. at 862–63; see also *Medellin*, 552 U.S. at 530 (noting that under U.S. law, the executive cannot give domestic effect to a non-self-executing treaty "by unilaterally making the treaty binding on domestic courts"). For another example of conflict between the executive and judicial branches over treaty interpretation, see Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

to a certain course of action. Thus, for all treaties a state must resolve to agree and comply. The distinction I seek to highlight is that resolution treaties seek to govern state actors alone, while persuasion treaties ask states to impose the international agreement on non-state actors as well.

Some treaties have both persuasion and resolution elements. The General Agreement on Tariffs and Trade ("GATT") was a hybrid persuasion/resolution treaty, for example, particularly with respect to the provisions introduced in the Uruguay Round. Though the provisions introduced at the Uruguay Round were principally directed to state conduct (elimination of tariffs), they also demanded that state parties institute agricultural sanitary measures that were directed to private conduct. Hybrid treaties can be evaluated provision by provision, as is the practice for treaties that are partially self-executing and partially non-self-executing, or treaties that have both binding and nonbinding elements. Just as common practice refers to mostly binding agreements as "binding" and primarily nonbinding agreements as "nonbinding," this Article suggests similar descriptive shorthand for the distinction between persuasion and resolution. Treaties might be imagined on a continuum, with different agreements falling at various points between the two extremes:

Figure 1

On this continuum, the Convention Against Torture may fall far to the left, the Montreal Protocol far to the right, and the Uruguay Round of the GATT somewhere in the middle.

After spreading treaties along the resolution/persuasion continuum, an additional distinction comes into focus. While the persuasion/resolution distinction concerns *whose behavior the treaty seeks to govern*, treaties may also be divided according to *how success is measured*. Signatory states might commit themselves to benchmarks that they must satisfy in order to comply with the treaty's terms. For instance, the Montreal Protocol and the Kyoto Protocol each commit states to eliminating specified emissions at a certain rate. For another type of agreement, most frequently managerial framework conventions, signatory states may simply

commit themselves to making efforts to remedy a situation. Mapping this distinction over the prior one provides a dual axis:

Figure 2

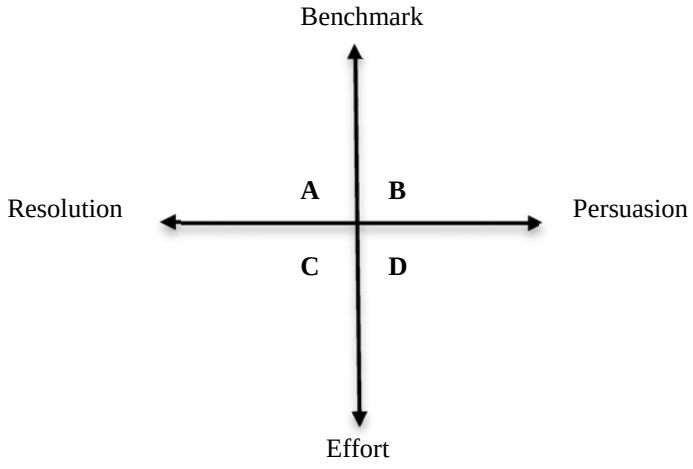

Figure 2 shows the degree to which a state will need to engage the private sector in order to attain treaty goals. Focusing just on the persuasion half of the graph (quadrants *B* and *D*), it is clear that not all agreements are equal. More persuasive treaties with more benchmarks will require states to do more work to persuade citizens to comply. By contrast, treaties that require only a commitment of effort (quadrant *D*), such as framework conventions that express aspirational commitments to a certain issue, carry only minimal state obligations.

The location of a treaty on the graph will determine which factors will be most significant for states seeking to negotiate and sign it. For treaties on the resolution side (*A*, *C*), the important factors will be principally those familiar to the international relations literature: consolidation of power, coordination and cooperation games with other states, and state reputation. By contrast, on the persuasion side (*B*, *D*), in addition to the international relations factors, a state will also have to concern itself with domestic relationships, potentially affected domestic constituencies, and regulatory power.

This set of treaty distinctions builds upon and contributes to our existing tools for categorizing and evaluating treaties. Familiar questions about the nature of international agreements include, among others, whether the agreement creates binding commitments, whether a treaty is self-executing or implemented through domestic regulations, whether it gives jurisdiction to any institution to monitor or enforce compliance, and to whom rights of enforcement are afforded.[140] Raustiala suggests that these treaty features may be divided according to "form" and "substance."[141] Features related to treaty form include (a) legality, or whether a treaty is legally binding or nonbinding, and (b) structure, which relates to a treaty's enforcement mechanisms.[142] Substance, in Raustiala's account, refers to the depth of a state's commitment, which he defines as the extent to which an agreement requires a state to "deviat[e] from the status quo."[143] In other words, to what extent must a state make substantial policy changes in order to carry out promises made in the agreement? The deeper the agreement, the more substantial the changes a state must make; conversely, shallow agreements rubber-stamp existing state practice.[144] The same treaty might be deeper for some parties and shallower for others, and the difference depends on the nature of state practice ex ante.[145]

The persuasion/resolution treaty distinction extends and provides a counterpoint to Raustiala's analysis by identifying a different set of features of state treaty commitments. The vertical axis I propose is similar to, but not coextensive with, Raustiala's deep/shallow distinction. Raustiala's "deep" commitments require that states make actual changes to their own or their private citizens' conduct, whereas shallow commitments require maintenance of the status quo or little more.[146] Those I call

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[140] See generally Raustiala, Form and Substance, supra note 2 (discussing these features and dividing them according to whether they affect what he terms the "form" or "substance" of an international agreement).

[141] Id.; see also id. at 581–82 (noting the dearth of analysis about how the features relate to each other and providing an account of that relationship).

[142] See id. at 581. Raustiala refers to binding and nonbinding agreements as "contracts" and "pledges," respectively. Id.

[143] Id. at 581, 584.

[144] See id. at 584.

[145] See id.

[146] Raustiala explains that, in his analysis, trade agreements like those constituting and carried out by the World Trade Organization are "deeper" because these agreements include a large number of very particularized rules with which states must comply. See id. at 585. Conversely, framework conventions, such as the U.N. Framework Convention on Climate

"benchmark" agreements may in many cases be deep while "effort" treaties will largely be shallow. Both Raustiala's distinction and my own home in on the extent to which states must alter conduct in order to comply with the treaty.[147] They differ in that a treaty may conceivably be both a benchmark treaty and shallow if, at the time of signing, the state has already instituted regulations or otherwise persuaded its citizens to adopt conduct that allows the state to meet the benchmark.[148]

B. The Role of Persuasion

Persuasion of domestic constituencies is a necessary condition for a state's compliance with persuasion treaties. Persuasion treaties are "persuasive" in the sense that, to comply with them, a state must persuade its natural or corporate citizens to alter their behavior to accomplish the goals the treaty sets.[149] In a way, all treaties are persuasion treaties in

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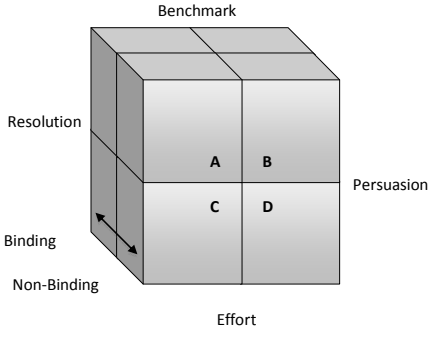
Change, exemplify "shallow" conventions because they rely on minimal commitments. See id.

[147] One would expect states easily to accede to agreements where the obligations are nonbinding and, in Raustiala's terms, "shallow," whereas treaties that are binding and "deep" require much more from state parties. For instance, the Kyoto Protocol was of the latter type and drew uneven commitments and spotty compliance.

[148] My chart also omits the binding/nonbinding distinction Raustiala identifies. That distinction could be mapped helpfully onto the dual axis by adding a third dimension:

Figure 3



[149] Note that treaties that require states to meet benchmarks require that the state effectively persuade, while for "effort" treaties, only an attempt at domestic persuasion is necessary. As discussed further in the following Section, the term "persuasion" does double duty: persuasion treaties require domestic regulatory persuasion, and they are also often the products of reciprocal persuasive battles between state and nonstate parties. A persuasion treaty thus

that states are required to maintain legitimacy and power by persuading citizens to accept the authority of state acts.[150] In some senses, then, states are in the act of persuading citizens all the time, for any class of treaty. Persuasion treaties are distinct because the chief burden on a state is not to persuade its citizens of the rightness or authority of the state's actions, but *to ensure that those citizens behave in a particular way*.

Why is persuasion necessary? Might a state comply with its international commitments simply by issuing regulations with which its citizens must comply? As I proposed earlier in this Part, the most obvious method of state persuasion is indeed regulation, with civil or criminal penalties serving to enforce those regulations. But regulation is not a necessary condition of state compliance with a persuasion treaty: regulation is not the only means at a state's disposal to persuade. The state may also persuade through control of privileges, education and public information campaigns, and market incentives.

Nor is regulation a sufficient condition of state compliance. The power to regulate effectively requires the power to enforce. Enforcement power requires consent by the object of regulation. This is true on a conceptual level for all regulations and all regulated entities and, to an increasing degree, on a practical level for all regulations that target powerful corporations.

First, on a conceptual level, all regulations require consent by the object of regulation.[151] Consider speed limits: states dictate speed limits and set penalties for disobedience. Nevertheless, drivers consistently disobey. Without some means of convincing drivers to internalize the regulatory rules, the rules themselves are incapable of ensuring compliance.[152] A state's enforcement power may assist citizens to internalize regulatory rules, but that power is not always sufficient to ensure a

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is the product of persuasive inputs and requires persuasive outputs. While the treaty itself may have nominal persuasive powers, this Article does not focus on the persuasive effect of the treaty itself. Rather, I seek to home in on persuasive activity by state and private actors that explains and affects the success of the treaty.

[150] See Raz, supra note 20 (introducing the "normal justification thesis," which explains that law is authoritative only when citizens accept the authority of its reasons).

