ARTICLE

Transnational Enforcement Leadership and the World Police Paradox

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In an international system that lacks centralized authority, the burden of enforcing the law generally falls on individual states. In many areas of transnational enforcement such as financial fraud, cybercrime, and tax evasion, the United States has historically assumed a prominent leadership role. In recent years, other states have also expanded their enforcement capabilities and activities. This Article proposes a theoretical framework to understand transnational enforcement leadership, drawing on theories of global public goods (GPGs) and leadership from economics and political science. Because transnational enforcement often has the attributes of a GPG, it tends to be systematically underprovided. States that possess greater resources and can capture more of the benefits tend to become leaders, thus closing part of the gap. Leaders can also derive significant private benefits by extracting penalties from their targets and entrenching their own laws as global standards. In addition, they benefit from cost advantages derived from existing enforcement capabilities, control over transnational hubs, and economies of scale. This self-reinforcing dynamic generates the "World Police Paradox:" leadership enhances global welfare, but it often takes the form of unilateral action and bestows upon leaders a privileged role in the international system. The Article acknowledges these concerns but argues that, given obstacles to effective international cooperation, leadership may often be the attainable second-best outcome. In addition, there is no sharp dichotomy between leadership and cooperation. Leadership can sometimes unlock the possibility of cooperation, as illustrated by the examples of bribery and tax evasion. A leader also cannot act despotically: its need for assistance by other states, and their ability to respond to perceived excesses, constrain its actions. Finally, the Article argues that many features of transnational enforcement leadership also apply to state-to-state enforcement and can illuminate the role of powerful states in sustaining international legal regimes.

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I. INTRODUCTION

In February 2022, the U.S. Department of Justice (DOJ) announced the arrest of a New York couple for laundering Bitcoin stolen in a 2016 hack of Bitfinex, a cryptocurrency exchange based in the British Virgin Islands.[1] DOJ also announced that it had recovered Bitcoin worth $3.6 billion, some

1. Press Release, U.S. Dep't of Just., Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency (Feb. 8, 2022), https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launder-45-billion-stolen-cryptocurrency; *In re* iFinex Inc., CFTC No. 22-05 (Oct. 15, 2021), https://www.cftc.gov/media/6651/enfbfxnaincorder101521/download.

of which may be returned to Bitfinex's customers around the world.[2] This is only one example of the United States's prominent role in transnational law enforcement. Almost two decades ago, a leading study noted the "late but rapid rise of the United States to a global leadership position in international crime control matters in the twentieth century."[3] In recent years, the country has asserted this leadership in suppressing corporate and white collar crime, imposing tens of billions of dollars in penalties on foreign firms for offenses ranging from bribery to market manipulation, tax evasion, and sanctions violations.[4] Other countries, notably including several in Europe, have joined the action, investigating and prosecuting transnational cases involving tax evasion, bribery, and human rights abuses.[5]

The prominent role of certain states in providing transnational enforcement and its implications, however, remain undertheorized. In an international system that lacks centralized authority, the burden of enforcing the law falls on individual states. Their primary role is most evident in areas such as financial fraud, cybercrime, or tax evasion, where violators are prosecuted in national courts pursuant to national laws. But even in areas regulated by international legal regimes such as the Rome Statute of the International Criminal Court (ICC),[6] states ultimately enforce the law by securing evidence and executing arrest warrants. As a rule, if transnational crime is to be stopped, states must take the initiative, and bear the burden, of doing so.

States differ widely in their enforcement capacity, the resources and capabilities they can bring to bear against violators. They also differ in their preferences and thus in the benefits they derive from enforcing the law in a particular instance or supporting a given international regime. In some cases, a state benefits from activity that harms others, and thus has little reason to stop or deter that activity and may oppose enforcement. More commonly,

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2. *See* Jessi Joseph & Eamon Javers, *Customers Battle to Regain Billions in Bitcoin the DOJ Recovered in Its Largest Seizure of Stolen Crypto*, CNBC (Oct. 20, 2022), https://www.cnbc.com/2022/10/20/battle-over-billions-in-stolen-bitcoin-recovered-in-doj-seizure-.html.

3. PETER ANDREAS & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS 58 (2006); *see also* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993) (describing and analyzing the internationalization of U.S. policing from the country's founding to the 1990s).

4. *See* PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE 8–9 (2020); Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1647–55 (2017).

5. *See, e.g.*, Stephen Morris & Joe Miller, *JPMorgan Raided by German Prosecutors in Tax Fraud Probe*, FIN. TIMES (Aug. 31, 2022), https://www.ft.com/content/84ad1e87-cad2-47d7-832f-5025b74a081d; Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html; David Keohane & Martin Arnold, *HSBC Agrees to Pay €300m to Settle Probe into Tax Evasion*, FIN. TIMES (Nov. 14, 2017), https://www.ft.com/content/7d228060-c959-11e7-ab18-7a9fb7d6163e.

6. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

states are indifferent to harmful practices that do not affect their interests and reluctant to devote resources to suppressing them. States also have wide discretion in deciding how to allocate their enforcement resources. Few international regimes compel members to enforce.

These features of the transnational legal order prompt multiple questions. Why, and under what circumstances, do states devote resources to transnational enforcement? Why do some states emerge as leaders? What is the impact of leadership on the overall level of enforcement? Does unilateralism by leaders inhibit broader international cooperation or, on the contrary, can enforcement leadership foster greater cooperation? Does enforcement leadership perpetuate the privileged position of powerful states in the international order? If so, can this privilege be restrained?

This Article seeks to answer these questions. It does so by drawing, first, on insights from economic theories of global public goods (GPGs).[7] Transnational enforcement, it argues, often has the attributes of a public good: by curbing a legal violation or harmful practice, the enforcer benefits not only itself but also others, who often cannot be excluded from the benefit. The private benefit to the enforcer is therefore less than the global public benefit. As a result, transnational enforcement tends to be underprovided relative to the socially optimal level—a straightforward application of public goods theory.[8]

This simple theoretical framework does not, however, account for the impact of differences in capacity and preferences among states regarding the provision of transnational enforcement. To account for this heterogeneity, the Article turns to leadership theory, developed by economists and political scientists to explain the provision of international public goods by powerful states.[9] The Article's second claim, derived from that theory, is that states

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7. *See infra* Part II.A.; *see* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 3 (1965); RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 536 (2d ed. 1996); Inge Kaul et al., *Defining Global Public Goods*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 2, 2 (Inge Kaul et al. eds., 1999); SCOTT BARRETT, WHY COOPERATE?: THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS (2007); Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651 (2012); J. Samuel Barkin & Yuliya Rashchupkina, *Public Goods, Common Pool Resources, and International Law*, 111 AM. J. INT'L L. 376 (2017); Wolfgang Buchholz & Todd Sandler, *Global Public Goods: A Survey*, 59 J. ECON. LIT. 488, 488 (2021); ROBERT D. COOTER & MICHAEL D. GILBERT, PUBLIC LAW AND ECONOMICS 1–2 (2022).

8. *See infra* Part II.B.

9. *See* Charles P. Kindleberger, *Systems of International Economic Organization*, *in* MONEY AND THE COMING WORLD ORDER 15, 15–18 (David P. Calleo et al. eds., 1976) [hereinafter Kindleberger, *Systems of International Economic Organization*]; Charles P. Kindleberger, *Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides*, 25 INT'L STUD. Q. 242, 242 (1981) [hereinafter Kindleberger, *Dominance and Leadership*]; ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS 1 (1981); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39

that possess greater resources and can capture more of the benefits of transnational enforcement will become leaders. Other states will generally prefer to free ride.[10]

GPG and leadership theory also reveal that several features of transnational enforcement favor the emergence and consolidation of leadership. First, states can derive significant private benefits from leadership. They can extract substantial fines and other penalties from their targets, as the United States has increasingly done.[11] More importantly, leaders can use enforcement to shape international norms, entrenching their own laws and preferences as global standards.[12] Second, some states benefit from inherent cost advantages, and thus begin the race with a head start. An important initial advantage comes from extensive investigative, prosecutorial, and punitive capabilities developed for domestic purposes. In addition, some states control crucial hubs of transnational relations—such as financial, communications, and transportation networks—that facilitate enforcement. These advantages are reinforced by economies of scale as leaders engage in more transnational enforcement and develop specialized expertise and resources.[13]

These factors explain the emergence and predominant role of a small number of transnational enforcement leaders. Because these factors are self-reinforcing, they also imply that leaders will become increasingly entrenched. This prospect gives rise to what this Article dubs the "World Police Paradox." On the one hand, leadership increases the supply of transnational enforcement and, under plausible assumptions, increases global welfare. On the other hand, enforcement leadership often takes the form of unilateral action that appears at odds with international cooperation. It also bestows upon the leader a privileged role in the international legal system, allowing it to selectively advance its interests and shape norms in its favor. As such, enforcement leadership seems to clash with fundamental principles of international law, such as the sovereign equality of states and collective lawmaking.

The World Police Paradox may be an inevitable feature of a decentralized international legal system composed of heterogeneous states.

INT'L ORG. 579, 579–80 (1985); CHARLES P. KINDLEBERGER, THE WORLD IN DEPRESSION, 1929-1939, 231–45 (1986) [hereinafter KINDLEBERGER, THE WORLD IN DEPRESSION]; William T. Bianco & Robert H. Bates, *Cooperation by Design: Leadership, Structure, and Collective Dilemmas*, 84 AM. POL. SCI. REV. 133 (1990); David A. Lake, *Leadership, Hegemony, and the International Economy: Naked Emperor or Tattered Monarch with Potential?*, 37 INT'L STUD. Q. 459 (1993); Robert O. Keohane & Elinor Ostrom, *Introduction*, 6 J. THEORETICAL POL. 403, 403–04 (1994); Kjell Hausken & Thomas Plümper, *The Impact of Actor Heterogeneity on the Provision of International Public Goods*, 25 INT'L INTERACTIONS 61, 61 (1999).

10. *See infra* Part II.C.

11. *See* VERDIER, *supra* note 4; Brewster, *supra* note 4.

12. *See infra* Part III.A.

13. *See infra* Part III.B.

As classical leadership theory predicted, states effectively concede a privileged position to the leader in return for the ability to free ride on its provision of transnational enforcement. However, drawing a sharp dichotomy between leadership and international cooperation would be misleading. First, while theory shows that cooperation is generally superior to leadership from a welfare standpoint, it is also often exceedingly difficult to achieve, making leadership the attainable second-best outcome.[14] More importantly, leadership does not inevitably preempt cooperation. On the contrary, it can facilitate it by overcoming common obstacles like free-rider and distribution problems. This phenomenon is illustrated by recent examples in which unilateral U.S. actions unraveled such problems and led to new international regimes against official bribery and tax evasion.[15] Finally, despite the leader's advantages, enforcement leadership is not unconstrained: the leader's need for assistance by other states and their ability to respond to perceived excesses discipline its actions.[16]

The last Part of this Article tentatively expands the argument to consider the implications of GPG and leadership theories for state-to-state enforcement.[17] Contemporary international law theories generally discount enforcement as a compliance mechanism, especially in the multilateral context, mainly because of the widespread assumption that it poses insurmountable collective action problems.[18] However, for much the same reasons that powerful states have both the incentives and resources to act as transnational enforcement leaders, they can often assume a leadership role in state-to-state enforcement. Taking into account state heterogeneity highlights and explains the role of powerful states in sustaining international legal regimes. It can also illuminate the implications of heterogeneity and leadership for the efficacy of international law, its content, and inequality in the international legal order.

This Article makes several key contributions. First, it provides a theoretical framework to analyze the provision of transnational and state-to-state enforcement—a subject often neglected in international legal scholarship. Second, by giving state heterogeneity a central place and drawing upon leadership theory, it addresses a blind spot in rationalist analysis of international law, which often operates on an implicit assumption of state homogeneity. It thus generates potential connections between rationalist analysis and approaches that emphasize power inequalities, hegemony, and the role of history in shaping the international legal order.

14. *See infra* Part IV.A.

15. *See infra* Part IV.B.

16. *See infra* Part IV.D.

17. *See infra* Part V.

18. *See, e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 66–67 (2008).

Finally, although its analysis is mostly retrospective, it provides a theoretical framework for thinking about how geopolitical changes in the world order may affect the provision of enforcement and, ultimately, shape international law.

Before proceeding, two clarifications are in order. First, this Article follows standard rational choice assumptions: it treats states as unitary actors with stable preferences that strive to fulfill these preferences by rationally weighing the costs and benefits of alternative courses of action.[19] It does not assert that this approach is universally superior or deny that non-state actors, domestic politics, or ideas are often important factors. In the context of enforcement, however, where state actors play a central role and face relatively discrete decisions, rationalist assumptions provide a reasonable starting point. Second, this Article's main contribution is theoretical, not empirical. While it argues that GPG and leadership theories explain salient and well-known features of transnational enforcement and uses several examples as illustrations, its purpose is not to systematically test predictions against data. That task is a separate one for future scholarship.

II. PUBLIC GOODS, ENFORCEMENT, AND LEADERSHIP

Is enforcement an international public good, and if so, how much will be provided and by whom? This section examines these questions by, first, briefly reviewing the theory of GPGs and the undersupply problems they generate. It then argues that transnational enforcement often has the characteristics of a public good, leading to inefficient undersupply. Finally, this section draws on leadership theory, a strand of international relations that emphasizes the role of powerful states in supplying GPGs, to analyze the provision of transnational enforcement.

A. Global Public Goods

In recent years, GPGs have attracted increasing attention from international law and public policy scholars.[20] The notion of a GPG and the

19. *See, e.g.*, ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 3, 18–19 (2013); GUZMAN, *supra* note 18, at 16–17; JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 4–10 (2005). On rational choice assumptions in international law, see generally Anne van Aaken, *Rationalist and Behavioralist Approaches to International Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 261, 261 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022).