[151] See, e.g., Goodman & Jinks, supra note 102, at 642 ("[P]ersuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm . . . .").

[152] Professor Rebecca Bratspies proposes that regulatory compliance in some cases comes from perceptions of regulatory legitimacy, which leads to regulatory trust. See Rebecca M. Bratspies, Regulatory Trust, 51 Ariz. L. Rev. 575, 578, 579 & n.16 (2009) (citing Tom R. Tyler, Why People Obey the Law 163 (1990), for the connection between perceptions of legitimacy and compliance).

course of conduct. Without sufficient enforcement power, a state will not be able to alter conduct unless it finds other means to persuade its citizens to "buy in" to the regulatory regime.

Second, and most importantly for our purposes, regulation of powerful corporate entities increasingly requires overt consent and participation by those entities. When the state is charged with regulating the behavior of large multinational corporations, which can capture regulators, evade enforcement, retaliate for a state's unwanted regulatory choices, and may possess more technical expertise than the state itself, the state may not have the capacity to erect and enforce successful domestic regulatory regimes.[153] In the domestic regulatory arena, the challenges a state faces when regulating a transnational corporation are significant. As fiduciary duty requirements, corporate charter obligations, and the profit maximization imperative prohibit a corporation from acting against its economic interests, corporate interests are often aligned against new regulatory regimes. A state's power to coerce corporations to change their behavior is often comparatively weak. The state must determine which corporate acts it can control when corporations are acting in complex transnational ways; it must avoid capture by industry and powerful lobbies, industry associations, and public opinion campaigns; it must acquire technical expertise to rival that of the corporation in order to make meaningful rules; and it must enforce any rules it makes, often requiring substantial outlays of state capital and manpower.

As Professor Jody Freeman observed in a seminal article on private participation in public governance, in the United States virtually any instance of state regulation "reveals a deep interdependence among public and private actors in accomplishing the business of governance."[154] So deep is the interdependence that Freeman observes that there is no longer such a thing as "purely public" power; rather, public administration is a joint venture between public and private entities.[155] In Freeman's account, the private actors that participate in this venture include corporations, industry groups, and industry-standard-setting organizations, and also public interest organizations and other NGOs.[156] Not only are the

[153] See Murphy, supra note 10 (stating that some governments are "unwilling or unable" to constrain effectively multinational corporations through regulations).

[154] See Freeman, supra note 21.

[155] Id. at 547–48 (proposing that public administration should be conceptualized as "a set of negotiated relationships" between public and private entities).

[156] Id. at 547.

participants varied, but the modes of participation are also diverse: private actors facilitate regulation at all points in the regulatory lifecycle, providing the content of rules, assisting with implementation of those rules, delivering services and benefits on behalf of the state, and assisting the state with monitoring and enforcement.[157] The cooperation between public and private actors is so thorough and enmeshed that, rather than thinking in terms of a hierarchy of public/private control, Freeman proposes that we should instead think of regulation in the United States as a process of "shared governance" and "negotiated relationships between the public and the private."[158]

The new cooperative regulatory relationship between public and private entities is not limited to the United States. Explicit coregulation has become a common feature of the regulatory architecture in Europe as well, and recent work traces its emergence in developing countries, where it is driven principally by shortfalls in governmental regulatory capacity.[159]

In sum, to regulate effectively, especially when the objects of regulation are principally powerful, monied, transnational corporations, the state must rely on the cooperation and collaboration of the regulated entities.

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[157] Id. at 547, 551–56 (offering an account of federal reliance on privately generated rules governing health, safety, and product standards, and noting that sometimes Congress delegates formal standard-setting authority, and sometimes the delegation takes place informally when administrative agencies adopt or defer to privately generated rules). Freeman proposes a "contractual metaphor" to explain administrative governance in which public and private actors create "both legally enforceable contracts and informal agreements or understandings." Id. at 571.

[158] Freeman, supra note 21, at 548.

[159] See McAllister, supra note 21, at 209; see also Fabrizio Cafaggi, New Foundations of Transnational Private Regulation, 38 J.L. & Soc'y 20–49 (2011) (examining the way public and private transnational regulatory regimes complement each other and analyzing the interaction according to various models including "hybridization, collaborative law-making, coordination, and competition"); Murphy, supra note 10 (arguing that states often lack capacity to make and enforce effective regulations over multinational industry). See generally Tim Büthe & Walter Mattli, The New Global Rulers: The Privatization of Regulation in the World Economy (2011) (reviewing the multiplicity of actors that contribute regulatory rules and participate in the process of regulation both at the domestic and at the transnational level).

C. Persuasion and Treaties

At the center of the privatization critique is the observation that in a world where corporations wield vast amounts of power, agreements that bind only states may be an ineffectual means of coordinating global conduct. The response by proponents of private and transnational regulatory networks follows rationally from the observations about the nature of public/private power outlined in the previous Section: we need to move beyond thinking about global governance in terms of explicitly top-down regulation and create structures that engage the private sector directly. This Article proposes that what the privatization critique suggests in the treaty context is that effective treaty governance will also depend upon private-sector persuasion. In other words, when states must engage and depend upon the private sector to regulate effectively, then effective regulatory treaty regimes will be a product of effective persuasion.

Without domestic persuasion—the capacity to engage the private sector in coregulation and compliance—a state will either fail to sign on to new persuasion treaty regimes or ultimately fail to comply with them. I will address these implications in reverse order.

First, for persuasion treaties that require a state to alter private behavior, a state's capacity to comply with its international commitments will correlate with its power to persuade domestically.[160] While the mere existence of regulations may be sufficient to achieve state compliance for persuasive effort treaties (those that are in quadrant *D*), to achieve success with persuasive benchmark treaties (those in quadrant *B*), the state must actually change behavior. For that latter group of treaties, a state's capacity to comply will depend not only on whether it is willing to implement a domestic regulatory regime, but also on the *success* of those domestic regulations. As the previous Section outlined, the success of domestic regulations will, in turn, depend on the state's power to persuade citizens to comply through adequate regulatory enforcement or other means.

In addition, a state's capacity to persuade domestically can also affect a state's willingness to enter into treaties, in two ways. First, as liberal international relations theory observes, strong domestic constituencies can set a state's international agenda.[161] Thus, if the most powerful do-

[160] In benchmark (quadrant *B*) treaties.
[161] See discussion in infra Section I.D.

mestic constituencies do not "buy in" to a set of treaty goals, the state will not count itself sufficiently interested in those goals to agree to them.

A state's capacity to persuade domestically also informs the state's understanding of its capacity to comply, which may affect its willingness to agree.[162] Professors Abram Chayes and Antonia Handler Chayes have proposed that states do not knowingly enter into treaties with which they cannot comply. If the Chayes assumption is correct, private persuasion is necessary in order to create a treaty to which states will subscribe. The assumptions of this Article, however, are more modest than those made by Chayes and Chayes. I assume only that a state that does not anticipate the capacity to comply with its international promises necessarily has only three options: the state may (a) refuse to join a treaty regime; (b) join the treaty without intending to comply;[163] or (c) negotiate for weaker or non-binding commitments under that treaty (such as agreeing to a treaty in quadrant *D*, rather than quadrant *B*).[164] None of these options lead to strong and successful treaties.

D. Reciprocal Persuasion

By identifying persuasion treaties and clarifying a state's responsibilities under them, the role of private multinationals in treaty making be-

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[162] See, e.g., Chayes & Chayes, supra note 19 (proposing that states will not tend to make international commitments with which they cannot comply); see also Raustiala, Form and Substance, supra note 2, at 595 ("[S]ubstantial evidence indicates that many states try seriously to comply with international law . . . ."). In Professor Louis Henkin's famous formulation, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Louis Henkin, How Nations Behave: Law and Foreign Policy 47 (2d ed. 1979) (emphasis omitted).

[163] See, e.g., Hathaway, Human Rights Treaties, supra note 102, at 1940, 1981 (concluding that countries with the worst human rights records are among the most likely to join human rights agreements); Daniel Vice, Note, Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution, 29 N.Y.U. J. Int'l L. & Pol. 577, 631 (1997) (noting that countries sometimes make environmental commitments "without fulfilling all of the treaty obligations, presenting the public image of an environmental commitment without having to dedicate resources to implementation").

[164] Professor Sabrina Safrin notes that another way that countries seek to soften treaty obligations prior to signing on is by negotiating special legal accommodations for themselves that become incorporated into the treaty text. Sabrina Safrin, The Un-Exceptionalism of U.S. Exceptionalism, 41 Vand. J. Transnat'l L. 1307, 1313–15 (2008) (observing that countries sometimes only sign on to treaty obligations after seeking and obtaining "a special or different legal norm for themselves"). Because their "special interests [are] expressly accommodated, they can better comply with the norms that they have accepted." Id. at 1313.

comes much clearer: as previous Sections outlined, a state's capacity to comply with persuasion treaties is commensurate with its capacity to regulate effectively. As that capacity to regulate slips, treaty making and compliance become more difficult, and effective treaty regimes become remote. Conversely, as industry aligns its interests with a particular regulatory regime, a state's capacity to enter into and comply with a persuasion treaty grows. Thus, persuasion treaties can in some senses be understood as products of the interests of both states and private multinational entities. To incorporate a robust view of multinational industry into our understanding of treaty making and compliance, we need to jettison a view of treaties as products only of state interests. It may be most helpful to think of industry and state actors as deeply enmeshed in an evolving persuasive relationship that creates or averts the conditions for states to agree on treaty texts and comply with treaty obligations.

Moreover, understanding the conditions for treaty making and compliance in the persuasion treaty arena requires an account not just of each single state's domestic regulatory capacities, but also of the complex global relationships between public and private entities.[165] Private corporations operate above and below the borders, and the laws, of a single state. In many senses the concept of a corporation as confined within the control of a single state is outdated. Because corporations are transnational, they are elusive. They can suddenly move out of a state that attempts to implement new regulations. They can incorporate, produce, and distribute in separate states, making jurisdiction and regulation complex.