20. A recent article in the *American Journal of International Law* notes that "[t]he use of public goods as an analytic concept is gaining increased currency in the discipline; the majority of this literature discusses the tools with which international law can facilitate the provision of global public goods."

accompanying theoretical framework have been applied, formally or informally, to a wide range of issues, primarily, but not exclusively, in environmental and health protection.[21] Recent contributions build upon older insights to generate more refined predictions and policy recommendations for different types of GPGs.[22]

Public goods share two fundamental attributes: nonrivalry and nonexcludability. Nonrivalry means that, once the good is provided, consumption by one individual does not inhibit others' ability to consume it.[23] Nonexcludability means that, once the good is provided, its benefits are freely available to all.[24] The more a good shares the attributes of a public good, the more its supply will be affected by the distinctive problems arising from divergence between its social and private benefits. The provider privately captures only a small portion of the good's benefit, while the rest accrues to others who cannot be excluded and thus "free ride."[25] As a result, public goods tend to be underprovided: even though an additional unit of the good would produce a net social benefit, no one has the incentive to provide it.[26] At worst, everyone may hold out on providing any of the public good in the hope of free riding.

GPGs are simply public goods whose benefit spillovers reach beyond one or a few countries, to the point where they are "global or near-global."[27] This adds another complication to the provision problem. In the domestic

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Barkin & Rashchupkina, *supra* note 7, at 377; *see also* Fabrizio Cafaggi & David D. Caron, *Global Public Goods Amidst a Plurality of Legal Orders: A Symposium*, 23 EUR. J. INT'L L. 643 (2012) (introducing a *European Journal of International Law* symposium on GPGs).

21. Buchholz & Sandler, *supra* note 7, at 488–89 (mentioning as examples "identifying virulent pathogens, ameliorating global financial crises, adopting universal regulatory practices, protecting essential ecosystems, allocating geostationary orbits, diverting earthbound planetesimals, preserving cultural heritage, reversing ozone layer depletion, and curbing climate change . . . eradicating infectious diseases, developing disease treatment regimes, fostering cybersecurity, preserving biodiversity, reducing transnational terrorism, maintaining world peace, discovering scientific breakthroughs, and addressing refugee flows"); Barkin & Rashchupkina, *supra* note 7, at 378 (mentioning as examples "environment, trade, financial stability, health care, poverty reduction, and culture preservation across states' borders"). The latter article focuses on common pool resources (CPR) problems, where the main cooperation challenge is to control consumption of a good rather than secure its provision.

22. For a recent and excellent review of the economic literature, see Buchholz & Sandler, *supra* note 7.

23. "Complete non-rivalry of GPG benefits indicates that one country's consumption or use of the provided good does not reduce, in the least, from what other countries can utilize, so that there is *zero* marginal cost in extending the good's consumption to additional countries . . . . This zero marginal cost of consumption dictates that all countries should receive a non-rival GPG's benefits even if benefit exclusion were possible." *Id.* at 492.

24. For these basic definitions, see CORNES & SANDLER, *supra* note 7, at 8–9. *See also* Kaul et al., *supra* note 7, at 2–6. Thus, in the case of GPGs, "benefits are non-excludable if, once provided, their benefits are available to all countries regardless of their payment, which then results in free-riding or easy-riding worries." Buchholz & Sandler, *supra* note 7, at 493.

25. Kaul et al., *supra* note 7, at 6.

26. As noted above, this account of public goods provision disregards the possibility of altruistic motives.

27. Buchholz & Sandler, *supra* note 7, at 494.

setting, the standard solution to public goods undersupply is mandatory provision: the state taxes the citizenry to fund the provision of national defense, roads, or libraries. Determining which goods are truly public and the appropriate amount to provide, and designing efficient tax regimes to fund public goods, are complex exercises.[28] Nevertheless, the state's domestic monopoly on the use of force ensures that a mechanism is available to determine what public goods are needed and to fund them. Because the international order lacks such a mechanism, provision of GPGs generates even greater challenges.

Recent scholarship emphasizes another important characteristic of GPGs: the relevant "aggregator technology," which "indicates how countries' contributions to the GPG determine the overall level of the good that is available for consumption and use."[29] For example, because cuts in greenhouse gas emissions from all countries contribute equally to moderating climate change, controlling these emissions is a "summation aggregator" public good.[30] By contrast, a "best-shot" GPG is one, such as "divert[ing] an earthbound comet," whose "aggregate provision . . . hinges solely on the largest contribution by a country."[31] The aggregator technology depends on the specific features of a GPG and shapes by whom and how much it will be supplied. It also has substantial implications for institutional design and policy recommendations to improve GPG provision.

B. Transnational Enforcement as a Public Good

Because international law scholarship uses the term "enforcement" in several ways, defining it is a necessary first step. As used in this Article, "transnational enforcement" refers to the imposition by official actors of lawful penalties on non-state actors such as individuals and corporate entities. The "transnational" component indicates that enforcement is directed at activity that causes cross-border harm.[32] The term also includes the process that leads to penalties, such as investigation, arrest, and prosecution. Because states play a predominant role in this kind of

28. Much of the economic literature on public goods relates to these issues, generally presupposing the availability of a government that can implement the recommended policy. *See, e.g.*, CORNES & SANDLER, *supra* note 7, at 198–239 (reviewing economic literature on alternative mechanisms to provide public goods).

29. Buchholz & Sandler, *supra* note 7, at 494.

30. *Id.*

31. *Id.* at 495.

32. The enforcement activities themselves, however, need not cross borders. For example, a state that investigates and prosecutes a cybercrime group that causes harm abroad is engaged in transnational enforcement for purposes of this Article, even if the investigation and prosecution are entirely domestic. The key factor is that because the group generates cross-border harm, the state's enforcement action generates benefits across borders.

enforcement, and some of its components are considered exclusive sovereign prerogatives, this Article focuses on enforcement by states.[33] The definition excludes state-to-state enforcement such as economic sanctions or the use of force, although, as will be discussed later, many of the insights developed here may also apply in that context.[34] Finally, the analysis excludes enforcement measures prohibited by international law, such as sending covert agents to a foreign state to abduct a suspected criminal. Outside a few clear prohibitions, international law provides ample latitude for states to engage in transnational enforcement, especially in economic matters.[35]

Is transnational enforcement, thus defined, a GPG? Existing scholarship recognizes that enforcement can be a public good in at least two ways.

First, scholars generally agree that the provision of GPGs through international agreements faces a second-order enforcement problem: once the agreement has been reached (e.g., requiring states to cut CO_2 emissions or to protect ecosystems), individual states face a temptation to defect and free ride on others' efforts. Because enforcing the agreement (e.g., by imposing sanctions on states that fail to meet their targets) is costly, enforcement itself becomes a public good that tends to be undersupplied. For example, scholars have blamed the Kyoto Protocol's failure, at least in part, on the fact that major polluters "eventually dropped out of the agreement" and "[w]ithout any real enforcement mechanism, other countries did not achieve their pledged cutbacks."[36] Likewise, in the context of common pool resources (CPRs), scholars have noted that "monitoring and enforcement can themselves have public goods, rather than CPR, characteristics."[37] This second-order problem relates primarily to state-to-

33. Although states sometimes rely on assistance from non-state actors, they do not typically delegate their enforcement function. Unlike in other areas, the type of enforcement discussed here is not widely privatized. *See* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1650–63 (2011) (describing privatization in international trade law, environmental law, civil litigation, and war crimes). While states typically enforce their own law in transnational enforcement contexts, the definition can accommodate those situations in which states enforce international law—for example, by executing an arrest warrant from an international criminal tribunal.

34. *See infra* Part V.

35. *See, e.g.*, Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EUR. J. INT'L L. 481, 495–501 (2022) (describing the flexibility of international law principles that govern state jurisdiction).

36. Buchholz & Sandler, *supra* note 7, at 518.

37. Barkin & Rashchupkina, *supra* note 7, at 386 (pointing out as examples that "[t]he provision of individual monitors, the maintenance of GPS satellites, and the gathering of intelligence on weapons proliferation are all examples of monitoring efforts that are non-rival and can be, in the context of a cooperative agreement, non-excluded"). They add that "[t]his distinction between the CPR characteristics of cooperation to protect the global commons and the public goods characteristics of elements of the monitoring and enforcement of that cooperation helps to explain why the latter is more prone to unilateralism than the former." *Id.*

state enforcement, which is excluded from our definition of transnational enforcement, although we will return to this problem later.[38]

Second, scholars also occasionally recognize that the provision of transnational enforcement can itself constitute a first-order GPG. Thus, standard lists of GPGs often include items such as "limiting the diffusion of transnational terrorism" or "curbing transnational organized crime."[39] Scholarship directly analyzing transnational enforcement as a public good, however, is relatively sparse and focuses on the creation of cooperative solutions such as international treaties (e.g., U.N. conventions on organized crime, illicit drugs, and terrorist financing) and cooperative organizations and networks (e.g., INTERPOL, mutual legal assistance agreements). Though states themselves play the primary role in providing transnational enforcement even where such cooperative arrangements exist, relatively little attention has been devoted to the capabilities and incentives that shape unilateral enforcement by states. This Article aims to build on these insights to provide a fuller account of transnational enforcement as a GPG.

At the outset, it must be acknowledged that transnational enforcement does not always constitute a public good. A state can sometimes fully internalize the benefits of enforcement so that its private incentives align with global welfare. The simplest example is a situation in which a harmful practice originating in one state affects only one other state. For example, suppose that fraudsters in Canada concoct a scam to defraud senior citizens in the United States by calling them, impersonating Internal Revenue Service (IRS) agents, and demanding that they transfer money to settle unpaid taxes. Because the harm occurs wholly in the United States, the U.S. government will have incentives to enforce unilaterally so long as the benefits of doing so exceed the costs. In such cases, enforcement is effectively a private good, and undersupply and other problems associated with public good provision are absent.

This Article is concerned with situations that do not fit this simple pattern, but where the harmful practice affects multiple states. Suppose that a transnational group of cybercriminals hacks computer systems around the world, threatening to delete vital files and demanding ransoms to unlock them. Because the group targets critical institutions like hospitals, there is often no choice but to pay. Its victims are widely scattered so each state suffers only a small fraction of the overall harm. Dismantling the group is possible but costly, since it would require experts to conduct a complex investigation, track down the group's members, and freeze its assets. In this scenario, enforcement is a public good: if a state dismantles the group, all others benefit. But from each state's perspective, the private cost of

38. *See infra* Part V.

39. Buchholz & Sandler, *supra* note 7, at 493.

enforcement exceeds the private benefit. As a result, no state will unilaterally enforce, even though doing so would increase global welfare.[40]

In such a situation, transnational enforcement has the characteristics of a GPG. Its benefits are nonexcludable: if the enforcing state eliminates the group, other states cannot be excluded from benefiting. They are also nonrival: no marginal cost is incurred in extending them to additional states. Because the public good's benefits accrue to many states, it can be characterized as global.

Before proceeding, some clarifications are warranted. As noted above, almost no good fully shares all the characteristics of a GPG.[41] For instance, a good's excludability can vary. The enforcing state might be able to deter the group from attacking it while leaving it free to attack others, thus excluding the latter from the benefits of enforcement. But in many cases, doing so may be impracticable or overly costly. Enforcement, like most other public goods, is "impure," and the degree to which it shares public good characteristics, and the resulting undersupply problem, will vary across cases. In addition, enforcement's range of benefit spillovers may vary.[42] In many cases, it will benefit only a subset of states. While this does not fundamentally alter the nature of the undersupply problem, it may have implications for who will provide enforcement, and how much will be provided. Finally, if all relevant countries receive a positive benefit or are neutral, the fact that a good produces unequal benefit does not undermine its public nature.[43]

As noted above, recent scholarship on GPGs emphasizes the importance of a good's aggregator technology, which "indicates how countries' contributions to the GPG determine the overall level of the good that is available for consumption or use."[44] What aggregator technology applies to transnational enforcement? In the example above, eliminating the cybercriminal group is a best-shot effort: the government that succeeds in identifying and neutralizing the group determines the outcome, and separate

40. For a simple numerical example, suppose that there are twenty countries, and the cybercriminal group imposes $10 in harm on each country. Any state can investigate and dismantle the group at a cost of $40. In this case, even though dismantling the group enhances global welfare by $160, no state will enforce unilaterally, because the private cost of doing so ($40) exceeds the private benefit ($10). Of course, these specific numbers are unimportant; they merely illustrate one of a range of scenarios in which transnational enforcement has the characteristics of a public good.

41. Buchholz & Sandler, *supra* note 7, at 493 (pointing out that such "impure GPGs encompass most GPGs").

42. *Id.* at 494.

43. *See id.* at 517 ("Benefit publicness does not require that countries evaluate their derived benefits identically."). As will be seen below, in some cases one or more states are harmed by a public good's provision, usually because they benefit from the "public bad" that is being eliminated. For instance, a state that shelters a cybercriminal group and "taxes" it may see its welfare reduced by the group's elimination. On this issue, see *infra* note 142.

44. *Id.* at 494.

efforts by other states are redundant. At best, they may weaken the cybercriminal group or generate information that facilitates the primary enforcer's efforts. In such cases, transnational enforcement may be a "better-shot" GPG, "for which the largest contribution by a country has the greatest influence on the good's overall level, followed by the second largest contribution, and so on."[45] In either case, transnational enforcement, unlike typical environmental GPGs like climate change mitigation, entails a predominant role for the primary enforcer in determining the quantity of the good effectively supplied.

C. Enforcement Leadership

The analysis so far might suggest that few GPGs will ever be supplied. Under models with homogenous participants who each receive a small fraction of the good's benefits, the rational course of action is to free ride.[46] Under different assumptions regarding the size of the relevant group and state heterogeneity, however, higher levels of public good provision can be achieved. Mancur Olson's classic analysis of collective action thus draws a distinction between incentives in large and small groups.[47] In small groups, some amount of a public good may be provided by one or several individuals, those who privately benefit most from its provision. In some cases, a single individual may derive sufficient private benefits (and possess

45. *Id.* at 495. Thus, "[c]ampaigns to limit the diffusion of transnational terrorism or drug trafficking may have some effectiveness even if they are not the largest action." *Id.* One alternative would be to describe transnational enforcement as a cooperative endeavor where the contributions of each state count roughly equally, leading to a summation aggregator. But it seems clear that two or three independent investigations by different states, none of which devotes sufficient resources to dismantle the group, do not produce a benefit equal to a single successful investigation. The typical pattern in international criminal investigations is for one country or agency to take the lead, with others supporting the effort by gathering evidence, freezing assets, or arresting suspects in their respective jurisdictions. In such cases, it seems clear that the primary enforcer's effort predominantly determines the outcome, with those of others also contributing to a lesser degree. This pattern corresponds to a "better-shot" aggregator, as suggested above the line. A final alternative would be to characterize transnational enforcement as a weakest-link aggregator, because criminals will move to the country with the weakest enforcement and be protected from other states' enforcement efforts by that country's sovereignty. This may sometimes happen, but as will be seen, in many contemporary transnational law enforcement scenarios, suppression can be achieved without the host state's cooperation. Even where such cooperation is needed, for instance to secure evidence or arrest culprits, the required contribution is often minimal compared to the costs incurred by the primary enforcer. International arrangements often exist to secure this type of cooperation and, at least where the host country does not benefit from the activity, it can be achieved relatively easily. The case where the host country does benefit is considered *infra* Part IV.

46. Alternatively, models under which the relevant GPG is continuous predict that, though some of the good will be provided, the level of provision will be far below the globally optimal level. *See id.* at 500–13 (providing a baseline economic model of GPG provision and developing its main implications).

47. OLSON, *supra* note 7, at 5–52. For a fuller, more recent account of the theory of public goods, see CORNES & SANDLER, *supra* note 7, at 143–346.

sufficient resources) to provide the public good unilaterally.[48] Alternatively, a small group of individuals who derive large private benefits from the public good and possess sufficient resources will find it easier to achieve collective action than the larger group, making it more likely that the good will be provided.[49]

Olson's fundamental insight is easily extended to the international level: because states are heterogenous in size and power, some can capture more private benefits than others from GPGs. They also possess more capabilities and resources to provide them. Indeed, beginning in the 1970s, economists and political scientists developed "leadership theory," a strand of international relations that emphasized the role of powerful states in providing public goods. Leadership theory, associated primarily with economic historian Charles Kindleberger, "claims that the presence of a single, strongly dominant actor in international politics leads to collectively desirable outcomes for all states in the international system."[50] Other states will generally prefer to free ride and devote relatively few resources to the provision of public goods.[51]

Kindleberger's early studies emphasized structural elements of international economic infrastructure such as the provision of a transaction and reserve currency, liquidity intervention to promote growth and stem panics, definition and protection of property rights, and the provision of a market for distressed goods,[52] and argued that such infrastructure "produces sufficient positive externalities so that for purposes of analysis we can treat it as if it were a public good."[53] Other scholars expanded the argument to explain international regimes in areas such as trade and security, including the North Atlantic Treaty Organization and the General Agreement on Tariffs and Trade.[54] A hegemon—during Kindleberger's period, the United States—has incentives to provide leadership in creating and enforcing such regimes, they explained, because it benefits most from an open international economy and from stabilizing the system through rules. It also has more resources to devote to providing public goods, sometimes unilaterally,

48. OLSON, *supra* note 7, at 33.

49. *Id.* at 32–33.

50. Snidal, *supra* note 9, at 579 (emphasis omitted). Snidal refers to this theory as the "theory of hegemonic stability." *Id.* As David Lake later clarified, the propositions regarding provision of public goods by a leader state constitute only one component of a broader theoretical program on hegemonic stability, a component he calls "leadership theory." Lake, *supra* note 9, at 460. This Article follows Lake's terminology. A succinct articulation of Kindleberger's original thesis can be found in Kindleberger, *Systems of International Economic Organization*, *supra* note 9.

51. *See* Snidal, *supra* note 9, at 582; Lake, *supra* note 9, at 467.

52. Lake, *supra* note 9, at 462–63.

53. *Id.* at 463.

54. *See, e.g.*, Kindleberger, *Systems of International Economic Organization*, *supra* note 9; GILPIN, *supra* note 9. The literature is vast; the short discussion here is based largely on Duncan Snidal's and David Lake's summaries and critiques. *See* Snidal, *supra* note 9; Lake, *supra* note 9.

sometimes by setting up regimes and institutions to foster and sustain them.[55]

More recent GPGs scholarship has put less emphasis on unilateral provision, perhaps because it is primarily concerned with environmental GPGs that cannot realistically be provided by a single state or a small group. Nevertheless, contemporary scholarship incorporates Olson's insights and recognizes that state heterogeneity shapes GPG supply. Thus, the basic model described by Buchholz and Sandler predicts that high-income countries and countries with stronger preference for the GPG will make larger contributions, leading to a form of "'exploitation' of the rich countries by the poor . . . [and] exploitation of countries that are more interested in GPG provision by less interested countries."[56] In addition, differences in states' capabilities to provide the public good efficiently also matter: the model predicts that "countries with high GPG productivities are more likely to be contributors, other things constant."[57]

What does leadership theory imply for transnational enforcement? The potential for powerful states to assume a central role can be illustrated by revisiting the example discussed above. This time, assume that one state is able both to investigate and dismantle the cybercriminal group unilaterally and to capture a disproportionate share of the benefits. In this modified example, the expected private benefit may be sufficient to prompt the leader to act unilaterally, thus providing a public good from which other states

55. At its origin, the theory held that in a decentralized world order, such public goods could only be provided by a single leader. *See* KINDLEBERGER, THE WORLD IN DEPRESSION, *supra* note 9, at 304 ("[F]or the world economy to be stabilized, there has to be a stabilizer—one stabilizer."). Kindleberger's thesis was motivated by study of international economic instability in the 1930s, which he argued was caused by the lack of a leader "because the world economic system was in transition from British leadership to American leadership." Kindleberger, *Systems of International Economic Organization*, *supra* note 9, at 35. However, "subsequent work suggests that a single leader is neither a necessary nor sufficient condition for the provision of an international public good." Lake, *supra* note 9, at 463; *see also* Snidal, *supra* note 9, at 597–612 (deriving conditions under which a small group of states will provide a public good); Lake, *supra* note 9, at 466–67 (same). For simplicity, the focus of the discussion here is on the case where a single state provides enforcement.

56. Buchholz & Sandler, *supra* note 7, at 504; *see also* Barkin & Rashchupkina, *supra* note 7, at 381.

57. Buchholz & Sandler, *supra* note 7, at 505.

benefit.[58] In other words, the logic of leadership applies straightforwardly to the provision of transnational enforcement.[59]

Transnational enforcement's best-shot (or better-shot) aggregator technology, described above, further reinforces the role of powerful states as leaders. As Buchholz and Sandler note, "[r]ich countries are essential in providing best-shot and better-shot GPGs for which concentrated action is required."[60] For example, in public health, the U.S. Center for Disease Control "takes actions to isolate new pathogens, develop vaccines, and coordinate surveillance efforts," best-shot GPGs that benefit all countries.[61] Perhaps counterintuitively, best-shot and better-shot GPGs are a case in

58. To return to the numerical example *supra* note 40, suppose that the leader receives a private benefit proportional to its share of world GDP, a common assumption in the leadership literature, and that this share is 25%. In this case, the leader would receive a benefit of $50 from dismantling the group, which exceeds the cost ($40), producing a net benefit of $10. Thus, the leader will enforce unilaterally, providing a public good on which other states can free ride—they receive a benefit of $150 at no cost to them. As of 2021, the United States' share ($23 trillion) of world GDP ($96 trillion) was approximately 24%. *See GDP (Current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Jan. 31, 2024).

59. Here, a terminological clarification is needed. Contemporary scholarship on public goods sometimes refers to "leadership" models as ones in which a country unilaterally increases its contribution above the Nash level in an effort to prompt contributions by others (without gaining any special private benefit from doing so). *See, e.g.*, Buchholz & Sandler, *supra* note 7, at 505–06. These models show that this form of leadership does not "pay," because others decrease their contribution in response. This Article, like the political science leadership literature discussed above, refers to a different notion of leadership, which describes the leading role of certain states in providing the good at the Nash equilibrium, shaped by factors such as wealth, productivity, preferences, and ability to capture greater private benefits. It is also worth noting that although classic leadership theory scholarship did not emphasize enforcement, it was seen as part of the infrastructure the leader can provide. For example, according to Kindleberger, the leadership system is one in which "the rules of the game, however devised and promulgated, are asymmetrically enforced and their costs asymmetrically shared." Kindleberger, *Systems of International Economic Organization*, *supra* note 9, at 36; *see also* Kindleberger, *Dominance and Leadership*, *supra* note 9, at 246–47 (discussing capacious definitions of public goods from classic texts, including "law and order"); Charles P. Kindleberger, *International Public Goods Without International Government*, 76 AM. ECON. REV. 1, 2 (1986). Likewise, Lake argued, "the enforcement of trade rules—such as the unconditional most-favored-nation principle—is a public good prone to collective action problems." Lake, *supra* note 9, at 463. More recently, political scientist Alexander Thompson argued, in a review of Andrew Guzman's reputation-based theory of international law, that enforcement constitutes a public good that powerful states sometimes have incentives to provide unilaterally. *See* Alexander Thompson, *The Rational Enforcement of International Law: Solving the Sanctioners' Dilemma*, 1 INT'L THEORY 307, 311, 315 (2009). Thompson's analysis is narrower than that presented here, in that it focuses only on state-to-state enforcement of international law and does not consider enforcement by states against non-state actors or against harmful practices not governed by international law. His approach is also different, as its main concern is with the strategic interaction between the sanctioning state, the state target of sanctions, and the rest of the international community, of which Thompson provides a simple sequential game theoretical model. The approach is thus closer to the traditional models of sanctions. *See* POSNER & SYKES, *supra* note 19, at 31. In general, most of the existing attention to enforcement in leadership theory focuses on state-to-state enforcement, a topic we will return to *infra* Part V.

60. Buchholz & Sandler, *supra* note 7, at 497. In the terms of their model, "the pivotal country has the largest [demand for the GPG], which then determines the GPG level in the Nash equilibrium . . . . The pivotal country is likely to have high income, high GPG productivity, or a great preference for the GPG." *Id.* at 510.

61. Buchholz & Sandler, *supra* note 7, at 526.

which global inequality generates public benefits by fostering provision by a "[r]ich or dominant country."[62] In fact, transfers to the country that provides a best-shot GPG can enhance global welfare by increasing supply of that GPG.[63] Fostering provision of such GPGs may even justify "reverse Robin Hood" policies in which resources are channeled to the leader.

Thus, from a theoretical standpoint, there is strong reason to expect leadership by powerful states to play an important role in the supply of transnational enforcement. However, before proceeding further, a crucial qualification is needed. While the presence of a leader increases supply, it does not generate optimal provision of the public good. In some cases, the cost of enforcement exceeds the leader's expected private benefit, thus providing insufficient incentives to enforce.[64] Therefore, the presence of a leader mitigates, but does not eliminate, the inefficiency that arises from undersupply of public goods.[65] From a global welfare standpoint, it is thus inferior to a cooperative solution in which all states agree to contribute to provision of the GPG.[66] However, international agreements to supply

62. *Id.* at 498.

63. *Id.* at 497, 510. More generally, transfers from a low-productivity to a high-productivity country "increases GPG supply and the utility of all countries in the Nash equilibrium." *Id.* at 505.

64. In the example above, suppose that the cost of enforcement is $60 rather than $40. Because the cost exceeds the leader's private benefit ($50), the leader will not enforce without some contribution from other states. This outcome is inefficient because the global benefit of enforcement exceeds the cost.

65. Following the same example, and absent cooperation, the presence of a leader improves outcomes by moving the world from a situation in which enforcement occurs only if it costs less than $10 (the private benefit to any one of a group of equal states) to one in which it occurs if it costs less than $50 (the private benefit to the leader). In other words, and assuming constant global welfare benefits of $200, enforcement efforts whose costs fall in the $11–$50 range will now be supplied; those which fall in the $51–$200 range will not, even though supplying them would be efficient. For the point that public goods remain underprovided even where the presence of a small group of leaders increases supply, see OLSON, *supra* note 7, at 33–36. Another possibility that might limit the supply of enforcement is that the leader may lack the capacity or resources to enforce, even though the private benefits would exceed the cost. In the examples above, this would describe a situation where the leader would derive a $50 benefit from enforcing but only possesses $20 of "enforcement resources." In a well-functioning market, one would expect the leader to be able to finance enforcement (since it is a positive-value project), but in actuality no one may possess the relevant enforcement resources or be able to "lend" them to the leader. Money may not be sufficient, at least in the short term, if what is needed is specialized skills, equipment, or organization. This generates incentives for the leader to invest in enforcement capabilities. Another complication is that a state's benefit from enforcement may not be proportional to its share of the world economy. However, in many cases it seems plausible that states with larger economies will derive a disproportionate benefit from enforcement against a practice that generates widespread global harm. A final problem is that sometimes a potential leader may strategically refrain from providing a public good in the hope that others will do so, and the putative leader can instead free ride. This is most likely to happen where there are multiple powerful states that could plausibly provide the good, either by themselves or in a small coalition.

66. In the example above, if all affected countries entered into an agreement to contribute equally to the cost of enforcement, and complied with that agreement, enforcement would be provided in all cases where it is globally efficient. With the numbers above, each country would contribute $2 and receive a benefit of $10 from eliminating the cybercriminal group. The net value for each country would

GPGs have often proven difficult to reach and sustain.[67] As such, leadership may often constitute the achievable "second-best" outcome. The relationship between leadership and cooperation is discussed further below.[68]

Despite these qualifications, theory strongly suggests that, at least in some circumstances and despite its GPG characteristics, transnational enforcement can and will be provided through leadership by a powerful state. It also generates more specific predictions. Unilateral enforcement becomes more likely to occur as the benefits become greater and as the proportion of those benefits the leader can capture becomes greater. It is less likely to occur the higher the cost of enforcement, and the more other states or actors can plausibly provide enforcement.[69] Finally, the leader's dominance is likely to be more pronounced where the enforcement situation most resembles a best-shot or better-shot effort. Thus, if the theory is correct, enforcement leadership will be at its zenith in combating large-scale, sophisticated, and hard-to-prosecute misconduct that affects many countries.

III. DYNAMICS OF ENFORCEMENT LEADERSHIP

The analysis above draws on theories of GPGs and leadership to understand transnational enforcement. This Part continues the analysis by examining factors that shape the supply of transnational enforcement and reinforce the role of powerful states. It argues that states can derive significant private benefits from transnational enforcement. These private benefits generate incentives to supply enforcement and, as predicted by GPG theory, help mitigate the underprovision problem. In addition, certain states face lower enforcement costs, an advantage strengthened by economies of scale as a state provides more enforcement. Because large and powerful states can capture more private benefits and begin the race with built-in cost advantages, they are more likely to emerge as transnational enforcement leaders. Finally, international law's permissive jurisdiction regime imposes few constraints on a leader's ability to enforce unilaterally.