Persuasion runs not just from states to corporations but also from corporations to states. Corporations clearly take an interest in treaty making. They lobby governments, attend treaty conferences, hold consultative status with the United Nations, and refer to treaties for their own purposes.[166] Private actors sometimes find it in their interest to influence

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[165] While treaties are made between states, an increasing diversity of parties participates in the drafting and ratification process. See Alvarez, Governing the World, supra note 17, at 601–02 (noting that international organizations such as the International Labour Organization or the World Health Organization sometimes first produce a treaty text, and then present it to states for signature and ratification). I propose that some treaties also require the tacit acquiescence of private multinational entities. Treaty success depends on whether private multinational corporations are prepared to align their interests with treaty ends.

[166] Indeed, multinational corporations often make use of treaties for their own purposes. See Affolder, supra note 131, at 160–62 (asserting that corporations refer to treaty standards to justify their behavior). Treaties can be useful not only to help reconcile divergent regula-

international standards and shape international behavior, and so they exert their power both to clarify new regulatory standards as well as to avoid them. Regulatory change can involve chains of responsive persuasive moves between industry and state actors. In traditional terms this would be both "top-down" and "bottom-up" regulation, but if the partners are no longer in a hierarchical relationship, these concepts are no longer useful. Rather, state and corporate actors influence each other in a reciprocal cycle. In this new framework, the international agreement is the tool of the multinational just as it is the tool of the state. As a corollary, single states now have help from the outside world: persuasion jumps across boundaries. State regulatory persuasion is now also transnational, with foreign regulations affecting the operations of domestic corporations, and the preferences of limited geographic communities having a global effect on corporate behavior.

This analytic framework leaves many questions open for empirical study. At what stage in the persuasive cycle will treaties become possible? How does this vary by state or kind of treaty or type of behavior or persuasive tool? The following Part offers some preliminary observations through a close analysis of a state/industry persuasive relationship as it unfolded to produce one of the world's most successful environmental treaties.

III. PERSUASION IN PRACTICE: MONTREAL

The Montreal Protocol is widely hailed as the "world's most successful environmental agreement,"[167] and possibly even the world's most successful international agreement of any type.[168] It should, however, have been a dismal failure. Why was it not?

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tory schemes, but also to clarify a corporation's responsibilities, which helps industry avoid litigation or increased regulation and rewards market leadership. See id. at 161–85 (surveying corporate disclosure statements to find that corporations referred to standards articulated in biodiversity treaties to demonstrate their compliance with biodiversity norms and principles). In fact, "corporations and financial institutions are among the most frequent users of the U.N. Treaty Series." Tully, supra note 58, at 10 (citing U.N. Secretary-General, U.N. Decade of International Law, ¶ 209, U.N. Doc. A/54/362 (Sept. 21, 1999)).

[167] Danielle Fest Grabiel, Crucial Crossroads, *in* Celebrating 20 Years of the Montreal Protocol, Our Planet, Sept. 2007, at 20, 20–21, available at http://new.unep.org/PDF/OurPlanet/2007/sept/EN/ARTICLE7.pdf.

[168] See C. Boyden Gray, Copenhagen Failure vs. Montreal Success, New Atlanticist Policy and Analysis Blog, Dec. 9, 2009, 11:48 AM, http://www.acus.org/print/5994 (quoting Kofi Annan as stating that the Montreal Protocol was "perhaps the most successful international agreement to date").

A. Montreal Should Have Failed, But Did Not

The Montreal Protocol mandated drastic reductions of production and consumption of chlorofluorocarbons ("CFCs"), which erode the stratospheric ozone layer.[169] At first blush, the Montreal Protocol challenges the theory of this Article that persuasion treaties require tacit industry consent. The Protocol is a classic persuasion treaty: compliance with the CFC limits required regulation by signatory states, and regulation directed to what was, at the time the Protocol entered into force, a "$100 billion global industry."[170] Moreover, not only is the Montreal Protocol a persuasion treaty, it is a quadrant *B* treaty—that is, a persuasion treaty with benchmarks. Specifically, the Montreal Protocol mandated that signatory parties cut their production and use of CFCs by half in a little more than a decade,[171] and the treaty anticipated domestic regulations that would require significant changes in industry practice.[172] Thus, the Montreal Protocol inhabits the furthest reaches of quadrant *B*, where signatory states take on the greatest burden.

Two years earlier, the global community had signed a much different treaty: the 1985 Vienna Convention for the Protection of the Ozone Layer, which, by all measures, is weak.[173] It is a quadrant *D* persuasion/effort treaty, with a mix of binding and nonbinding provisions; a managerial framework convention that merely created mechanisms to monitor ozone depletion and communicated the general intentions of state parties to work together to do something about the problem.[174]

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[169] See Grabiel, supra note 167.

[170] Peter M. Haas, Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone, 46 Int'l Org. 187, 187 (1992). The following discussion of the negotiation of the Montreal Protocol draws substantially from Haas's account, as well as that of Professor Detlef Sprinz and Doctor Tapani Vaahtoranta. See Detlef Sprinz & Tapani Vaahtoranta, The Interest-Based Explanation of International Environmental Policy, 48 Int'l Org. 77 (1994). I am indebted to Oona Hathaway and Harold Koh for bringing these accounts together in Hathaway & Koh, supra note 60, at 243–68.

[171] See Haas, supra note 170, at 212 (noting that the Montreal Protocol "called for two staggered cuts in consumption that would lead to a 50 percent total reduction from 1986 levels"); Palmer, supra note 49, at 274.

[172] See Haas, supra note 170, at 212, 214–15 (noting the magnitude of CFC reductions under Montreal and constraints on industry).

[173] The Vienna Convention for the Protection of the Ozone Layer, opened for signature Mar. 22, 1985, 1513 U.N.T.S. 293, 324 (entered into force Sept. 22, 1988).

[174] See U.N. Env't Programme, Ad Hoc Working Group of Legal and Technical Experts for the Elaboration of a Global Framework Convention for the Protection of the Ozone Layer, Revised Draft Protocol Concerning Measures to Control, Limit and Reduce the Emissions of Chlorofluorocarbons (CFCs) for the Protection of the Ozone Layer, U.N. Doc.

What happened in just the two years after the toothless Vienna Convention to permit the Montreal Protocol's aggressive commitments and remarkable success?

Indeed, the Montreal Protocol is by many measures a success. In contrast to the Vienna Convention, the Montreal Protocol quickly entered into force and has enjoyed broad global adherence: a record 197 state parties have joined, including significant global actors such as the European Union, the United States, Russia, China, India, and Brazil.[175] Later amendments to the Protocol made Montreal's limits even more aggressive, requiring almost complete elimination of ozone-depleting emissions on a rapid timetable.[176]

Even more remarkable than Montreal's aggressive limits, or the fact that the global community quickly agreed, is the fact that parties largely managed to meet their commitments. By 2005, parties to the Montreal Protocol had reduced the production and use of all prohibited substances to ninety-five percent of 1987 levels.[177] Some predict that, due to CFC reductions under the Montreal Protocol, the ozone layer will completely recover within this century.[178] Others point out that Montreal is also, almost by accident, the world's most successful climate change treaty.[179]

Why?

UNEP/WG.94/9 (Nov. 14, 1983); see also Palmer, supra note 49, at 274 (noting that the Vienna Convention was successful because rather than requiring states to agree on specifics, it established a process and required almost nothing in the way of concrete commitments).

[175] The Protocol opened for signature on September 16, 1987, and entered into force less than two years later, on January 1, 1989. U.N. Env't Programme, Ozone Secretariat, The Montreal Protocol on Substances that Deplete the Ozone Layer, http://ozone.unep.org/new_site/en/montreal_protocol.php (last visited Nov. 24, 2012) [hereinafter Ozone Secretariat]. Some parties ratified the convention after subsequent amendments. See Palmer, supra note 49, at 274–75.

[176] See Palmer, supra note 49, at 274–75 (noting the subsequent agreements made in the 1990 London Amendments to the Protocol).

[177] See Grabiel, supra note 167, at 20.

[178] See id. at 20–21.

[179] See Barrett, Rethinking Global Climate Change Governance, supra note 15, at 7 ("The Montreal Protocol has reduced greenhouse gas emissions *four times* as much as the Kyoto Protocol intended to achieve."); see also Grabiel, supra note 167, at 20 (stating that Montreal is the "world's most effective climate treaty—reducing greenhouse gas emissions by the equivalent of approximately 11 gigatons of carbon dioxide a year between 1990 and 2010, and thereby delaying the onset of climate change by up to 12 years"); Gray, supra note 168 (stating that the Montreal Protocol "produced 10 times the climate benefits of Kyoto and could produce several times more greenhouse gas reductions than any post-2012 climate agreement").

B. Why Montreal Succeeded

Because of Montreal's renown as the world's most successful environmental treaty, there is no dearth of literature probing the reasons for its success. Some accounts focus on the evolving scientific understanding of the causes and effects of ozone depletion and resulting public panic, others on the role of U.S. political leadership, and still others on the roles played by the epistemic community or international institutions in sharing knowledge and facilitating political bargaining.[180] Embedded within some of these existing accounts is a compelling story about the significance of events that transpired within that $100 billion industry. In short, Montreal was successful because industry flipped.

In the initial stages of the negotiations of the Montreal Protocol, the global industry in CFCs was fully against such a treaty.[181] After all, a strong form of the Protocol (like the one that ultimately entered into force) would cut the industry down to half its size.[182] Industry lobbied behind the position that scientific evidence of ozone depletion was inconclusive; it urged that the international community should not take action without more evidence.[183] The key industry group, the Alliance for a Responsible CFC Policy, stated that it "[did] not believe the scientific information demonstrates any actual risk from current CFC use or emissions."[184] As both the largest global source and largest global consumer of CFCs, the United States became a key player in the Protocol negotiations.[185]

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[180] See John K. Setear, Ozone, Iteration, and International Law, 40 Va. J. Int'l L. 193, 194–98 (1999) (collecting explanations); see also Richard Elliot Benedick, Ozone Diplomacy: New Directions in Safeguarding the Planet (enl. ed. 1998) (U.S. political leadership); Edward A. Parson, Protecting the Ozone Layer: Science and Strategy (2003) (international institutions); Haas, supra note 170 (epistemic community); Sprinz & Vaahtoranta, supra note 170 (science); cf. Oona Hathaway & Scott J. Shapiro, Outcasting: Enforcement in Domestic and International Law, 121 Yale L.J. 252, 321–22 (2011) (highlighting role of trading regime that incentivizes compliance by offering certain rights and privileges only to compliant states).