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be positive as long as the cost of enforcement is less than $200. Thus, enforcement would be provided in the full range of cases where it is globally efficient. This reflects the broader "social dilemma" in public good provision: "[I]solated actions by utility-maximizing agents do not result in a Pareto-optimal allocation for public goods so that collective action is required to attain optimality." Buchholz & Sandler, *supra* note 7, at 502.

67. One of the reasons, noted above, is that cooperative agreements to supply GPGs generate a second-order enforcement problem. *See supra* notes 36–38 and accompanying text. Other obstacles to successful international cooperation are discussed *infra* Section IV.A.

68. *See infra* Section IV.B.

69. For a simple mathematical model that implies these propositions, see Lake, *supra* note 9, at 466–67.

Indeed, in many cases, other states welcome leadership because it allows them to free ride.

The analysis in this Part emphasizes the United States' role as transnational enforcement leader. While the United States is far from the only state active in this field, it has carved out a unique place. As a leading study puts it, the United States is "the world's most ambitious and aggressive policing power,"[70] following its "rapid rise . . . to a global leadership position in international crime control matters during the twentieth century."[71] In virtually all major areas of transnational enforcement—such as financial fraud, bribery, organized crime, drugs, money laundering, terrorist financing, human trafficking, and tax evasion—the U.S. government plays a prominent, often pioneering role.[72] The analysis below illuminates the reasons for the United States' emergence as leader and the dynamics that tend to reinforce its dominance.

The United States is not, however, the only state that provides transnational enforcement on a significant scale. European countries have a long history of cross-border cooperation in law enforcement and crime control.[73] Although much of their efforts focused on intra-European cooperation, both EU institutions and individual member states have bolstered their enforcement capabilities in recent years.[74] In areas such as tax evasion, bribery, and corporate human rights abuses, Europe has become the world's second most prolific enforcer—often in response to the risks it sees in unilateral U.S. action. The rest of the world has so far been less active, often taking a follower role by collaborating with U.S. enforcement actions. Nevertheless, other countries may emerge as regional enforcement leaders. Thus, while the theory below emphasizes the United States' unique role in recent decades, its aim is broader: to explain how and why states emerge as transnational enforcement leaders.

A. Private Benefits

In explaining the provision of international public goods, classical leadership theory emphasized the leader's ability to capture an outsized share of the good's benefit. It generally assumed that a leader's share of the

70. ANDREAS & NADELMANN, *supra* note 3, at viii.

71. *Id.* at 58.

72. Documenting the United States' leadership role in these areas is beyond the scope of this Article. For an overview of U.S. dominance in traditional crime control areas, notably drugs and money laundering, see ANDREAS & NADELMANN, *supra* note 3. For recent U.S. leadership in transnational criminal enforcement against global banks for financial fraud, tax evasion, and sanctions violations, see VERDIER, *supra* note 4. On bribery, see KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (2019); Brewster, *supra* note 4.

73. ANDREAS & NADELMANN, *supra* note 3, at 59–104.

74. *Id.* at 174–88, 237–41.

benefit would be roughly proportional to some measure of relative size, such as its share of world GDP.[75] The intuition is straightforward: providing a stable international monetary system or eliminating a cybercriminal group should provide benefits to each state commensurate with the size of its economy. If this is correct, it means that GPG provision by a leader, while greater than in a world of equal states, remains far short of the globally optimal level.[76] It also implies that provision of GPGs depends on the leader's continued dominance. Indeed, the main prediction of classical leadership theory was that provision of GPGs, such as collective defense and international regimes, would fall dramatically as the United States' relative economic size declined.[77]

The insight that states with larger economies tend to contribute more to GPG production remains central to contemporary scholarship.[78] However, perhaps because many of today's crucial GPGs—such as climate change mitigation or biodiversity protection—are beyond the ability of any state or small group to provide, recent scholarship also emphasizes the importance of jointly produced private benefits in generating incentives to provide public goods. The insight, which goes back at least to Olson, is that providing public goods can jointly generate private goods appropriable by the producer.[79] For example, protecting a country's forests generates both a GPG (global biodiversity) and a joint private good (revenues from ecotourism). "When jointly produced private benefits are added to the contributor's share of the tied public benefits, the contributor may come to view received net benefits to be positive . . . . This is especially germane for GPGs that often contain donor- or country-specific benefits tied to public benefits."[80]

Is this notion relevant to transnational enforcement? At first glance, it might appear that an enforcer's gain is limited to its share of the overall

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75. *See, e.g.*, Snidal, *supra* note 9, at 603.

76. *See supra* note 58. More sophisticated models of GPG provision also predict that larger states will provide more of the GPG but that overall provision will fall below the globally optimal level. *See* Buchholz & Sandler, *supra* note 7, at 500–05.

77. *See, e.g.*, Kindleberger, *Systems of International Economic Organization*, *supra* note 9, at 34. This perceived decline is also why, in the 1980s, many international relations theorists turned away from leadership theory to explain international regimes and institutions, and towards theories that emphasize cooperation amongst homogeneous states in repeated games such as the Prisoner's Dilemma. *See, e.g.*, KEOHANE, *supra* note 9; INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983). U.S. decline in that era may have been overstated; in fact, it was followed by a period seen by many as the high-water mark of U.S. relative power. In addition, as will be discussed *infra* Part IV, even in horizontal cooperation theories, enforcement retains public good characteristics that imply a role for leadership in its provision.

78. *See* Buchholz & Sandler, *supra* note 7, at 504.

79. *See* OLSON, *supra* note 7, at 51.

80. Buchholz & Sandler, *supra* note 7, at 497, 499. "In a sense, contributor-specific benefits foster property rights to the jointly produced public good, because the former private benefits can only be acquired by contributing to the joint product activity." *Id.* at 499.

public benefit of suppressing the relevant crime or harmful practice. However, there are several ways in which a state that takes a leadership role in enforcement may be able to capture private benefits, which reinforces the state's incentives to enforce.

First, successful enforcers can sometimes extract private benefits directly from their targets. Many transnational crime control operations result in substantial asset seizures, which often flow to government coffers.[81] In addition, in a growing number of cases, enforcers are collecting fines and financial penalties from private actors involved in illegal activities. In some areas, these sums are staggering. The United States has imposed more than $17 billion in penalties on global banks, many of them foreign, in connection with benchmark manipulation and tax evasion.[82] Under the Foreign Corrupt Practices Act (FCPA), the United States has also imposed large fines on many U.S. and foreign companies for bribing foreign officials.[83] These sums are paid to the U.S. Treasury and directly benefit the country, in addition to the benefit it accrues from deterring these practices.

In other words, while stopping and deterring harmful practices is a public good, seizures and fines are private benefits that incentivize the leader to enforce.[84] It is unsurprising that, following the United States' example, other countries have expanded their cross-border enforcement efforts. Countries such as Germany, the United Kingdom, and France have adopted FCPA-like anti-bribery regimes and imposed substantial fines.[85] France, Germany, and other countries have also followed the U.S. model in pursuing criminal cases against multinational firms for tax evasion.[86] France and Canada now allow civil suits and prosecutions for extraterritorial human rights violations.[87] In all these areas, the prospect of fines and monetary awards incentivizes public and private actors to provide enforcement, and to develop the capacity to do so where needed.

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81. As noted above, the DOJ seized $3.6 billion worth of Bitcoin in the BitFinex case alone. *See supra* note 1. Through civil forfeiture and other authorities, it seizes more than a billion dollars in miscellaneous assets every year, although its statistics do not identify how much is related to transnational cases.

82. VERDIER, *supra* note 4, at 8.

83. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.). *See* VERDIER, *supra* note 4, at 36; DAVIS, *supra* note 72; Brewster, *supra* note 4.

84. See POSNER & SYKES, *supra* note 19, at 31 (conjecturing that, in the context of sanctions, "[a] high degree of compliance can be exacted if . . . the sender can extract reparations from the target to cover the cost of the sanction"); William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521, 547 (2016) (arguing that "regulatory recoveries can act as a kind of tax on other countries for the regulating state's provision of the good in question, reducing the costs of the unilateral action").

85. *See* Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011); Brewster, *supra* note 4.

86. *See, e.g.*, Morris & Miller, *supra* note 5; Keohane & Arnold, *supra* note 5.

87. *See, e.g.*, Nevsun Resources Ltd. v. Araya, [2020] 1 S.C.R 166 (Can.); Alderman, *supra* note 5.

By contrast, areas in which enforcers typically cannot recoup their costs from targets are less likely to see strong and consistent voluntary enforcement. Arresting international criminals—either pursuant to international court warrants or universal jurisdiction—rarely generates immediate benefits. Indicted individuals typically lack the means to pay substantial fines or penalties, which in any event could only occur after a long and costly trial. Their assets may sometimes be seized, but arrest is not a prerequisite to do so, and these assets are rarely held in the same jurisdiction where the individual is present. In such circumstances where private benefits for the enforcing states are muted or nonexistent, one would not expect even powerful states to volunteer. This conjecture appears consistent with anecdotal evidence from international arrest warrants: states often seem eager to avoid the diplomatic fallout of arresting foreign officials.[88]

Another crucial private benefit for unilateral enforcers is the ability to shape the norms that govern the relevant area. Many scholars have noted that powerful states or organizations, such as the United States, the European Union, and China, compete to impose their own standards in various areas of transnational regulation such as antitrust, finance, or data privacy.[89] In explaining their ability to do so, these scholars emphasize market power: the larger a state's internal market, the more market participants will tend to adopt its standards in order to gain access.[90] Because market participants tend to converge on one or a few standards for efficiency reasons, states with large internal markets dominate transnational standard-setting.

Market size, however, is only one dimension of a state's ability to impose its standards worldwide. Another is enforcement: market participants who expect that transnational activities that breach a state's laws will be successfully detected and punished have strong incentives to comply with these laws, regardless of market size. To be sure, a state with a small market may be unable to adopt this strategy, as market participants could simply avoid activities that trigger its jurisdiction. But given a certain market size, a robust enforcement program strengthens a country's hand in the

88. This was most apparent in the recent diplomatic ballet over Russian President Vladimir Putin's possible attendance at a BRICS summit hosted by South Africa, which would have been legally obligated to arrest him under an ICC warrant. In the end, South Africa announced that Putin would not attend. *See* Nomsa Maseko & Kathryn Armstrong, *Putin Will Not Attend Brics Summit—South African Presidency*, BBC (Jul. 19, 2023), https://www.bbc.com/news/world-africa-66247067.

89. *See, e.g.*, ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES (2007); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

90. *See, e.g.*, DREZNER, *supra* note 89, at 32 (arguing that "state power comes from the size of a government's internal market").

competition to set global standards.[91] This may explain why in some areas, such as money laundering and sanctions, the United States has successfully entrenched its rules as de facto global standards even though its market size is comparable to that of the EU and China. For example, as a result of robust enforcement, large banks around the world comply with U.S. sanctions, even those based in countries that resist these policies.[92]

Enforcement leadership also reinforces a country's ability to set its own high standards without suffering from a competitive disadvantage, because it can enforce them against both its own nationals and foreigners. For example, after the FCPA was enacted and the DOJ began enforcing it against U.S. firms that bribed foreign officials, many of these firms complained that the law prevented them from competing effectively with foreign firms in some parts of the world.[93] In response, the DOJ began enforcing the FCPA against foreign firms, enabled by the fact that many were listed on U.S. stock exchanges and thus subject to the FCPA.[94] The ability to mitigate this competitive disadvantage preserved the United States' own policy space; it also enabled it to turn its law into a global standard. The home states of many of the foreign firms targeted by U.S. enforcement joined the Organization for Economic Cooperation and Development (OECD) Bribery Convention and began adopting and enforcing their own anti-bribery regimes, effectively internationalizing the policy.[95]

B. Cost Advantages

The existence of joint private benefits of transnational enforcement does not, by itself, predict the rise of any state as enforcement leader. As in the case of biodiversity conservation, where many states can contribute to the public good while deriving private benefits, one could imagine many states investing in transnational enforcement, and deriving some revenue, without any single state emerging as leader. The nature of certain private benefits, however, begins to point the way towards enforcement leadership. For instance, imposing the enforcer's standards through enforcement can only benefit powerful states that can realistically compete to set worldwide standards.

Other reasons, relating to different states' relative costs of providing transnational enforcement, further explain the emergence of powerful states

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91. *See* BRADFORD, *supra* note 89, at 25–26; DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995).

92. *See* VERDIER, *supra* note 4, at 32–33; Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 255–64 (2019).

93. *See* Brewster, *supra* note 4, at 1646.

94. *See id.* at 1671–74.

95. *See* Kaczmarek & Newman, *supra* note 85, at 760–64.

as leaders. Again, the central insight is rooted in GPG theory: states that can more efficiently provide GPGs—in other words, that can provide more of the public good at lower cost—will tend to be the largest contributors.[96]

First, some states have resources that enable them to provide transnational enforcement more efficiently than others. In part, this is because they possess preexisting capabilities, usually developed for domestic law enforcement and national defense, that can be deployed for transnational enforcement. These resources take many forms: trained and experienced investigators and prosecutors, information-gathering technology, an efficient judicial system, and the capacity to conduct surveillance, protect witnesses, and reward informants. All of these contribute to a state's ability to enforce outside its borders. These resources are concentrated in larger, more economically and technologically advanced states, both because they generally have more resources and because they often face large-scale domestic criminality.[97]

In addition to these law enforcement resources, select states benefit from another crucial advantage: their privileged position in transnational networks of interdependence, such as financial and communications infrastructure. This position allows them to investigate and punish activities outside their borders. U.S. prosecutors have been able to extract record fines and reforms from many of the world's largest banks, most of them based outside the United States, for activities that primarily took place overseas.[98] These actions required little or no cooperation from other countries. The key to U.S. prosecutors' ability to enforce was the threat—implicit and sometimes explicit—of blocking a bank's access to U.S. dollar payments. Faced with that threat, banks cooperated with U.S. investigations and paid the fines. Because many foreign governments, companies, and individuals have U.S. bank accounts, maintain U.S. assets, or rely on U.S. financial intermediaries, the United States can often wield such threats.[99] The EU, for its part, regulates the primary international financial messaging system, known as SWIFT.[100]

Political scientists Abraham Newman and Henry Farrell describe two consequences of this centrality: the "panopticon effect," which consists of

96. Buchholz & Sandler, *supra* note 7, at 505.

97. In the case of the United States, long domestic experiences of interjurisdictional law enforcement cooperation (necessitated by federalism) and border policing facilitated the internationalization of crime control in the postwar era and beyond. On the evolution and internationalization of U.S. policing, see ANDREAS & NADELMANN, *supra* note 3, at 105–55; *see generally* NADELMANN, *supra* note 3, at 15–188.