[181] See Haas, supra note 170, at 187, 189 (noting that industry representatives initially pressed the position that there was insufficient scientific evidence to move forward on a treaty regulating CFCs, and that "American economic interests" cut against such a treaty).

[182] See Palmer, supra note 49, at 274 (noting that the Montreal Protocol required CFC reductions of fifty percent baseline levels).

[183] See Haas, supra note 170, at 194.

[184] Id. at 204.

[185] See id. at 197.

At the time of the negotiations, the CFC industry had very few participants, and was limited to seventeen companies operating in sixteen countries.[186] Of these, DuPont, headquartered in the United States, produced more than twenty-five percent of all CFCs globally, and was the only company to provide CFCs in all significant global markets.[187]

In September 1986, DuPont abruptly broke with its peers and issued a statement that concluded "that it now would be prudent to limit worldwide emissions of CFCs while science continues to provide better guidance to policymakers."[188] Immediately after DuPont reversed its position, the United States reversed as well, and less than four months later the Montreal Protocol opened for signature.[189]

C. What to Make of Montreal's Success

To say that the Montreal Protocol's success is the result of DuPont's flip would be a vast oversimplification. Nevertheless, as some of the scholarship notes, the circumstantial evidence tells a compelling story: After its key industry player acquiesced to the treaty regime, the United States withdrew its own opposition. Since the United States was the key player in the international negotiations, U.S. support quickly led to global support.

To understand the story fully, another piece of the puzzle is needed. What explains DuPont's sudden reversal? Social scientists Detlef Sprinz and Tapani Vaahtoranta suggest an answer: DuPont had "initiated a large research effort as early as the mid-1970s" to identify substitutes for the two primary CFC types, but later discontinued that effort.[190] In 1986, when the global community began seriously negotiating the Montreal Protocol, DuPont restarted that research, and quickly discovered that it

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[186] See id.

[187] See id. (noting that DuPont produced fifty percent of the CFCs consumed by the U.S. market and operated in North America, Europe, and Japan).

[188] Id. at 205.

[189] See id. at 208–12.

[190] See Sprinz & Vaahtoranta, supra note 170, at 94. Haas credits the epistemic community with sharing policy information with DuPont, intimating that DuPont's change of position may have been affected by this information, but does not explain how that information may have motivated DuPont to change course. See Haas, supra note 170, at 220. In the end, Haas states merely that DuPont's "decisions [were] made by higher-level executives for diverse corporate reasons." Id.

would be able to produce and distribute suitable CFC alternatives.[191] The Montreal Protocol suddenly fell within DuPont's economic interest. Because DuPont's science gave it a head start in producing CFC alternatives, it could capture market share by becoming a leader in producing those alternatives. Indeed, DuPont soon "announced plans to build the world's first commercial-scale plant to produce a substitute" CFC and, at the same time, "supported 'an orderly transition to a total phaseout' of the most harmful CFCs."[192]

Professors James Murdoch and Todd Sandler argue that the Montreal Protocol was merely a "symbolic" victory: Montreal was successfully enacted "because it codified reductions in CFC emissions that polluters were voluntarily prepared to accomplish as the scientific case against CFCs grew."[193] One of the implications of this, the authors suggest, is that Montreal "may be a poor blueprint for other global agreements."[194]

I propose the opposite: Montreal is an excellent blueprint for binding persuasion treaties because it demonstrates that one means to make an effective treaty is to line up stakeholder interests—to persuade—in advance of the treaty making. Lining up stakeholder interests in advance of the treaty making reduces the burden on state parties to alter industry conduct afterwards in order to satisfy treaty commitments.

The Montreal Protocol is a simple example in some ways because the industry group over which the Protocol anticipated regulation was small and well-defined. Other persuasion treaties will involve constituencies that are much larger, more diverse, and for other reasons more complex. Climate change accords, for example, involve regulation of a much larger group of stakeholders. Nevertheless, the Montreal Protocol's simplicity is also a virtue in that it clearly demonstrates the role of the private sector in getting a treaty signed and ensuring its effectiveness.

As proposed in the last Part, the word "persuasion" does double duty. If state and industry interests matter to effective multilateral persuasion treaties, then, for treaty success, both sets of stakeholders—states and private-sector entities—must be persuaded to come on board. Persuasion

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[191] See Sprinz & Vaahtoranta, supra note 170, at 94 (stating that DuPont announced that those alternatives would be available within five years).

[192] Id.

[193] See James C. Murdoch & Todd Sandler, The Voluntary Provision of a Pure Public Good: The Case of Reduced CFC Emissions and the Montreal Protocol, 63 J. Pub. Econ. 331, 332 (1997).

[194] Id. at 347.

refers not only to the work the state must do to ensure that private industry alters its conduct to satisfy treaty ends; it also refers to the pressure industry places on states to regulate or not to regulate. The Montreal story suggests that these two persuasive flows may operate together, in a reciprocal fashion.

Sprinz and Vaahtoranta make this point in slightly different terms. In their account, two simultaneous "causal chains" led to Montreal's success: "technological advances led to more ambitious preferences for environmental regulation," and "public policy . . . force[d] the development of more efficient environmental technologies."[195] In other words, as industry found CFC alternatives, states were more confident of their capacity to commit to aggressive CFC reductions. At the same time, industry was motivated to find those CFC alternatives precisely because they knew that a CFC treaty was likely on the horizon.[196] The prospect of an international agreement pushed technological innovation, and the technological innovation pushed treaty making. Thus, the Montreal Protocol both contributed to, and was the product of, a reciprocal persuasive cycle between public- and private-sector actors.

The Montreal story thus also suggests that the private-sector support required to create an effective persuasion treaty may take place either before the treaty comes into force, or after, or both. For treaty success, industry must align its interests with state treaty commitments, but it is not necessary that industry's acquiescence happen in a linear fashion—through regulation or some other strategy—after the treaty is enacted. One compelling explanation for why Montreal became the world's most successful environmental agreement is that the key industry actors discovered an economic advantage to aligning themselves with treaty goals. This industry alignment then paved the way for successful domestic regulatory enforcement.

IV. NORMATIVE IMPLICATIONS

How does the Article's descriptive theory help resolve persistent treaty-making problems? Any new concept is a means of simplification, and

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[195] Sprinz & Vaahtoranta, supra note 170, at 95.

[196] See id. ("[A]nticipation of a regulatory intervention" gives industry an "incentive to search for alternatives for existing products or production methods. . . . [I]ndustry starts preparing itself for more stringent environmental controls by improving the state of abatement technology" which "enhance[s] the likelihood of substantive international environmental regulation.").

simplification is valuable to the extent that it is useful. In part, the persuasion treaty frame is useful to the extent that it inspires and facilitates further helpful inquiry. Further analytic inquiry could illuminate the borders of the persuasion/resolution distinction and clarify its relationship to a state's other obligations under a treaty. Systematic empirical research could clarify how, when, and to what extent private-sector relationships or domestic regulatory capacities affect a state's treaty-making and compliance decisions. Even without more elaboration, however, the persuasion treaty theory facilitates preliminary conclusions as to how to move forward toward more successful treaty making. It does so by dividing and ordering the types of problems governments face when making treaty decisions, and thus clarifying means of resolving them.

To excavate and illuminate the normative proposals that flow from the persuasion treaty theory, this Part begins with a case study: the transnational spread of the European REACH regulations.[197] Focusing on the REACH regulations may at first appear odd, as the chemical safety realm is not currently governed by treaty. The REACH story is pertinent because it provides a vivid example of how private corporate interests relate, in a reciprocal fashion, to domestic regulatory success; it demonstrates that industry interests are not fixed, but respond to changing regulatory and social pressures, and suggests the transnational nature of the influence that flows among regulators, industry, and civil society. The REACH story thus provides clues as to how treaty proponents may cultivate corporate cooperation in advance of, or alongside, treaty-making efforts. After presenting the case study, this Part explores those implications.

A. Charting Corporate Persuasion: REACH

1. Industry-State Persuasion

A decade ago, the European Union's chemicals regulations were fragmented and byzantine and, among other failures, imposed impossibly high burdens on public servants.[198] In fact, the prior laws were so in-

[197] See Regulation 1907/2006, of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2006 O.J. (L 396) (EC) [hereinafter REACH Regulations].

[198] See White Paper, supra note 54, at 6 (reviewing the prior chemical regulations and their shortcomings, including a poor "allocation of responsibilities" between public officials and industry); see also European Comm'n, Q and A on the New Chemicals Policy REACH, Oct. 29, 2003, http://europa.eu/rapid/press-release_MEMO-03-213_en.htm?locale=en [hereinaf-

ept that they failed to have any meaningful effect on the production and distribution of harmful chemicals.[199] So the European Union began to discuss adopting an "an ambitious new framework" to regulate chemicals: the Regulation on Registration, Evaluation, Authorisation, and Restriction of Chemicals, or "REACH."[200]

Global industry actors resisted the proposed European regulations, and placed pressure on European Union officials who were considering the new policy.[201] This first chapter of the story presents a familiar persuasive story: industry lobbied governments against socially productive regulations that would harm industry. However, the story also shows that the means industry uses to do so can include governments (including, in this case, high-level U.S. officials) and can reverberate transnationally.

First, U.S. industry enlisted the U.S. government to assist it in building a campaign against the E.U. regulations.[202] Representatives from

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ter EC Q&A] (stating that the prior regime imposed "lengthy and cumbersome" burdens on public authorities in order to issue new chemical regulations). According to the European Commission, REACH was proposed because of significant shortcomings in the previous regulatory framework, which "has not produced sufficient information about the effects of chemicals on human health and the environment, and where risks are identified, it is slow to assess them and introduce risk management measures." Id.

[199] See White Paper, supra note 54, at 6 (noting that "[t]here is a general lack of knowledge about the properties and uses of existing substances," which constitute "99% of the total volume of all substances on the market"; those substances were not subject to restriction under the prior regime). Also, the older regulations privileged older chemicals over newer chemicals, perversely burdening any efforts by the industry to introduce newer, less dangerous chemicals. See id. at 5–8.

[200] See EC Q&A, supra note 198; Scott, supra note 87, at 897; see also REACH Regulations, supra note 197.

[201] The information in this Subsection regarding the breadth and depth of the industry campaign against the REACH regulations comes from a report prepared for U.S. Representative Henry Waxman in 2004. Many of the quotations in this Subsection are from primary source documents, such as diplomatic cables and government reports quoted in the Waxman Report. See Minority Staff of H. Comm. on Gov't Reform, Special Investigations Div., A Special Interest Case Study: The Chemical Industry, the Bush Administration, and European Efforts to Regulate Chemicals 4 (Apr. 1, 2004), available at http://oversight-archive.waxman.house.gov/documents/20040817125807-75305.pdf [hereinafter Waxman Report]. The Waxman Report had overtly partisan aims—it was meant to expose relationships between the Bush administration and the chemical industry, a key Bush campaign supporter—but helpfully collects original source material to support the story it presents. See id.; cf. Thaddeus Herrick et al., U.S. Opposes EU Effort to Test Chemicals for Health Hazards, Wall St. J., Sept. 9, 2003, at A1 (reporting separately on many of the facts the Waxman Report presents).

[202] See Waxman Report, supra note 201, at 3.

chemical trade groups met with government officials to express concerns and construct a strategy.[203] The State Department, the U.S. Trade Representative, the Commerce Department, and the Environmental Protection Agency all became involved.[204]

To assist the chemical industry, the Department of Commerce prepared a "demarche" to critique the proposed REACH regulations.[205] The State Department solicited assistance from the chemical industry to "develop 'themes' for the U.S. government to use in opposing REACH."[206] Industry officials communicated themes to the U.S. Trade Representative for Europe, who promised to pass them on to the European Union.[207] The American Chemistry Council also provided various U.S. government officials with a study about the effect of the proposed E.U. regulations.[208] Relying on the American Chemistry Council report, the United States issued the demarche to E.U. member states in the spring of 2002.[209] The United States also filed formal comments with the European Commission regarding the REACH draft proposal, asserting industry's theme that the regulations would be "costly, burdensome, and complex."[210]

Then-Secretary of State Colin Powell also sent two cables to U.S. diplomatic posts.[211] The first cable aimed to elicit support from nations outside the European Union, directing U.S. diplomats to "raise the EU chemicals policy with relevant government officials . . . and the local

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[203] See id. at 4. U.S. government officials met "actively" with representatives from the "Synthetic Organic Chemical Manufacturers Association (SOCMA), the American Chemistry Council (ACC), the American Plastics Council, ISAC 3, DuPont, and Dow to identify industry concerns." Id.

[204] See id. at ii.

[205] Id. at 5. According to then-Secretary of State Colin Powell, the "[U.S.] Office of EU and Regional Affairs is working with . . . [the] Office of Chemicals on a demarche to go to EU Member States and to important third countries to get this campaign going." Id.

[206] See id. at 6.

[207] See id.

[208] See id. at 5. According to the Waxman Report, the U.S. government relied entirely on the American Chemistry Council to support its critique of the REACH proposal. See id. at 5 (stating that "[t]here is no evidence in the available documents that the U.S. government performed its own analysis, subjected the draft ACC study to any form of peer review, or otherwise attempted to verify the basis for Secretary Powell's direction to the diplomatic posts").

[209] See id. at 6.

[210] See id. at i, 14. According to the Waxman Report, these comments critiqued REACH and suggested a "multilateral, consensus approach," adopting the position the chemical industry had advocated. Id. at 14.

[211] See id. at 5, 7.

business community."[212] Powell's second cable, sent to posts in European Union nations, urged U.S. embassy officials to "reiterate to the European Commission and EU Member states our general concerns before" finalization of the REACH proposal.[213] The cable also included a list of arguments recipients could use to oppose REACH.[214]

A curious feature of this story is that the U.S. government did not confine itself to lobbying E.U. government counterparts. Rather, both the U.S. government and industry specifically targeted *industry*, both within the E.U. and outside of it, and encouraged foreign industry pressure on E.U. government officials.[215] In fact, among the "flood[]" of submissions about REACH ultimately made to the European Commission, industry submissions were the most significant.[216]

To solicit foreign industry support, U.S. embassy officials met with industry officials and advised them to "develop an official position and strategy as soon as possible" in order to influence the draft REACH regulations.[217] For example, the U.S. embassy in Greece met with Dow Chemical executives "to discuss how to engage the Greek government."[218] The U.S. embassy advised Dow to reach out to E.U. colleagues, and also coached Dow on which Greek government officials to contact and "how best to approach them."[219] Later, the U.S. Trade Representative for Europe played matchmaker, coordinating an effort whereby specific members of U.S. industry in Europe would lobby spe-

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[212] Id. at 5.

[213] Id. at 7.

[214] See id. at 7–8. According to the Waxman Report, the arguments "reiterated the industry 'themes.'" Id. at 7.

[215] See id. at 9.

[216] See Fisher, supra note 51, at 547. For additional accounts of industry pressure on the European Union surrounding the issuance of the REACH Regulations, see Jean-Philippe Montfort, The Commission White Paper on a Strategy for a Future EU Chemicals Policy: The View of European Companies of American Parentage, 23 J. Risk Analysis 399, 399–404 (2003); Thomas Persson, Democratizing European Chemicals Policy: Do Consultations Favour Civil Society Participation?, 3 J. Civ. Soc'y 223, 223–38 (2007).

[217] See Waxman Report, supra note 201.

[218] See id. at 6. According to the U.S. Commerce Department, industry representatives in Greece and elsewhere advised the United States that "EU Member States and third [party] countries [were] largely unaware of this EU initiative and would like the [U.S. government] to work to educate them so that they can join the United States in raising concerns with EU proposals for this important sector." Id. at 4.

[219] Id. at 6. At least one other embassy followed suit. See id. at 4. For example, embassy officials in Brussels "also met with . . . chemical companies . . . to solicit their views" and encourage their participation. Id.

cific European counterparts.[220] U.S. agencies hosted meetings with European officials and business representatives, in which the U.S. government critiqued the proposed REACH provisions and advocated U.S. methods of chemical regulation.[221] U.S. agencies also sent staff to meet with European industry to urge "active participation in the REACH comment period"; arranged videoconferences with E.U. enterprises, press, and government officials; submitted articles to chemical industry publications in Europe; and briefed congressional representatives traveling to Europe.[222] The U.S. government lobbied industry outside of Europe as well, approaching the Asia-Pacific Chemical Industry Coalition and the Asia-Pacific Economic Cooperation ("APEC") Business Advisory Council.[223]

Both supporters and opponents of REACH recognized the significance of the effort by the global chemical industry, assisted and coordinated by the U.S. government.[224] The American Chemistry Council characterized the industry-based movement as building an "aggressive position worldwide," and lauded the U.S. government action as a "major intervention."[225] A partisan report prepared for U.S. Representative Henry Waxman in 2004 concluded that the REACH lobbying efforts present "a case study of how a well-connected special interest can reverse U.S. policy and enlist the support of numerous federal officials, including a cabinet secretary, to intervene in the environmental policies of other countries."[226]

2. State-Industry Persuasion

While global industry lobbying efforts did weaken the REACH proposal, the European Union was nevertheless able to withstand corporate

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[220] See id. at 9–10.

[221] See id. at 10. Meetings hosted by the EPA and the American Chemistry Council were intended to critique the proposed REACH provisions, to encourage "efficient voluntary measures," and to explain the U.S. approach. See id.

[222] See id. at 11–12.

[223] See id. at 13. The Commerce Department encouraged delegations from the twenty-one member states to express their concerns to APEC ministers, and offered to draft "a negative economic impact paper, which could be submitted to the EU as APEC collective comments." Id.

[224] For example, European environmental groups noted that "interference by the chemical producers in Europe and the US" had a significant impact on the REACH proposal. Id. at 15.

[225] Id. at 15.

[226] See id. at 17.

pressure and construct an effective new regulatory regime.[227] The new regulations came into force on June 1, 2007 and will be fully implemented by 2018.[228] As the REACH regulations have gradually come into effect, they have become a model of what this Article terms "regulatory persuasion"[229]—whereby the European Union "persuaded" European industry and those doing business in Europe to comply with regulatory ends by refusing to license noncompliant behavior.

Before moving to the transnational effects of the European regulatory persuasion, a brief summary of features of the REACH regulations will frame the analysis. The regulatory strategy was innovative, involving both a market-based registration requirement and a more traditional regulatory regime. First, as for registration, the "no data, no market rule" requires chemical producers or manufacturers to register chemicals before placing them on the E.U. domestic market.[230] The rule thus imposes responsibility on both domestic chemical producers and foreign importers to generate and turn over information about their chemicals.[231] To register chemicals, producers and importers must submit a "technical dossier" that includes information about the chemical, guidance for its safe use, a record of any testing of the chemical, and, in some instances, a safety report.[232] When chemicals are especially dangerous, producers and importers have additional reporting burdens.[233]

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[227] See id. at 15; REACH Regulations, supra note 197.

[228] See REACH Regulations, supra note 197; see also Fisher, supra note 51, at 543–45 (tracing the development and implementation of REACH regulations).

[229] When I speak in terms of traditional regulatory persuasion, I am referring to the state's interaction with industry by means of a regulatory mechanism, rather than distinguishing between particular regulatory tools. The REACH regime married traditional command-and-control regulation and the newer market-based mechanisms. The registration process is an example of the latter, and the authorization and restriction elements are examples of the former.

[230] See Fisher, supra note 51, at 544.

[231] See REACH Regulations, supra note 197, art. 5.