98. *See* VERDIER, *supra* note 4, at 4–9.

99. *See id.* at 26–33; Patrick Emmenegger, *The Long Arm of Justice: U.S. Structural Power and International Banking*, 17 BUS. & POL. 473 (2015); Magnuson, *supra* note 84, at 565–66.

100. Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42, 60, 65–70 (2019).

"the ability to glean critical knowledge from information flows" and the "chokepoint" effect, through which "privileged states" can "limit or penalize use of hubs by third parties."[101] In the enforcement context, these effects augment central states' capacity to gather information and credibly threaten sanctions, while reducing their need to rely on cooperation by other governments. They also reach well beyond the financial realm, as the United States and a handful of jurisdictions are also central to international travel and transportation, communications, intelligence, and many other areas. In other words, because some states are in privileged positions in international networks of interdependence, their enforcement costs are lower, which primes them to take on the role of transnational enforcement leaders.

Second, transnational enforcement likely generates economies of scale, which implies that a state's rise as leader involves a self-reinforcing dynamic. Once a state develops the capacity to investigate and prosecute complex transnational cases, the incremental cost of doing so decreases. Experienced investigators, intelligence-gathering tools, detailed legal authority, and many other specialized resources facilitate future investigations and prosecutions. For example, the DOJ has developed internal expertise and a wide set of tools to prosecute and settle corporate criminal cases, including those involving foreign firms.[102] Incipient leaders have incentives to invest in specific transnational enforcement capabilities. The United States pioneered cooperative arrangements with foreign jurisdictions, such as Mutual Legal Assistance Treaties (MLATs), Memoranda of Understanding (MOUs), extradition treaties, tax treaties, and treaties targeting specific criminal activities.[103] These arrangements help U.S. law enforcement obtain evidence

101. *Id.* at 55–56.

102. *See* VERDIER, *supra* note 4, at 19–23; Verdier, *supra* note 92, at 245–82.

103. MLATs are bilateral agreements under which criminal investigators can request information, documents, and testimony from the other party. As of April 2022, the United States had 70 MLATs, including one with the European Union that covers all EU member states. It is also a party to the Inter-American Convention on Mutual Assistance in Criminal Matters, *adopted* May 23, 1992, T.I.A.S. No. 01-624, O.A.S.T.S. No. 75 (entered into force for the United States June 24, 2001). *See* OFF. OF INT'L AFFS., U.S. DEP'T OF JUST., MUTUAL LEGAL ASSISTANCE TREATIES OF THE UNITED STATES (2022), https://www.justice.gov/criminal-oia/file/1498806/download. The United States also has several bilateral mutual legal assistance agreements relating to drug enforcement, and it is a party to several multilateral conventions that provide for mutual legal assistance in respect of specific crimes, such as the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95; the U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209; and the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197. The United States also has extradition treaties with more than 110 countries. *See* 18 U.S.C. § 3181 note.

Memoranda of Understanding are arrangements among regulatory agencies under which they can request information relevant to investigations and enforcement. In securities and commodities fraud enforcement, bilateral MOUs have been supplanted by the International Organization of Securities Commissions (IOSCO)'s Multilateral Memorandum of Understanding (MMOU), which the U.S.

and testimony from foreign governments. The United States plays a central role in promoting these arrangements and has historically been their heaviest user, although many more states have become active in the past decade.[104]

By engaging in frequent and robust enforcement, a state may also develop a reputation for resolve that reduces its enforcement costs over time.[105] Targets that lack direct information about the enforcer's resolve may believe that it will be unwilling to incur the cost of enforcement, or that it will back down in the face of threats of reprisals or evasive tactics. A record of successful enforcement can dispel these beliefs and incentivize targets to cooperate and settle quickly. For example, the DOJ's guidelines for corporate prosecution encourage firms to put in place internal monitoring systems, investigate potential crimes, and turn over information to the government to benefit from more lenient treatment.[106] At best, a feared enforcer can foster an equilibrium in which targets refrain from harmful practices in the first place.

These economies of scale imply that as leaders provide more transnational enforcement, their incremental costs decrease. As a result, they will have incentives to enforce in situations where it would not be cost-effective for others to do so.[107] Thus, the emergence of a leader alleviates the underprovision problem. Economies of scale also imply that enforcement will tend to become increasingly concentrated in one or a few states. Here, as in other areas, increasing returns may generate a dynamic of

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Securities and Exchange Commission (SEC) played a central role in designing and promoting. All IOSCO members must join the MMOU, which has 129 signatories as of August 2023. *See Signatories to Appendix A and Appendix B List,* IOSCO, https://www.iosco.org/about/?subSection=mmou&subSection1=signatories (last visited Aug. 2, 2023); IOSCO, MULTILATERAL MEMORANDUM OF UNDERSTANDING CONCERNING CONSULTATION AND COOPERATION AND THE EXCHANGE OF INFORMATION (2012) [hereinafter MMOU], http://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf. The U.S. Commodity Futures Trading Commission (CFTC) is also a member.

Bilateral tax treaties typically contain information-sharing provisions for enforcement purposes. The United States currently has seventy-eight tax treaties, including at least one (with the former Soviet Union) that now cover several countries. *See United States Income Tax Treaties—A to Z*, U.S. INTERNAL REVENUE SERV., https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited Aug. 2, 2023).

104. For example, in fiscal year 2017, the United States made 987 requests for assistance under MLATs that were granted and secured extradition of 375 fugitives, while it granted 2,868 MLA requests and extradited 62 fugitives. *See* CRIMINAL DIVISION, U.S. DEP'T OF JUST., PERFORMANCE BUDGET FY 2019 CONGRESSIONAL SUBMISSION, https://www.justice.gov/d9/pages/attachments/2018/02/13/9_criminal_division_crm_0.pdf.

105. *See* Thompson, *supra* note 59, at 315–16; POSNER & SYKES, *supra* note 19, at 31; GUZMAN, *supra* note 18, at 46–47.

106. *See* VERDIER, *supra* note 4, at 21–22.

107. Greater abilities to capture benefits and lower costs work together to incentivize enforcement. To return to the example above, a state that can capture a $35 share of the global benefit will not enforce, because the cost ($40) exceeds that share. But if that state can either capture a sufficient private joint benefit such as a fine (at least $5), or incur a lower cost due to preexisting capabilities or economies of scale (the savings being at least $5), or some combination thereof, then it will enforce (and provide a public good to others).

path dependence.[108] One or a few states may initially enforce more intensely because of their preexisting capabilities or their greater ability to capture private benefits; as they do so, their incremental costs decrease, they provide an even greater share of transnational enforcement, and their dominance becomes entrenched. As a result, transnational enforcement will tend to become concentrated in a relatively small number of powerful states.

C. Permissive Legal and Political Environment

Public international law has, so far, played little role in our analysis of transnational enforcement leadership. Where a leader enforces across international borders, are other states not likely to take offense and resist this incursion on their sovereignty? In doing so, can they not invoke international law norms that limit a state's ability to enforce extraterritorially?

Traditional customary principles limit a state's ability to regulate or enforce outside its territory to instances where there is a legally recognized connection between that state and the relevant person or activity. For example, states can regulate the activities of their own nationals abroad, as well as certain activities by foreigners that affect their vital interests, such as counterfeiting.[109]

In practice, these principles have little constraining effect on the sort of enforcement discussed in this Article. The multiple bases of jurisdiction recognized by international law often give rise to concurrent claims by several states.[110] Thus, the actions of enforcement leaders often fit within legal bounds—think of the United States prosecuting U.S. banks for fraud at their London branches. In addition, the permissible bases of jurisdiction are loosely defined, and the required strength of the connection is unclear. The United States routinely asserts territorial jurisdiction based on relatively minor contacts, such as a phone call or internet communication through its

108. *See generally* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000) (theorizing how self-reinforcing social processes can lead to path-dependent outcomes).

109. *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 441–48 (9th ed. 2019). Some courts and scholars have claimed that even where such a connection exists, states should refrain from exercising jurisdiction where case-by-case balancing reveals that doing so would be "unreasonable"; but this has never been clearly accepted as a customary international law rule. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 407 reporters' note 3 (AM. L. INST. 2018) [hereinafter RESTATEMENT (FOURTH)]; Cedric Ryngaert, *The Restatement and the Law of Jurisdiction: A Commentary*, 32 EUR. J. INT'L L. 1455, 1461 (2021).

110. *See, e.g.*, Krisch, *supra* note 35, at 495–503.

territory.[111] In effect, "practice has largely 'unbound' territoriality from its constraining aspects, opening the door to an exercise of jurisdiction on the basis of thin connections with the issue at hand and, thus, a normalization of regulation with few traditional territorial links."[112]

Regardless of international rules on jurisdiction, one might expect foreign governments to denounce the leader's actions as exorbitant and resist them. Although states and scholars occasionally complain of overreach, the striking fact is the extent to which transnational enforcement leadership goes unchallenged.[113] Looking at transnational enforcement through the lens of GPGs and leadership theory illuminates this phenomenon. Since other states usually benefit from the leader's enforcement actions, they are unlikely to oppose them. On the contrary, resisting the leader's ability to provide the public good would compromise their own ability to free ride.[114] In some cases, they may resist because they support the practice the leader is targeting. Thus, most clashes over extraterritorial jurisdiction occur in areas such as antitrust, human rights statutes, environmental law, and sanctions, where state preferences diverge sharply. But in most instances, transnational enforcement occurs with little complaint or resistance by other states.

D. Conclusion

The factors described above explain the emergence and entrenchment of transnational enforcement leaders. The ability to extract joint private benefits, such as fines, seizures, and the ability to impose a state's preferred norms, provide incentives to enforce unilaterally. By virtue of their size, preexisting enforcement resources, and control over transnational interdependence hubs, some states begin the race with an inherent advantage. As they provide transnational enforcement, they generate economies of scale that reinforce their position. Because international law imposes few real constraints on unilateral enforcement and most other states benefit from the leader's actions, it encounters little resistance.

The theory does not predict all-encompassing consolidation into a single transnational enforcement hegemon. After all, some harmful practices

111. *See* Verdier, *supra* note 92, at 270–76; Krisch, *supra* note 35, at 488–89. The United States and other states also assert jurisdiction on the basis that a practice has substantial effects on their territory. *See* RESTATEMENT (FOURTH), *supra* note 109, § 402(1)(b); § 402 cmt. f.

112. Krisch, *supra* note 35, at 482.

113. For example, see most of the cases discussed in Krisch, *supra* note 35, at 488–95, and some of those described in VERDIER, *supra* note 4, at 41–107.

114. This also explains their willingness to provide low-cost assistance to the leader's enforcement efforts, for instance through MLATs, MOUs, and extradition treaties. Indeed, the purpose of these arrangements is to overcome those constraints that international law does impose on extraterritorial investigation and enforcement.

harm only one state, or harm groups of states that do not include a global leader. Because leaders are unlikely to target such practices, other states have incentives to develop some transnational enforcement capacity. However, because these states will not benefit from a leader's preexisting capabilities and economies of scale, the underprovision problem will be more acute. To alleviate this problem, regional (or specialized) enforcement leaders may emerge, focusing their efforts on practices neglected by global leaders.[115] Thus, one may expect global leadership to coexist with some transnational enforcement by regional leaders and individual states. Global leadership will be more pronounced where the problem has global dimensions—where an illegal practice causes widespread harm, the cost of enforcement is high, and the effort constitutes a best-shot or better-shot GPG.

IV. ENFORCEMENT LEADERSHIP AND THE WORLD POLICE PARADOX

Parts II and III argued that transnational enforcement constitutes a GPG and described the conditions that favor the rise of powerful states as enforcement leaders. This Part examines the implications of, and concerns that may arise from, transnational enforcement leadership.

These concerns are encapsulated by the "World Police Paradox." On the one hand, leadership increases the supply of transnational enforcement and, other things being equal, increases global welfare relative to a world of equal states without a leader. From that perspective, transnational enforcement leadership benefits the world and should be welcomed. On the other hand, leadership often appears to preempt international cooperation with unilateral action. It also allows the leader to play a privileged role, using its power selectively to advance its interests and to shape international norms in its own favor. As such, it seems at odds with foundational ideas of the international legal system such as sovereign equality and collective lawmaking. At worst, leadership appears to manifest and perpetuate international inequality and hegemony.

This Part acknowledges that these concerns are real. At the same time, it argues that they should not be overstated. It first examines the relationship between leadership and international cooperation. It shows that, although cooperation is generally superior to leadership from a welfare standpoint, it

115. Another possibility is that global leaders may provide enforcement even against practices that do not significantly harm them, hoping to benefit from imposing fines or mitigating a competitive disadvantage for their firms. Anti-bribery enforcement by the United States, for instance, may fit this category. *See, e.g.*, Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

is often unavailable due to well-known obstacles such as free-riding and distributional conflict. As a result, leadership is often the achievable second-best outcome. More fundamentally, it shows that the dichotomy between unilateralism and cooperation is illusory, because leadership is sometimes necessary to unlock the possibility of cooperation. A leader's actions can overcome free-rider problems and distributional conflicts that inhibit effective cooperative regimes. Finally, this Part examines the implications of enforcement leadership for inequality in the international system, and whether such concerns can be alleviated. It argues that, while procedures meant to promote accountability and responsiveness have limited potential, the leader's need for assistance by other states and their ability to respond against perceived excesses discipline the leader's actions.