[232] See id. art. 10 (outlining the information that must be supplied in a "technical dossier" for general chemical registration); see also id. art. 14 (requiring a chemical safety report); id. art. 31 (outlining information that must be present in a safety data sheet to accompany the chemical throughout its transit in the supply chain).

[233] See id. art. 14 (providing that when chemicals are "dangerous," or "persistent, bioaccumulative and toxic," registrants must complete additional risk testing and provide additional disclosures); see also id. arts. 31–32 (outlining what information must be present in the safety data sheet, and what obligations producers have to communicate information down the supply chain); id. arts. 34, 37 (requiring that downstream manufacturers and importers communicate up the supply chain about any anticipated uses of the chemical that may alter the risk management information in the safety reports).

Second, after producers and importers register the chemicals, a new European Chemicals Agency (the "Agency") and E.U. members evaluate them on a rolling basis, beginning with those chemicals identified as especially dangerous.[234] After evaluation, some chemicals may be restricted or banned.[235] Alternately, the Agency and E.U. countries may authorize the manufacture and sale of especially dangerous chemicals if risks are "adequately controlled" or if the "socio-economic benefits outweigh the risk . . . arising from the use of the substance and if there are no suitable alternative[s]."[236]

The REACH regulatory persuasion in Europe thus functioned in several ways. First, it placed the burden on chemical industry participants to compile information about the characteristics and effects of the products they wished to sell. Second, the REACH regulations encouraged industry innovation and competition by threatening to ban unreasonably dangerous chemicals and encouraging the availability of chemical alternatives.[237]

The European Union is a sufficiently powerful regulator that the chemical industry has largely been "persuaded" to come on board. Indeed, the European Chemicals Agency recently compiled a report on the effectiveness of the regulations five years after their implementation, and the report states that the regulations "are working successfully and the various actors responsible for the work are responding as required."[238] Notably, the report remarks that to attain full compliance with REACH, industry internalization of regulatory rules will be neces-

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[234] See id. arts. 40–42, 44–45 (providing that the Agency will review testing plans and chemical regulation dossiers to check for compliance, and, in concert with member states, will identify and prioritize substances with "properties of concern" and subject them to further testing according to a "Community rolling action plan").

[235] See id. arts. 67–68 (outlining the restriction process); id. Annex XVII (listing restricted substances and the scope of those restrictions).

[236] See id. art. 60.

[237] See Scott, supra note 87, at 929 (examining how REACH functioned as "competition-based regulation" and provided incentives for actors in the chemical industry to search for alternative substances).

[238] European Chems. Agency, Report Summary 2011: The Operation of the REACH and CLP Regulations 2 (June 30, 2011), available at http://echa.europa.eu/documents/10162/13634/operation_reach_clp_2011_summary_en.pdf. Responding to critics who "feared that REACH was too ambitious . . . complex," and burdensome for industry, the report states that though the REACH legislation "set challenging deadlines"—requiring industry to preregister large-volume chemicals just eighteen months after the regulations came into effect, then complete formal registration and other requirements in 2010 and 2011—"tens of thousands of companies" succeeded in meeting those deadlines. Id.

sary: "[Success] requires a fundamental change in mindset that is not yet fully there. Industry and industrial associations need to continue to promote this change in mindset if industry is to fully shoulder its responsibilities for safer chemicals."[239]

The regulatory persuasion of the REACH regulations leapt state boundaries, affecting industry outside Europe as well.[240] Social science accounts trace at least three mechanisms by which this global influence spread.[241]

First, the regulations created a "nontariff barrier" to trade.[242] To compete in E.U. markets, U.S. and foreign producers are required to compile and report toxicity data for their products.[243] To do this, they must understand the chain of custody of their chemicals in the European Union and how their chemicals will be used in E.U. markets.[244] These requirements serve as a competitive disadvantage both to companies based outside the European Union and to smaller companies that do not have the technical expertise to comply with the E.U. requirements.[245]

Second, the regulations increase information available about the toxicity of existing chemicals and possible substitutes for those chemicals.[246] Information about chemical toxicity and risk equips global regulators to regulate more effectively; civil society to mount public information campaigns exposing the practices of those who use dangerous chemicals; consumers to boycott branded products; and private enti-

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[239] Id. at 3.

[240] Even prior to the implementation of REACH, the REACH proposal was already "affecting U.S. producers, including chemical producers, and . . . doing so along the full length of the industrial supply chain." See Michael P. Wilson et al., Green Chemistry in California: A Framework for Leadership in Chemicals Policy and Innovation 61 (2006) [hereinafter Wilson Report].

[241] See, e.g., Fisher, supra note 51, at 553–55 (tracing the REACH regime's "interjurisdictional impacts").

[242] Id. at 554.

[243] See Wilson Report, supra note 240, at 63.

[244] See id.

[245] See id. at 62–64. The Wilson Report observes that the power of the European Union to affect U.S. and global producers flows from "the size and wealth of its 25-nation market—and its capacity to restrict access to that market" on the basis of particular standards. Id. at 61.

[246] See id. at 61–63; see also Fisher, supra note 51 (noting the significance of the fact that the REACH regime will produce information).

ties to undertake civil suits.[247] The regulations themselves provide a "blueprint" for regulatory action elsewhere.[248]

Third, the regulations catalyze global investment in new chemical products. When REACH's restriction phase begins, the regulations will directly spur development of new products by providing market opportunities for those who introduce less risky chemicals.[249] Even in advance of that restriction phase, companies are making voluntary shifts to avoid the consequences outlined above: regulation, private lawsuits, public shaming, and boycotts.[250]

3. Industry-State Persuasion, In Reverse

There is another persuasive story here as well, and it reverses the earlier story about industry pressure. Regulators in California, Massachusetts, Maine, the U.S. federal government, and China have all proposed or enacted regulatory regimes that respond to REACH, and have done so

[247] See Wilson Report, supra note 240, at 63–64 (noting that information facilitates regulation); Fisher, supra note 51, at 554–55 (noting that REACH both provides a "blueprint for international initiatives in relation to chemicals regulation" and leads to "contagious diffusion" of regulations and regulatory policy in other domestic jurisdictions); Scott, supra note 87 (exploring how the REACH regime equipped NGOs both to spread information about dangerous chemicals globally and to mobilize consumers to exert various forms of pressure on chemicals producers and regulatory officials).

[248] Fisher, supra note 51, at 554 (noting that the "blueprint" functions well at the international level but serves as an irritant to policy reform in other jurisdictions because regulations are "embedded" products of "legal and economic cultures").

[249] See Wilson Report, supra note 240, at 53 (noting market opportunities); see also id. at 63 (asserting that REACH "will produce global changes in chemical production practices, including in the U.S.").

[250] See, e.g., id. at 63 (noting that "General Electric's CEO Jeffrey Immelt announced in 2005 that GE [would] devote $1.5 billion annually to clean technology research and development, citing the potential for a U.S. competitive disadvantage with the E.U. in [the chemicals] arena"). A final mechanism of REACH's influence is the global redistribution of risky chemicals. Because the E.U. market is now closed to non-REACH-compliant chemicals, companies must either diminish production of those chemicals or increase distribution in alternative markets. In other words, REACH also has the potential to lead to a race to the bottom, perversely incentivizing industry to "dump" noncompliant products elsewhere, where regulations are less stringent. See id. at 64 ("The German chemical company BASF . . . will continue to produce and sell [DEHP] in the U.S. even though it will be permanently banned in the E.U. for use in toys in 2006. BASF will discontinue production of DEHP and its raw material, 2-ethylhexanol, in the E.U., where it will introduce a substitute whose safety, according to the company, 'is beyond all question.'").

(at least in part) to respond to the needs of domestic industry constituencies.[251]

Once the global chemical industry lost its battle to prevent the REACH regulations from coming into effect, it became subject to the pressures outlined in the previous Subsection, including a changing global chemicals market, increased public exposure, and the threat of public and private action.[252] Suddenly, the chemical industry's interests changed. Industry now needed to enlist regulators to assist it in staying competitive in the global market. Regulators began to institute copycat regulations not just because they were armed with a European blueprint,[253] but also to protect the interests of domestic industry actors.

For example, when California began considering a change to its chemicals laws, one of its principal reasons for doing so was to respond to changing behavior by large U.S. and E.U. companies.[254] California noted that U.S. industry had responded to "conditions of considerable uncertainty" regarding the nature of the chemicals they produce, distribute, purchase, or use—and the corresponding potential for liability—by attempting to produce safer products and "remove hazardous chemicals and materials from their supply chains."[255] California interpreted these

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[251] See Scott, supra note 87, at 910–20 (California, Massachusetts, Maine, and U.S. federal responses); Cal. Envtl. Prot. Agency, Executive Summary, California Green Chemistry Initiative, Phase 1: A Compilation of Options, at xv (Jan. 2008) [hereinafter California Green Chemistry], available at http://www.dtsc.ca.gov/pollutionprevention/greenchemistry initiative/upload/executive_summary.pdf (California response); cf. Zhu Boru, Electronic Waste Poses Mounting Challenge, China Daily, Apr. 6, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-04/06/content_431666.htm (noting that China considered adoption of laws similar to E.U. regulations in the electronic waste arena (which constitutes a sister regime to REACH) so that "Chinese companies [would] not be squeezed out of the market").

[252] See Scott, supra note 87, at 920–28; see also Marla Cone, Europe's Rules Forcing U.S. Firms to Clean Up: Unwilling to Surrender Sales, Companies Struggle to Meet the EU's Tough Stand on Toxics, L.A. Times, May 16, 2005, at A1 (noting efforts by U.S. companies to comply with the stringent E.U. standards).

[253] See Scott, supra note 87, at 920–28 (examining how the availability of chemical toxicity information enabled NGOs to activate regulatory networks in the United States and to catalyze regulatory travel).

[254] See id. at 910–14 (stating that California was interested "in the implications for California of chemical policy developments in the European Union"; one of its principal concerns was the economic success of state industries); see also Wilson Report, supra note 240, at 63–65 (noting changes in behavior of California chemical industry participants precipitated by REACH regime).