A. The Limits of Transnational Enforcement Cooperation

The analysis in Part II has shown that leadership in the provision of a GPG increases the level of that good and increases global welfare. This outcome, however, is usually inferior to one in which states cooperate to provide the public good collectively.[116] The leader provides less of the good than would be provided under a successful cooperative arrangement and, in many cases, fails to provide the good altogether. In other words, while leadership is desirable—and perhaps inevitable in a world without centralized enforcement—it is a second-best solution. As Duncan Snidal observed, leadership theory "contains a third, virtually hidden, assumption: *collective action is impossible* . . . . Such a view is necessary to the theory, for if collective action is possible then states might cooperate to provide the public goods in the absence of hegemonic power."[117]

Explaining how international cooperation can be sustained is at the heart of rational choice analysis of international law. The main lesson from this scholarship is that, in many situations, cooperation is both hard to achieve and fragile. The first major problem is that, in the absence of a central authority that can "tax" states or compel them to uphold their promises, each state will be tempted to free ride.[118] Rational choice theorists often model cooperation using the Prisoner's Dilemma, a situation in which although cooperation would generate a more efficient outcome, each individual participant is better off defecting. Their theories then identify

116. *See supra* notes 64–66.

117. Snidal, *supra* note 9, at 593.

118. In this example, each state could rationally calculate that, if the nineteen others honor the agreement, the resources they contribute will be sufficient; thus, the state is better off shirking and reaping the benefits without contributing anything. Of course, if enough states follow the same reasoning, cooperation will fail; but, even in that case, each individual state is better off not contributing.

mechanisms that can generate incentives for states to overcome the short-term temptation to defect. The key insight is that, in repeated interactions, these mechanisms can sustain cooperation.

Andrew Guzman identifies three mechanisms: reciprocity, retaliation, and reputation.[119] Reciprocity consists simply of withholding cooperation from a state that defects.[120] States who expect others to withhold cooperation in response to a breach have incentives to abstain from the short-term rewards of defection to secure the greater long-term benefits of cooperation. The second mechanism, reputation, relies on the information revealed by a state's breach.[121] When other states observe a breach, they draw inferences about the state's reliability, which they consider when deciding whether to cooperate with that state in the future.[122] The last mechanism, retaliation, consists of costly actions that a state may take to "punish" another state for a breach.[123] Classic examples include cutting off foreign aid, imposing economic sanctions, and military action.

Can these mechanisms sustain multilateral cooperation in transnational enforcement? Again, consider the cybercriminal group example. Absent some form of agreement, it is hard to see how the affected states could cooperate. What constitutes cooperation—e.g., how much and how each state is expected to help—is undefined, which makes it difficult for others to identify a breach and respond through reciprocity, reputational sanctions, or retaliation. Moreover, the situation described is a one-period game: each state chooses now whether to help in dismantling the group or not; there are no future cooperation rounds whose benefit the breaching state can forfeit. In such a game, each player's dominant strategy is to defect and attempt to free ride on the others' efforts.[124]

International treaties and institutions foster cooperation by embedding states in patterns of repeated interaction, turning such one-period games into multiple-period ones.[125] In this example, states could enter into a multilateral agreement to combat cybercriminality, which would define the targeted crimes and what is expected of each member. By creating a durable

119. GUZMAN, *supra* note 18, at 33–48.

120. *Id.* at 33, 42–45.

121. *Id.* at 33, 34–41.

122. In other words, states build up a reservoir of "reputational capital" that shapes their future opportunities for cooperation and, to protect it, have incentives to forgo opportunistic gains and comply with their obligations.

123. GUZMAN, *supra* note 18, at 34, 46–48.

124. If expectations are sufficiently well-defined, it is conceivable that a defecting state could be subject to retaliation or suffer reputational loss that deprives it of opportunities for cooperation in other areas in the future. These mechanisms, however, would still suffer from the limitations discussed below.

125. POSNER & SYKES, *supra* note 19, at 27–30; GUZMAN, *supra* note 18, at 36–40; GOLDSMITH & POSNER, *supra* note 19, at 83–106.

arrangement that covers repeated interactions, it would generate incentives to comply in the expectation that others will do so in the future. It would also make breaches clearer and more public, enhancing the impact of reputational sanctions, and might provide for mechanisms through which other states may retaliate against the breaching state. In principle, such an agreement provides a basis for the three mechanisms to operate: member states have incentives to comply because defection might lead others to withhold reciprocal cooperation in the future, damage the state's reputation, and attract sanctions.

For a more concrete example, consider an area where states have in fact created a multilateral enforcement regime: the trial and punishment of the gravest international crimes, such as genocide, crimes against humanity, and war crimes. The Rome Statute of the ICC defines these core international crimes, imposes individual responsibility, and binds all member states to assist in investigations and execute arrest warrants.[126] In principle, it provides a basis for the three mechanisms to operate: member states have incentives to comply because defection might lead others to withhold reciprocal cooperation in the future, damage the state's reputation, and attract sanctions.

The mechanisms described above clearly provide some incentives for member states to comply, but they suffer from important limitations. Consider the case of a member state faced with an ICC arrest warrant targeting a visiting foreign dignitary. The scenario is far from fictional: South Africa faced this dilemma some years ago when Sudanese President Omar Al-Bashir visited the country after his ICC indictment, and, more recently, as it organized a diplomatic summit that Russian President Vladimir Putin was set to attend.[127]

Compliance has obvious costs: it would be considered an affront by the dignitary's home state and could attract retaliation by that state and its allies. It might also jeopardize the member state's diplomatic ambitions. On the other side of the ledger are the costs of noncompliance generated by the mechanisms described above. There is a risk that not executing the warrant might attract reciprocal noncompliance, but this will likely be of little concern to South Africa. Arrest warrants originate with the ICC, not individual member states, so other members cannot deny South African requests in response to its breach. Failure by other states to execute ICC arrest warrants in the future is unlikely to impose costs specific to South Africa. Moreover, if another member state would otherwise execute a

126. *See* Rome Statute, *supra* note 6.

127. *See* Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html; John Eligon, *South Africa Skirts Dilemma After Putin Cancels Visit*, N.Y. TIMES (July 19, 2023), https://www.nytimes.com/2023/07/18/world/xampl/putin-south-africa.html.

warrant in the future, it seems highly unlikely that it would refrain from doing so as a means to incentivize South Africa to return to compliance: the stakes are too high and the impact on South Africa too small for this strategy to be credible.[128]

By reneging on a formal commitment, South Africa is likely to suffer some reputational costs. Whether these costs are significant, however, is doubtful.[129] As scholars have noted, it is unclear that states have a reputation for compliance with international law in general such that other states would infer from South Africa's failure to execute the ICC warrant that it is an unreliable partner for, say, a trade or investment agreement.[130] It is also unclear to what extent and how long that reputation persists given changes in leadership that might soon lead other states to update their assessments. Moreover, when trying to predict a state's compliance with new treaties, other states can access many other sources of information beyond the state's past record of compliance with other treaties. Thus, while reputational sanctions may provide incentives to comply, the strength of these incentives may be weak. In President Al-Bashir's case, they were clearly insufficient: the South African government refrained from arresting him, and, while South Africa may have suffered reputational consequences, their impact is difficult to measure.[131]

The last mechanism, retaliation, would require that others take action to impose costs on South Africa, such as economic sanctions, cuts to foreign assistance, or expulsion from other organizations. The ICC itself has little power to do so, as is typically the case: "Enforcement of international agreements nearly always continues to be decentralized in the hands of member states rather than the organization itself."[132] The problem is that sanctions impose costs not only on the target, but also on the state that

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128. In this regard, the Rome Statute faces the same problem as human rights treaties, the classic example where reciprocity is not credible and does not work. For example, see GUZMAN, *supra* note 18, at 45, on this question. For an argument that states may be concerned with the impact of the precedent they are setting for the viability of the cooperative equilibrium, see Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 390–91 (2014). More generally, simple reciprocity is widely recognized to be an insufficient basis to sustain cooperation to provide GPGs, because other states cannot credibly respond to defection by withholding their own provision of the public good.

129. Guzman, whose theory relies most heavily on reputation, notes several reasons why its impact on compliance may be limited: reputational payoffs may be too small relative to the benefits of violating the law; some states may value a different kind of reputation (e.g., for toughness rather than for law-abidingness); or their reputation may already be so poor that further violations generate little incremental reputational cost. *See* GUZMAN, *supra* note 18, at 111–17.

130. *See, e.g.*, Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S97 (2002).

131. *See* Eligon, *supra* note 127.

132. Lisa L. Martin, *The Political Economy of International Cooperation*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 51, 52–53 (Inge Kaul et al. eds., 1999).

inflicts them. As a result, threats of retaliation are often not credible.[133] In multilateral settings, they also generate a collective action problem: each member state would prefer to stand by while others incur the cost of sanctioning defectors.[134] Since potential defectors know this, threats of enforcement lack credibility. Indeed, no state imposed meaningful sanctions on South Africa following its failure to arrest Al-Bashir.[135]

This example illustrates a crucial point: even where states have created international agreements and institutions to promote cooperation, enforcement of the regime's rules against defectors is itself a public good.[136] As such, enforcement is underprovided, would-be defectors know that they will be unlikely to face punishment, and cooperation is hard to sustain. In other words, creating treaties and institutions turns the GPG provision problem into a second-order enforcement problem.[137] This is why classical leadership theory held that the presence of a hegemon was essential to create and to sustain multilateral regimes in trade, finance, defense, and other areas: the hegemon's essential function was to coerce members to comply. Likewise, cooperative arrangements turn the first-order transnational enforcement problem against non-state actors into a second-order, state-to-

133. GUZMAN, *supra* note 18, at 47–48 (arguing that because sanctions are costly, the threat to impose them often lacks credibility).

134. *See* POSNER & SYKES, *supra* note 19, at 23. Suppose that the dignitary's arrest would create a benefit of $200 for the world (incapacitating a dangerous criminal, exposing the truth at trial, bringing closure to the victims, facilitating political transition, and deterring other potential criminals). Suppose further that South Africa's share of these benefits is $2 and its costs of arrest are $20. To incentivize South Africa, other states would need to impose sanctions of at least $18. If the sanctioner would reap the same benefits as South Africa ($2) and incurs a cost of sanctioning equal to the impact of the sanctions on the target ($18), no state will volunteer to sanction South Africa, since the costs exceed the benefits.

135. This is not to say that treaties and institutions cannot alleviate the enforcement problem. In some cases, they can sustain cooperation simply by generating information and facilitating the operation of the mechanisms described above. In addition, other mechanisms may be relevant. For example, an important strand of literature emphasizes the role of domestic institutions, such as courts, in enforcing international commitments against the executive. *See, e.g.*, Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149 (2009); Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT'L ORG. 469 (2013). After Al-Bashir's failed arrest, South African courts made it clear that the government had a legal obligation to execute ICC warrants. *See* Agence France-Presse, *South African Court Rules Failure to Detain Omar al-Bashir Was 'Disgraceful'*, GUARDIAN (Mar. 15, 2016), https://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful. Their resolve likely played a role in deterring President Putin from visiting the country. The impact of this mechanism, however, appears conditional on numerous factors, including the strength and independence of national courts.

136. *See* BARRETT, *supra* note 7, at 82 ("The problem is that enforcing an agreement to cut back on CFCs is itself a collective action problem."); *see also* Kindleberger, *Dominance and Leadership*, *supra* note 9, at 252 ("Not only will countries chisel on the commitments, but they will free ride the application of sanctions . . . .").

137. *See supra* notes 36–38 and accompanying text.

state enforcement problem. In the absence of leadership, underprovision is likely to persist.[138]

Besides free riding, distributive concerns are another important obstacle to international cooperation. International agreements are based on consent: every member state must agree to undertake a regime's obligations. But the benefits and costs of a regime are often uneven and can be allocated in multiple ways, making agreement difficult. Climate change is a case in point: even though all states would benefit from limiting global carbon dioxide emissions, they disagree vehemently on who should bear most of the burden. Developing countries argue that advanced economies that accounted for most historical emissions should undertake much stricter cutbacks, while the latter retort that this amounts to giving the former—who account for most of today's growth in emissions—unfairly favorable treatment.[139] Such debates long hindered attempts to set and to enforce emissions limits under the UN Framework Convention on Climate Change, for example.[140]

The distributive stakes of international agreements can be even more dramatic. Suppose a state—let's call it Switzerland—has a large and profitable banking industry that caters to wealthy individuals worldwide. Both the banks and the government know that many of these depositors evade taxes in their countries of origin, but neither shares information about the accounts; on the contrary, the banks attract foreign depositors by touting their secrecy. Tax evasion is illegal in the depositors' home states, but those states cannot enforce their laws without account information and lack the capacity to compel Swiss banks to disclose information without the Swiss government's assistance. While Switzerland gains from this practice (through employment, bank fees, and corporate tax revenues), many other states lose more in aggregate. Banning the practice—perhaps by establishing a system of automatic tax information exchange—would improve global welfare, but Switzerland will not voluntarily join such an agreement, as it would face a welfare loss.[141]

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138. This reasoning also underlines how transnational enforcement often shades into state-to-state enforcement, a theme we will return to *infra* Part V.

139. *See* Elena Shao, *A Core Question at COP27: Who Will Pay for Climate Change?*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/interactive/2022/11/06/climate/cop27-climate-change-loss-damage.html.

140. On obstacles to climate change cooperation, see Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy*, 6 NATURE CLIMATE CHANGE 570 (2016). The classic paper on distributive obstacles to international cooperation is Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991).

141. Scott Barrett characterizes this type of GPG as a "weakest link" good, since a single cheating state can undermine the benefits of cooperation for others. Here, as long as Switzerland does not share tax information, it does not matter that all other countries do; tax evaders will all go to Switzerland to

There are two obvious ways in which Switzerland could be convinced to join the agreement. First, it could be offered some compensatory benefit, such as trade concessions by the other states worth at least as much as the lost income. But there is a collective action problem: each state may simply wait for the others to act and free ride. It might be possible to avoid this by limiting access to the disclosures to states that contribute, but this may be difficult to enforce, and states may find it difficult to agree to a "fair" distribution of the cost. They may also have moral or strategic objections to "bribing" Switzerland. Should it be rewarded for such behavior? Will that not entice other states to adopt tax secrecy to attract similar bribes? It may be difficult to identify a benefit that is acceptable to both sides, roughly equivalent in amount, legally and economically feasible, and unlikely to incentivize strategic behavior by other states.[142]

The other solution is coercion. Other states can adopt retaliatory measures, such as a special tax on assets held by Swiss banks in their jurisdiction. If these measures cost Switzerland more than the income from tax evaders, it will have incentives to end secrecy. Here again, however, states face a collective action problem, because coercion is costly. Each sanctioning state must adopt laws and devote resources to tracking Swiss investments and enforcing the withholding tax. It will face resistance by its own financial industry and may jeopardize its relations with Switzerland. Even if Switzerland changes its policy, the sanctioning state will only capture a fraction of the benefit. Most importantly, unless other states adopt the same policy, it will likely prove ineffective: Swiss banks may simply move their investments out of the sanctioning country's banks.

In short, where distributive conflict obstructs the creation of welfare-enhancing international regimes, now-familiar collective action and free-riding problems recur.[143] States that provide carrots or sticks capture only part of these benefits, so their provision faces the same problems that hinder that of other public goods. Who will provide them? Again, overcoming this

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set up their accounts. According to Barrett, "[t]he treaty is therefore an inappropriate instrument. Participation in a treaty is voluntary; if just one country chooses not to participate, that country, if it is the weakest link, can make cooperation by all the other countries pointless . . . . Enforcement is essential to the supply of many weakest link public goods." BARRETT, *supra* note 7, at 72. For a more general account and additional examples of situations in which countries have incentives to "insource" crime, see Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 812–26 (2009).

142. On side payments and cooperation, see POSNER & SYKES, *supra* note 19, at 21–22.

143. From a terminological standpoint, many economists may resist characterizing such situations as a public good, because the good does not benefit all participants. Where participation is obtained by coercion, for instance, the holdouts are worse off after the regime is established, and bribes merely compensate the holdouts for the costs the regime imposes on them. In other words, the holdouts' motivation in resisting the change arises not simply from a desire to free ride, as in a typical public good, but from the fact that provision of the good actually harms them. They have incentives to invest resources in actively resisting its provision and must be bribed or coerced to accept it.

problem through horizontal cooperative arrangements often proves elusive. Leadership is required.

B. From Leadership to Cooperation

The discussion above outlined several obstacles to international cooperation: distributive conflict often inhibits the creation of regimes and institutions, and, even within cooperative arrangements, states often have incentives to free ride. Horizontal mechanisms—such as reciprocity, retaliation, and reputation—can facilitate cooperation, but they are often insufficient. Given these obstacles to effective cooperation, leadership may often be the second-best solution that maximizes global welfare. In the case of transnational enforcement, the leader's private gains (imposing fines on targets and shaping norms to its advantage) and its efficiency advantages (structural power and economies of scale) narrow the gap.[144] If this is correct, leadership does not compete with international cooperation but improves outcomes where cooperation is unavailable.

But the relationship between leadership and cooperation may be more complex. One might worry, for example, that leadership might inhibit or displace cooperation. Snidal warns that in some circumstances, "[t]he presence of a hegemonic actor is deleterious to collective action because the hegemonic actor has the power to provide the good itself without collaborating with other states. Subordinate states also have power because they can count on obtaining a free ride."[145] If this is true, accepting enforcement leadership as a desirable feature of the international order might foreclose opportunities for cooperation.[146] However, the opposite might also be true: far from inhibiting cooperation, leadership may facilitate it. The rest of this Section describes several ways, illustrated by recent examples, in which transnational enforcement leadership by a powerful state can pave the way to cooperative arrangements.

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144. For example, if the leader can recoup fines or forfeited assets worth $25 from the cybercriminal group in addition to the $50 in benefit from cessation of its activities, then the leader will be willing to enforce up to a cost of $75. If, thanks to economies of scale, the leader can dismantle the group at a cost of $20, whereas it would cost other states $40, it will require a smaller private benefit to decide to enforce, thus leading to more enforcement overall. These effects can clearly work concurrently and significantly increase the leader's enforcement activity.

145. Snidal, *supra* note 9, at 611. Specifically, Snidal shows that where a small group of states could cooperate to provide a public good, the presence of a hegemon makes cooperation less likely, and hegemonic decline makes it more likely.

146. This is why scholars of that era saw relative decline of the hegemonic power as a precondition for the development of horizontal cooperation. *See*, *e.g.*, KEOHANE, *supra* note 9; Snidal, *supra* note 9. For a more recent example of this concern, see Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 14–15 (2014) (arguing that international antitrust cooperation has been unsuccessful "partly because central actors such as the United States and the EU have reduced the need for cooperation by extending their unilateral capacities").

To begin with, consider scenarios in which the main obstacle to cooperation is the prospect of free riding, as illustrated by the cybercriminal group and ICC warrant examples above. Can the presence of a leader help the world shift from a noncooperative, low-provision equilibrium to a cooperative, high-provision one? Theory suggests it can in several ways.

First, compared to other states, the leader's enforcement resources may allow it to overcome the first-mover penalty that arises from unilateral action. The rise of the international anti-bribery regime illustrates this effect. In the late 1970s, the United States moved first by adopting the FCPA, which prohibited U.S. companies from bribing foreign officials. The law, however, generated a free-rider problem. Because other advanced economies such as Germany, France, and the United Kingdom had no such laws and indeed tolerated and even encouraged foreign bribery, their companies gained a competitive advantage at the United States' expense.[147] By the same token, continued bribery by their firms undermined any global benefits that could arise from decreasing official corruption.

In other words, cooperation to fight bribery was inhibited by a classic free-rider problem. The United States, however, had unique resources in its arsenal. Because many important foreign firms had accessed U.S. financial markets by listing their shares on U.S. stock exchanges, the U.S. government could assert jurisdiction over them under the FCPA. Beginning in the 1990s, it did just that, targeting foreign companies with FCPA prosecutions and extracting large fines.[148] The prosecutions focused on firms from home countries with the most capacity to contribute to the fight against foreign bribery. U.S. actions not only undermined the benefits of free riding, but they also prompted the United Kingdom and Germany to adopt and to enforce their own anti-bribery laws to preempt U.S. enforcement.[149] They and many others also ratified and implemented the OECD Anti-Bribery Convention, a broad multilateral regime.[150]

Second, a transnational enforcement leader has incentives to invest in the creation of cooperative arrangements. Although a leader possesses substantial capacity to act unilaterally, assistance by other states will often benefit its transnational enforcement efforts. In some cases, some assistance will be indispensable. For example, a key piece of evidence may be located

147. *See* Brewster, *supra* note 4, at 1646.

148. VERDIER, *supra* note 4, at 35–36.

149. *Id.* at 38; Kaczmarek & Newman, *supra* note 85, at 753–56.

150. VERDIER, *supra* note 4, at 38. The same effect can be observed in the cases concerning manipulation of international financial benchmarks such as the London Interbank Offered Rate (LIBOR), where U.S. enforcement cases against global banks—many of them based in foreign jurisdictions—led to large fines and penalties. These prosecutions were followed by renewed efforts at international regulatory cooperation that led to new international standards for benchmarks, a worldwide cooperative effort to replace the tainted LIBOR, and greater oversight of the largely unregulated foreign exchange market. *Id.* at 69–72.

abroad, or the investigation's target may flee to a foreign jurisdiction. As noted above, transnational enforcement is best characterized as a "better shot" GPG: the leader's contribution is most important, but "[m]ultiple countries can contribute."[151]

These foreign contributions often require treaties or other cooperative arrangements. In criminal and regulatory enforcement, these include MLATs; extradition treaties; and specialized agreements, such as securities enforcement MOUs and tax treaties. They also include myriad bilateral agreements, informal understandings, and continuing relationships with foreign law enforcement bodies. Unsurprisingly, the United States, as the world's leading law enforcement power, has invested heavily in cultivating such arrangements.[152] From the leader's perspective, these mechanisms further its transnational enforcement capacity at a modest cost. For other states, they provide a low-cost way to enhance the leader's enforcement efforts. These states' role is mostly passive, relying on the leader to initiate investigations, bear most of the cost, and issue requests for assistance where needed. In other words, they essentially continue to free ride on the leader's contributions. In those relatively rare cases where the leader's actions threaten these states' interests, enforcement arrangements typically give them ample opportunity to withhold cooperation.[153]

Once these arrangements are in place, they foster greater cooperation and provision of transnational enforcement, including by states other than the leader. As noted above, leaders often lack interest in curbing practices that do not affect them.[154] By virtue of cooperative arrangements, affected states can concentrate their resources on such cases and benefit from assistance by the leader where needed. The United States not only requests hundreds of extraditions every year, but also extradites individuals to other states under various treaties. It also responds to thousands of requests under MLATs, to the extent that the DOJ's Office of International Affairs can

151. Buchholz & Sandler, *supra* note 7, at 498. By contrast, in the case of a true "best shot" aggregator GPG, such as stopping a comet, duplicative efforts are wasteful and "[m]ultiple best shooters results in a coordination problem." *Id.* In the alternative, one could characterize transnational enforcement as a "best shot" GPG to which other states make contributions by transferring resources to the leader.

152. *See supra* note 103 and accompanying text.

153. *See, e.g.*, U.N. Convention Against Transnational Organized Crime, *supra* note 103; Treaty on Mutual Legal Assistance in Criminal Matters, U.K.-U.S., art. 3(1)(a), Jan. 6, 1994, T.I.A.S. No. 96-1202 (providing that "the Requested Party may refuse assistance if . . . the Requested Party is of the opinion that the request, if granted, would impair its sovereignty, security, or other essential interests or would be contrary to important public policy"); IOSCO MMOU, *supra* note 103, art. 6(e)(iv) ("A request for assistance may be denied by the Requested Authority . . . on grounds of public interest or essential national interest."). Of course, because requests for assistance require affirmative action by the requested authority, it can simply "drag its feet" without formally invoking one of these exceptions.

154. *See supra* note 115 and accompanying text.

barely meet the demand and has repeatedly requested funding increases.[155] Moreover, where the leader fosters the creation of multilateral assistance arrangements—such as the UN Convention against Transnational Organized Crime or IOSCO's MMOU Concerning Consultation and Cooperation and the Exchange of Information—other states can benefit not only from the leader's assistance but also from each other's.[156] As a result, the cost of transnational enforcement decreases for all states, which tends to increase its provision.

Finally, in some circumstances, investment by the leader in transnational enforcement may encourage others to invest more rather than less. According to GPG theory, this will occur when "the GPG contributions of different countries are not strategic substitutes but strategic complements."[157] The classic example is a military alliance, where "increases in one ally's conventional forces on its border may lead other allies to augment their conventional forces along their borders so that they are not viewed by an enemy as more vulnerable."[158] Likewise, if the leader concentrates its resources on repressing practices that harm it, other states may fear that wrongdoers will choose to target them. If so, they will have incentives to invest more in enforcement, both in developing their own capacity and in creating and supporting international cooperative arrangements.

As noted above, the second major obstacle to international cooperation is distributive conflict. The Switzerland example illustrates this phenomenon: cooperation would produce overall global benefits, but it proves impossible because one or more states benefit from the status quo and international institutions are unable to reward or coerce them into joining the regime.[159]

This is, in fact, the situation that prevailed prior to the U.S. enforcement campaign against Swiss banks. International efforts to mandate tax information exchange, either upon request or automatically, had floundered for years in the face of strong resistance by Switzerland and other tax havens.[160] Even within the EU, information-sharing was very limited: the Savings Directive required EU members to report some payments to customers in other states, but it was ridden with loopholes, largely at the insistence of Austria and Luxembourg.[161] Both of these EU states had large wealth management industries, who feared that their customers from other

155. *See supra* note 104.

156. On the IOSCO MMOU, see *supra* note 103.

157. Buchholz & Sandler, *supra* note 7, at 509.

158. *Id.*

159. The account of this case here follows VERDIER, *supra* note 4, at 94–103, which contains additional details and references.

160. *See id.* at 78–81.

161. *See id.* at 94 n.101.

EU states would move their funds to Switzerland. At the international level, offshore tax havens that resisted OECD efforts to compel tax transparency could denounce the hypocrisy of an organization whose own members—Switzerland, Austria, and Luxembourg—did not share information.[162]

The U.S. enforcement campaign against tax evasion unraveled this deadlock. Based on information provided by a whistleblower, the DOJ threatened a criminal case against Switzerland's largest bank, UBS, which hosted thousands of undeclared U.S. bank accounts. The bank agreed to pay $780 million and, more importantly, was forced to disclose 4,450 U.S. customer names to the IRS.[163] The United States followed this action not only with other cases against Swiss banks, but also with the adoption of the Foreign Account Tax Compliance Act (FATCA), a statute which threatened a large withholding tax on all foreign banks that did not share information with the IRS on their U.S. customer accounts.[164] The United States soon concluded FATCA implementation agreements with large onshore jurisdictions. Switzerland, its government eager to ward off criminal cases against its banks, salvage their reputation, and preserve their access to U.S. markets, entered a FATCA agreement in 2013. After Switzerland yielded, many other major offshore tax havens quickly ratified FATCA agreements.[165]

Although DOJ enforcement and FATCA only compelled banks to share tax information with the United States, they radically altered the conditions for international cooperation. Once Switzerland complied with U.S. demands, it lost any pretext for refusing to share the same information with the EU, which quickly insisted that it do so.[166] In turn, this weakened Austria's and Luxembourg's resistance to intra-EU tax information exchange, and they soon agreed to a reinforced Savings Directive.[167] Other tax havens around the world, which had pointed to these countries' secrecy to resist reforms, also saw their position weakened. FATCA also provided a

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162. The Organization for Economic Cooperation and Development (OECD) made some progress after the 2008 financial crisis. In April 2009, it threatened sanctions against noncooperative jurisdictions, leading to a wave of new bilateral tax information exchange treaties. These treaties, however, proved largely ineffective. *See id.* at 98–99.

163. *Id.* at 84–87.

164. *See id.* at 94–98; Foreign Account Tax Compliance Act, Pub. L. No. 111-147, § 501, 124 Stat. 97, 104 (codified at 26 U.S.C. §§ 1471–74) (2010).

165. VERDIER, *supra* note 4, at 98–103.

166. One might wonder why Switzerland could not disclose information to the United States while withholding it from other, less powerful states. There are several possible explanations; however, one possibility is that once Switzerland agreed to share tax information with the United States, its reputation as a secrecy haven was destroyed and secrecy-seeking customers from other jurisdictions lost confidence, so that the incremental cost of agreeing to additional information exchange agreements became much lower.