[255] Wilson Report, supra note 240, at 64; see also id. at 91 (noting that "[m]otivating the chemical industry to invest *proactively* in this transition represents a key, underlying rationale for a comprehensive chemicals policy in California").

efforts as a demand in the U.S. market for more information on chemicals and safer materials, which California could facilitate through new regulations.[256]

California sought to help its industry actors to avoid the market costs of the global shift towards safer chemicals and to capitalize on market opportunities.[257] A state-sponsored report noted that the state's "small and medium-sized chemical producers" would have trouble preserving their access to markets in the European Union, and concluded that a coordinated regulatory approach in California would "assist its businesses in meeting REACH requirements."[258] As the California Secretary for Environmental Protection put it, "[i]n the absence of a unifying approach, interest groups and policy makers have been attempting to take these issues on one-by-one" in product-specific, chemical-specific, or city-specific approaches, with negative market effects.[259] California also recognized the fact that industry was devoting—and would likely continue to devote—substantial sums into research and development related to safer chemicals, so it sought to capture some of this new investment by using regulatory policy to inspire investment in California.[260]

Finally, California was also persuaded to act to prevent dumping. The state-sponsored report noted that companies that were marketing REACH-compliant chemicals in Europe were nevertheless continuing to

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[256] See id. at xiv–xv.

[257] See id. See generally California Green Chemistry, supra note 251 (justifying new chemical regulations in California).

[258] See Wilson Report, supra note 240, at 63. The report explained that "California producers that fail to act early in meeting the requirements of REACH could face a loss of market share and profitability" as they attempt to play "catchup," and concluded that California producers "would benefit from information on alternatives to riskier chemicals that are likely to fall under the REACH authorization process"—information that California regulations could provide. Id.

Among the mounting pressures on industry that the report noted was the regulatory patchwork or "divergent convergence" problem that currently existed in California, though the report raised this problem in a context unrelated to the REACH regulations. See California Green Chemistry, supra note 251, at vi (noting problems with a "piecemeal approach" to chemical regulation in California). Other commentators recognized that REACH was causing divergent convergence in various jurisdictions. See, e.g., Wilson Report, supra note 240, at 64 (noting that industry was responding to divergent global regulatory schemes by sending different chemicals to different global markets); Fisher, supra note 51 (explaining the social science concept of "divergent convergence").

[259] Memorandum from Linda S. Adams, Sec. for Envtl. Prot., regarding California Environmental Protection Agency (CAL/EPA) (Apr. 20, 2007), *in* Green Chemistry Initiative, supra note 251, at Appendix A.

[260] See Wilson Report, supra note 240, at 63.

market noncompliant chemicals in California, a practice which the state sought to bar.[261]

Massachusetts's interest in regulatory reform in the chemicals industry was also generated in part by the fact that industry was already compelled to respond to the European regime.[262] Indeed, an explicit impetus for regulatory reform in Massachusetts was the fact that "the European Union and other countries have already adopted more restrictive policies regarding the use of toxic chemicals and more health protective requirements for products, and over 37% of Massachusetts trade is with the European Union's Member States."[263]

Significantly, the U.S. chemical industry's lobbying position in the post-REACH world appears to have changed. In response to an open call for comments on California's new regulatory proposal, the American Chemistry Council comments were largely favorable.[264] In marked contrast to its pre-REACH positions, industry's comments in California proposed only a very modest cabining of the reach of the California initiative, and they principally served as a self-congratulatory showcase of industry's recent efforts.[265]

B. Implications

The REACH and Montreal examples show that industry interests can evolve under threat of regulation, as technology evolves, or in response to transnational regulatory pressures. The equities are not fixed: as eco-

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[261] See id. at 64 (noting that California especially sought to avoid the dumping of "1,400 chemicals that could be presumptively removed from commercial circulation under the REACH authorization process").

[262] See Scott, supra note 87, at 914–15.

[263] Id. at 915. China, in announcing a regulatory regime patterned after E.U. regulations, stated that its reason for doing this was to ensure that Chinese industry did not become closed out of European markets. See Boru, supra note 251 (stating that China's regulations were patterned after REACH sister regulations concerning electronic waste).

[264] See Memorandum Regarding Information on Chemicals for Clearinghouse, from Mike Walls, Managing Dir., Am. Chemistry Council, et al., to Maureen Gorsen, Dir., Cal. Dep't of Toxics Substances Control (Jan. 29, 2009), available at http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GC_American_Chem_Input.pdf. Admittedly the connection between the issuance of the REACH regulations and industry's apparent change of position is highly circumstantial. Tracing whether or to what extent REACH influenced this change would require a complex empirical analysis.

[265] See, e.g., id. at 2 (stressing that the U.S. chemical industry was involved in a major voluntary effort to provide information according to global testing standards on commercial chemicals that "represent 95% of the chemicals in U.S. commerce by volume").

nomic facts change, state and industry actors often change positions. In other words, this is not solely a matter of states seeking socially productive conduct and corporations opposing it. Corporate influence does not always thwart regulatory ends. Rather, corporations can suddenly swap sides and support regulations they previously opposed. Corporate regulatory influence can operate transnationally and can interact with state influence in reciprocal cycles, or a chain of responsive persuasive moves, between industry and state actors across national borders.

These descriptive facts invite further research by those who would understand and cultivate conditions for multilateral treaty success. When and under what circumstances do corporations flip? What remains is to study the mechanics of that change and how to facilitate it.[266]

Nevertheless, even the preliminary account suggests that the global governance tools for manipulating corporate dependencies—such as those outlined briefly in Section I.C—may be brought to bear for treaty-making ends. For the persuasion type of treaty, in other words, proponents should focus their attention on facilitating and capitalizing on domestic private-sector persuasion. This is because although all treaty regimes require potential treaty parties to consider how their accession or nonaccession—and compliance or noncompliance—will affect their international standing, for a persuasion treaty, a potential signatory state must also consider the nature of domestic regulatory relationships.

The persuasion treaty theory suggests that whether the state will be able to enlist the support of relevant private-sector constituents will determine the state's capacity to comply with the treaty regime, and may determine the state's willingness to sign the treaty in the first place. Thus, if corporate stakeholders can influence regulatory success, and therefore treaty success, the project for those who would create successful treaty regimes is to align corporate interests with the ends the treaty seeks to accomplish. The next Section outlines possible strategies.

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[266] Of course, there is much more work to be done. A more systematic analysis could either support or challenge the particular features of state/industry regulatory persuasion suggested by the REACH and Montreal examples. See, e.g., Fisher, supra note 51, at 553 (noting that "REACH is a distinct departure from other techniques of environmental regulation . . . because its role is far more to do with creating the market than just regulating it").

C. Proposals

The discussion in this Section is intended to lay the groundwork for strategies that deserve more sustained attention. Because this approach to treaty success has not received sustained theoretical attention, however, even a brief introduction may help guide future analysis.

As a preliminary matter, persuasion treaty proponents should identify the targets of their advocacy and persuasion.[267] Those targets are not solely governmental decision makers.[268] Rather, proponents should train their sights on the private-sector companies and industries that will be most affected by the proposed treaty regime. Identifying the relevant private-sector stakeholders will involve evaluating, globally, (a) how a potential treaty will affect various industries and subgroups, and (b) which stakeholders within a particular industry or subgroup have the most power to alter the course of the treaty. As the persuasion treaty theory shows, the relevant stakeholders are those with the capacity to shape competition among peers, lobby effectively, employ connections with government regulators, or deploy the expertise and enforcement power upon which regulators depend.

To garner private-sector support, states and other proponents can execute strategies aimed at bringing treaty goals within the business interests of relevant constituencies. A rich and evolving corporate governance literature shows how business entities operate within the confines of a number of different kinds of "licence."[269] If corporations breach the licenses, they face repercussions with economic effects.[270] Thus, to bring treaty goals within the business interest of relevant private-sector actors, states and other proponents should target those licenses.

As Professor Neil Gunningham explains, business entities are driven toward particular agendas based upon external influences from three

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[267] Those I call "treaty proponents" may come from all quarters and may include NGO advocates or other citizen groups seeking to persuade their own government to act; industry actors attempting to influence one or multiple potential state parties to adopt a regime; government officials seeking to persuade domestic constituencies; or even governments seeking to exert influence on intransigent treaty counterparties. The same basic strategy applies to all proponents.

[268] Government officials may also be suitable targets for advocacy—in the United States, for example, these officials might be State Department treaty negotiators, the Senate, or others in the executive branch—but the focus of analysis and persuasive energy should also include the private-sector entities that have a stake in how a treaty might change the status quo.

[269] Gunningham, supra note 56, at 481.

[270] See id.

principal sources: "economic, legal, and social."[271] These economic, legal, and social influences place obligations on industry actors that might be helpfully conceptualized as the "terms or conditions of a 'licence to operate.'"[272] Thinking about these various sources of obligation and influence as "licences"—a term traditionally associated only with the legal realm—provides a means to understand how business is affected by a broader set of stakeholders beyond traditional regulators.[273] Groups of stakeholders can extend or cancel the licenses, or privileges, upon which the corporation's success depends.[274] In short, "business is dependent upon, and has a direct relationship with, the various economic, regulatory and social stakeholders who define, measure and enforce the terms of the licence."[275]

Just as business entities and government regulators negotiate and interact to shape regulatory rules and structure compliance, so too other stakeholders participate in negotiated relationships with corporations.[276] Legal, social, and economic licenses are all products of interactive, interdependent, and evolving relationships.[277] For example, litigation can prompt regulatory change. The existence of regulatory standards, even unenforced, can provide fodder for public information campaigns by NGOs or shaming by activists. A company's failure to respond to social pressures can prompt regulatory or shareholder responses. Regulations in one country can trigger public or regulatory responses in another. Persuading corporations to align their interests with treaty goals involves making use of these relationships and interdependencies. The REACH regulations and events in their aftermath demonstrate such a strategy: modifying a legal license (the REACH regulations themselves) modified social licenses (public awareness and outcry regarding dangerous chemicals) and intercorporate competitive dynamics. These changes altered

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[271] Id. ("Economic stakeholders include shareholders . . . banks and customers. . . . Legal stakeholders include regulators, legislators and citizens . . . seeking to enforce regulations. Social stakeholders include neighbors (the local community), . . . activist organisations and the general voting public.").

[272] See id.

[273] Id.

[274] See id.

[275] Id.

[276] See Freeman, supra note 21, at 548 (suggesting the process of regulation is best conceived as a set of "negotiated relationships"); see also Gunningham, supra note 56, at 481 (observing that constraints on business entities are set by the expectations of a diverse array of stakeholders).

[277] See Gunningham, supra note 56, at 480–81.

corporate interests and pushed corporations to modify their conduct in socially productive ways.

Businesses can, and do, engage in socially responsible activities that are not immediately profit-maximizing in order to maintain and expand their license to operate. The "brave new world of compliance . . . can deeply impact [the] survival and prosperity" of multinational corporations such that "the stakes are simply too high" for officers and directors to ignore non-economic constraints on their behavior.[278] On the one hand, corporations face the risk of litigation and liability in domestic and international courts when they fail to meet legal obligations relating to human rights, the environment, labor, and corruption.[279] On the other hand, businesses face nonlegal risks such as "loss of reputation, denial of access to foreign markets . . . shareholder dissent," and bad publicity, with its corresponding depletion of stock values.[280] Some argue that all of these risks place corporate responsibility measures squarely within the "business case."[281] Indeed, corporate directors and managers often explain corporate social responsibility measures as an attempt by businesses to reduce risk by anticipating or responding to changes in economic, legal, or social expectations.[282]

The private governance mechanisms surveyed in Section I.C serve as a means to capture existing corporate interests in maintaining licenses and market share and put them to use to further socially productive ends. For example, transparency initiatives and industry standards may encourage improved conduct where public exposure would threaten social licenses, or may encourage outliers to bring their standards up to meet the rest. Treaty proponents should seek to build upon these strategies. Doing so takes advantage of the fundamental dependency of corporations on the social, economic, and legal licenses by signaling to the relevant companies and industries that stakeholder requirements and expec-

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[278] Scheffer & Kaeb, supra note 86.

[279] See id. at 335.

[280] Id.

[281] Id. at 334; see also Gunningham, supra note 56 (noting that companies often justify corporate social responsibility measures by providing the "business case").

[282] See Scheffer & Kaeb, supra note 86, at 374; see also Gunningham, supra note 56, at 481 (discussing risk reduction in terms of economic, social, and legal expectations).

tations are changing, or may imminently change.[283] Three strategies may be particularly effective:

Regulatory Networking. Corporate opposition may be overcome through incremental regulatory migration and networking. Governments should seek to craft regulatory regimes that are exportable, and states can build global, persuasive capital by contributing to or borrowing from the cache of available regulations. States with weak regulatory power can borrow from successful regulatory templates elsewhere, with prior implementation paving the way. Treaty designers should seek to identify and consolidate successes garnered by transnational regulatory networks, corporate responsibility measures, and industry standards.

Transnational Litigation and Public Information Campaigns. Because corporations are dependent on legal and social licenses to operate, the threat of removal of those licenses is a powerful way to shape corporate conduct. Corporate responsibility measures provide a way for industry members and groups to prove to government regulators and civil society that they are already managing a given problem, and there is no need, therefore, for further regulation. Transnational litigation can expose corporate conduct in a way that threatens further regulation and social opprobrium, and thus the removal of licenses.[284] Litigation can also, of course, threaten the imposition of damages, and corresponding shareholder responses. Triggering competition for consumers also motivates corporations to change their behavior. Advocates can seek to neutralize industry resistance to treaty regimes by putting corporate choices in the public eye. Doing so can constrain all three licenses, as consumers and shareholders vote with their feet and state regulators gather popular support for new regulatory regimes. Thus, transnational litigation, corporate responsibility measures, and public information campaigns can all serve a role in publicizing corporate choices.

Corporate Law. Corporations have legal status under particular states and depend for their existence on legal licenses to operate.[285] To put it another way, law creates the features of corporations that ensure the

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[283] The strategies I offer involve the use of law and target principally the legal license. Further interdisciplinary work could be useful in exploring other strategies to target the social and economic licenses more directly.

[284] See, e.g., Percival, supra note 12, at 600–24 (presenting several major examples of transnational environmental litigation and asserting that even when it is unsuccessful, litigation can be useful to enhance transparency); see also Hunter, supra note 87 (same).

[285] See Gunningham, supra note 56, at 476–500.

scope of their influence; theoretically, therefore, law could also modify these features.[286]

This Article's principally descriptive account raises sobering normative concerns. If, as a descriptive matter, corporations are among the actors whose interests inform the nature and success of multilateral treaties, then the interests of natural citizens—expressed through the domestic political system—are diluted. The dilution is particularly significant because corporate interests will not always align with the interests of private citizens. Corporate interests are at heart economic, a feature that arises from the practical, structural, and often legal requirement that corporate officers maximize shareholder value. Since corporations are legally barred from performing acts that do not maximize shareholder value, the corporation may not pursue moral or social goods unless those goods are economically beneficial, or at least economically neutral.[287] Thus, even when corporations engage in corporate social responsibility endeavors, their explanation for these acts is usually economic.[288]

To begin to remedy these problems, governments could modify fiduciary duty rules, eliminate limited liability for corporate directors and officers or extend liability to shareholders, eliminate corporate personhood, revoke corporate charters, prohibit corporate electoral contributions, or strengthen safeguards against corporate lobbying or conflicts of interest in government.[289] Any of these acts would alter the descriptive

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[286] See Danielsen, supra note 10, at 424 (noting that "the structure and decisionmaking of corporations" flows out of the corporate law in which the corporation is embedded, which varies across jurisdictions, but "is generally concerned with the creation, operation, rights, duties, and liabilities of corporations, as well as the rules, structures, and practices that organize decisionmaking and power within corporations").

[287] See Gunningham, supra note 56, at 480–81.

[288] See id. at 498 (explaining that corporations engage in corporate social responsibility measures as "a calculated response to external pressures" rather than as "an expression of any internal moral or philanthropic commitment," and that they justify their participation in terms of risk management). Anne-Marie Slaughter suggests that the dilution of the influence of individuals in domestic and thus international law is not significant because it is balanced by a corresponding rise in power by NGOs and public officials, who press back on the bounds of private power. See generally Slaughter, New World Order, supra note 96. Slaughter's account depends, however, on a sufficiently empowered public sector, which my account challenges.

[289] Credit is due to Gus Speth for many of these proposals. See Speth, supra note 56, at 167–80; see also Kent Greenfeld & D. Gordon Smith, Debate: Saving the World with Corporate Law?, 57 Emory L.J. 947, 947–53 (2008) (asserting that modifying aspects of corporate law could reduce externalities and ensure a more equitable distribution of wealth). See generally Progressive Corporate Law (Lawrence E. Mitchell ed., 1995) (reviewing debates over whether corporate officers and directors do, or should, have responsibilities to attend to so-

facts that contribute to corporate pressure on domestic regulatory systems and, as a result, on international agreements. These proposals may appear more unrealistic than they are. In the United States, for example, several states have modified laws of incorporation to permit "benefit" corporations that may deviate from the fundamental object of maximizing shareholder wealth in order to pursue socially or environmentally responsible ends.[290]

CONCLUSION

For some treaties, such as a global climate change accord, the obstacles to treaty making and enforcement seem more intractable than ever. Yet the business of non-treaty governance is booming. A multitude of new mechanisms compete for the allegiance of global corporate powers. Private, NGO-sponsored, or quasi-public corporate responsibility plans throng one side of the field, and traditional and transnational regulatory measures occupy the other. And progress on important global problems ensues: corporations, sensitive to the threats of public censure, competitive failure, ballooning regulations, and transnational legal repercussions, engage actively in both designing the terms by which they will be governed and demonstrating the appropriate compliance.

Treaties, however, are not obsolete. Even the staunchest proponents of the new governance mechanisms recognize that they are constructed within, and structured by, the traditional international law system.[291] Moreover, as corporations are incapable of acting against their economic interests, voluntary and soft-law plans are inherently limited. Finally, in our newly interdependent and resource-limited world, some global problems will be solved by nothing less than full international agreement. Identifying obstacles to effective treaty making in beleaguered areas—and the means of resolving them—remains imperative.

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cial goods beyond profit maximization); David Millon, Communitarians, Contractarians, and the Crisis in Corporate Law, 50 Wash. & Lee L. Rev. 1373 (1993) (same).

[290] See Dana Brakman Reiser, Benefit Corporations—A Sustainable Form of Organization?, 46 Wake Forest L. Rev. 591, 594 (2011) (identifying these states as Hawaii, Maryland, New Jersey, Vermont, and Virginia).

[291] See Alvarez, Interliberal Law, supra note 12, at 250; see also Shelton, supra note 13, at 322–23 (examining the state of international law at the end of the twenty-first century, and observing that new nonlegal ways of shaping global affairs can be effective to solve some problems, and can lead to traditional international law, but that traditional international law is nevertheless indispensable).

This Article offers an analytic structure that (a) clarifies which treaties are most directly subject to the challenges of private-sector influence, (b) identifies the sources of the problem, and (c) offers suggestions as to how to resolve it. The structure rests on two premises. First—and building upon important insights by others about the nature of public/private regulatory relationships—states cannot effectively regulate without the consent and participation of affected industries. Second, there is an important category of treaties whose content, success, and very possibility depends upon solving the problems of domestic regulation. The conclusion follows: without solving domestic regulatory problems by enlisting the consent and participation of relevant private parties, important regulatory treaties will fail to materialize, or fail to garner success. I have attempted to identify and distinguish the relevant treaties, and to suggest some of the instruments we have in our toolbox to secure private consent. Among other tools, we find the plentiful set of global governance mechanisms that champion direct engagement with the private sector. Future attention should be paid to how these and other mechanisms play a role in facilitating the functioning domestic regulatory regimes that ensure persuasion treaty success. Because persuasion treaties are indispensable, guarding against their failure is imperative.