167. Council Directive 2014/107 of Dec. 9, 2014, Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, 2014 O.J. (L 359) 1.

ready-made legal template and technological model for automatic account information exchange. Within a few years, the OECD had established what many had long thought impossible: a multilateral automatic tax information exchange system, the Common Reporting Standard, with more than 120 members, including the most important offshore financial centers.[168]

Thus, in addition to addressing free rider problems, leadership can facilitate cooperation by overcoming distributive deadlocks. Importantly, the United States did not accomplish this outcome by coercing the holdout states directly, such as by imposing economic sanctions or threatening military force. Instead, it used its unique transnational enforcement capabilities to punish non-state actors—Swiss and other foreign banks—for violating U.S. tax reporting laws. Other states lacked the means to effectively exercise authority over these banks, such as assets to attach or infrastructural hubs whose access they could deny. The United States, by contrast, could sanction these banks and had incentives to do so: it derived a private benefit (fines and unpaid taxes) from obtaining account information. Its actions, however, had broader repercussions: they modified the underlying payoffs so that international cooperation became achievable.

C. Enforcement Leadership and Institutional Design

The preceding two Sections have shown that, although cooperation is a superior outcome, the difficulty of achieving it means that transnational enforcement leadership may often be the achievable second-best solution. In addition, both theory and experience indicate that enforcement leadership can be a stepping stone towards a more efficient cooperative outcome. These conclusions suggest that transnational enforcement leadership is generally desirable, and that the international legal system should encourage it.

As noted above, this reasoning helps explain international law's broad and permissive customary rules on jurisdiction.[169] In some instances, exercises of extraterritorial jurisdiction conflict with other states' interests and lead to well-publicized disputes. In such cases, aggrieved states attempt to argue that the leader's jurisdictional claims exceed the bounds set by international law. But, in many more cases, other states welcome the leader's enforcement efforts since they can free ride on the elimination of practices that also threaten them. They are even willing to assume modest costs to assist the leader's efforts through various cooperative arrangements. In

168 *See AEOI Standard's Implementation Status by Jurisdiction*, OECD AUTOMATIC EXCH. PORTAL, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/ (last visited Oct. 13, 2023).

169. *See supra* notes 110-12 and accompanying text.

many other cases, they are simply indifferent. The outcome is a widespread practice of uncontested, broad jurisdictional claims by the leader (and other states when they opt to provide transnational enforcement). As a result, customary international law, which reflects this practice, imposes few clear limits beyond broad principles, whose contours are fuzzy and that are easily satisfied in most cases.[170]

An interesting question is whether and how international law should further encourage leadership. Here, the key lesson from GPG scholarship is that "public goods mechanisms should focus on encouraging those most willing to produce."[171] Specifically, "[m]ultilateral organizations and treaties can bolster country-specific *complementary* benefits to entice select countries to take a greater interest in supporting the provision of the GPG."[172] When states create an international regime to address a common problem, they could include features that incentivize enforcement leadership. One possibility would be to provide rewards or bounties to leaders out of the institution's resources. This solution, however, would raise its own collective action problems, as other members would have to contribute and may be prone to free riding.

A more promising solution may be to facilitate direct recoupment by enforcers from targets themselves. The law of piracy provides a historical precedent: anyone who captured a pirate ship could keep it as prize, an incentive that helped overcome the collective action problem that inhibited enforcement.[173] There are some similar instances in modern settings. Anti-bribery enforcement under the OECD Convention includes the ability to impose fines on culprits.[174] This system could be extended to other regimes, such as human rights, criminal law, or environmental law. International regimes could facilitate the collection of fines by making judgments enforceable in any member state, as the International Centre for Settlement of Investment Disputes (ICSID) Convention does for investor-state awards.[175] Fully exploring the institutional implications of GPG theory for transnational enforcement is beyond the scope of this Article, but it seems

170. *See* Krisch, *supra* note 35, at 495–503.

171. Barkin & Rashchupkina, *supra* note 7, at 377.

172. Buchholz & Sandler, *supra* note 7, at 515.

173. I thank George Rutherglen for this point.

174. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 3, Dec. 17, 1997, T.I.A.S. No. 99-2215.

175. *See* ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. To be sure, this idea would not work in all settings. For example, most perpetrators of international crimes will likely not have enough assets to recoup enforcement costs.

likely that such design features could incentivize additional enforcement and improve regime effectiveness.[176]

D. Leadership, Inequality, and Legitimacy

International law is founded on the notion of formal equality of states. Although international lawyers acknowledge power inequalities, they often regard the disproportionate influence of powerful states as antithetical to the system's values. More than twenty years ago, a prominent scholar deplored the rise of "hegemonic international law" shaped by looming U.S. power.[177] More recently, Nico Krisch expressed concern that the expanding use of extraterritoriality by certain states "establishes hierarchies . . . over other states whose ability to define their own policy is thereby curtailed" and "easily turns into a new form of oligarchical governance in the international order."[178] From that perspective, the account of transnational enforcement offered above may strike some readers as inattentive to the dangers of hegemony.

From its origins, leadership theory has recognized the potential for leadership to turn into exploitation. As Snidal pointedly asked, "it is unclear why the hegemon would use its powers only for the provision of public goods—why would it not also expropriate a wider range of private goods to benefit itself at the expense of other states?"[179] It may often be difficult to distinguish between situations where a leader uses its power to make others contribute to a GPG or participate in welfare-enhancing cooperation and where it coerces others into adopting policies that advance its own interests at their expense. For example, although the United States sees its sanctions against countries such as Iran, Cuba, and Libya as upholding the international order for the benefit of all, many other states have complained about the use of U.S. prosecutions to compel foreign banks and firms to comply, calling it a form of imperialism.[180]

Even short of such fundamental policy disagreements, there are multiple ways in which leaders' self-interested decisions can neglect others' interests. After all, "[t]he concentration of capabilities in a few actors may facilitate provision of public goods . . . but only if these actors would benefit

176. For a fuller account of how international crime control regimes could be structured to leverage and structure unilateralism towards better accomplishment of their goals, see Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297 (2015).

177. *See* Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001).

178. Krisch, *supra* note 35, at 504–05.

179. Snidal, *supra* note 9, at 588.

180. VERDIER, *supra* note 4, at 33.

significantly from such provision."[181] This suggests that powerful states will tend to neglect harmful activities that do not affect them—the cybercriminal group, for example, may be well advised to target countries that lack enforcement capabilities, knowing that leaders are likely to ignore it.[182] Worse yet, leaders might themselves pursue activities that harm others, confident in their invulnerability to enforcement. For example, scholars and policymakers have criticized the United States for failing to adopt the OECD's multilateral tax reporting regime and pointed out that some U.S. states have become major destinations for illicit money.[183]

Finally, even where a regime enhances global welfare and the leader participates in good faith, the leader's influence can tilt distributive outcomes in its favor and entrench its dominant position. Provision of public goods can often take multiple forms, each of which benefits some participants more than others. As seen above, strategic bargaining over these relative payoffs is one of the major obstacles to international cooperation. While leadership can overcome this obstacle, it also allows the leader to promote its preferred solution, making it the relatively greater beneficiary of the regime.[184] Within the regime, the leader's enforcement choices—for example, which cases to pursue and which arguments to make to set precedent—also contribute to norms evolving in the leader's preferred direction.[185] In this way, powerful states can use enforcement leadership to shape substantive international law and norms in accordance with their preferences.[186]

There is also a more subtle way in which this phenomenon may occur. As noted above, powerful states are more likely to enforce when doing so benefits them. This applies not only to individual cases, but likely to entire regimes or areas of international law. If, for example, enforcement leaders

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181. Keohane & Ostrom, *supra* note 9, at 425; *see also* BARRETT, *supra* note 7, at 46 ("When one or a few states have an incentive to supply a global public good, these providers cannot be counted on to take into account the interests of other countries."); Buchholz & Sandler, *supra* note 7, at 529 (noting that "less than 10 percent of US annual health-research spending is tied to the healthcare interests of 90 percent of the world's population . . . . The 90/10 gap means that there is an imbalance of best-shot health GPGs that primarily favor rich-countries diseases") (emphasis omitted).

182. As noted above, *supra* note 115 and accompanying paragraph, regional leaders may emerge to tackle such problems. But as Buchholz and Sandler point out, "[p]oor regions may not possess a best shooter." Buchholz & Sandler, *supra* note 7, at 498.

183. *See, e.g.*, Elisa Casi et al., *Cross-Border Tax Evasion After the Common Reporting Standard: Game Over?*, 190 J. PUB. ECON. 1 (2020); Rachel E. Brinson, *Is the United States Becoming the "New Switzerland"?: Why the United States' Failure to Adopt the OECD's Common Reporting Standard Is Helping It Become a Tax Haven*, 23 N.C. BANKING INST. 231, 239–43 (2019).

184. *See* Barkin & Rashchupkina, *supra* note 7, at 385 ("With public goods, those providers willing to bear the greatest costs are likely to have the greatest say in defining the form of the good and the content of law regulating it.").

185. *See supra* notes 89–92 and accompanying text.

186. Where there are multiple unilateral enforcers, private actors may be caught in duplicative or contradictory proceedings in multiple states, with little recourse or means of resolving conflicts.

devote resources to enforcing norms against intellectual property violations (which affect them) but not against corporate human rights violations (which do not), the former norms will be more effective than the latter. In other words, leaders' ability to set enforcement priorities can drive a wedge between the "law in the books" and the "law in action," facilitating the impression that some areas of international law are more "real" than others.[187]

How can the international system respond to these concerns? To eliminate the problem at its source, one would need to eliminate inequalities of size, power, and resources among states. This seems a distant prospect and would not be an unambiguous improvement, as without leadership fewer GPGs would be provided. Krisch proposes another approach: because "[t]he exercise of unbound jurisdiction to tackle transboundary problems" is "a form of governance," it "triggers demands for . . . public accountability."[188] Specifically, it requires mechanisms of "input legitimacy," the "actual participation of citizens in the decision-making process."[189] Affected parties around the world must be involved; what is more, "narrower forms of stakeholder participation or thin requirements of consideration" will not suffice—there must be "direct accountability to citizens."[190]

This solution raises numerous questions that cannot be fully answered here. But the enforcement leadership framework reveals one fundamental difficulty. In the kinds of situations discussed above, the leader is not acting in a "governance" function that is neatly separable from self-interested action within the rules. The leader is enforcing because doing so will improve its own welfare, using its own resources, in a manner permitted by international law. The benefit to others can be described as a welcome side effect of its action as easily as it can be described as a form of "global governance." Indeed, states do many things—such as building domestic infrastructure or educating their populace—that generate positive externalities, yet it is hard to imagine that in all these contexts they should be accountable for their choices to a global polity. This is not to deny that the actions of enforcement leaders can shape global outcomes in a manner that resembles governance, but the line seems hard to draw.

187. On the importance of sanctions in defining law and assessing its effectiveness, see generally FREDERICK SCHAUER, THE FORCE OF LAW (2015).

188. Krisch, *supra* note 35, at 507.

189. *Id.* at 506–07.

190. *Id.* at 507; *see also* Barkin & Rashchupkina, *supra* note 7, at 377, 392 (arguing that "effective legal mechanisms for determining what kind of good something is must be more inclusive than those for generating or managing that good" and that "an institution designed to legitimate a process for determining what constitutes a good in the first place would need to place a premium on inclusivity and deliberation . . . .").

From a practical standpoint, the prospect that powerful states will constrain their enforcement discretion by adopting strong accountability mechanisms towards outsiders seems remote. However, this does not mean that we cannot distinguish beneficial leadership from exploitation, or that leadership is unconstrained. First, other states can resist the leader's actions. At one extreme, "when . . . hegemony is exercised in ways that do not benefit all states, subordinate states will chafe under the (coercive) leadership . . . [and] will work to hasten [a declining hegemon's] demise."[191] Short of all-out efforts to undermine the leader, states can react to specific instances of enforcement, and the patterns of these reactions can reveal much about whether the leader's actions are exploitative or beneficial. For example, while many European states complained bitterly about U.S. sanctions enforcement, few countries other than Switzerland complained about U.S. prosecutions of Swiss banks for tax evasion.[192] Only a few tax havens resisted FATCA and the OECD's automatic tax information exchange system, while many developed and developing countries welcomed these initiatives.[193]

Finally, leaders have incentives to bring other states on board. As seen above, cooperative arrangements are generally more efficient than solitary leadership, so the theory predicts that leaders will often want to turn unilateral efforts into multilateral regimes. To do so, however, they must loosen their grip and make concessions. This is where accountability mechanisms and other constraints on the leader can be introduced, in return for others' agreements to contribute to the regime.[194] States with the capacity to develop their own enforcement capabilities thus gain incentives to do so, to have a greater effective say in shaping the regime. This reduces free-riding and can give rise to a more coherent regime. There are several examples of this dynamic in recent years. As the United States increased its anti-bribery enforcement, other states adopted their own laws, began enforcing them, and joined the OECD regime.[195] Parallel developments occurred in countering financial fraud and tax evasion.[196]

These constraints on the leader, long recognized by leadership theory, admittedly cannot resolve all of the concerns described above. The interests of countries that lack the resources to contribute to enforcement or to credibly threaten resistance will likely suffer from relative neglect.[197] Overall, enforcement patterns both inside and outside formal international regimes

191. Snidal, *supra* note 9, at 582.
192. *See* VERDIER, *supra* note 4, at 84–87, 128–37.
193. *See* Verdier, *supra* note 92, at 37–38.
194. BARRETT, *supra* note 7, at 36–37.
195. *See* Kaczmarek & Newman, *supra* note 85, at 755–56, 766; Brewster, *supra* note 4.
196. *See* VERDIER, *supra* note 4, at 69–72, 98–103.
197. *See* BARRETT, *supra* note 7, at 45–46.

will tend to reflect and reinforce power inequalities. These serious drawbacks must be weighed against the reality that in an international system without centralized enforcement, the alternative to the kind of cooperation that unilateral enforcement can foster will often be no cooperation at all, or paper agreements that lack effectiveness. Such a scenario is itself ripe for exploitative behavior, not only by powerful states but also by anyone whose activities generate harm across borders.

V. STATE-TO-STATE ENFORCEMENT

The definition of transnational enforcement offered in Part II.B excludes state-to-state enforcement.[198] The enforcement measures states use against each other include trade and financial sanctions, aid termination, and the use of force. At first glance, these measures differ from transnational enforcement in several ways: apart from being directed at states rather than non-state actors, they rely on different state resources (economic and military rather than law enforcement) and are governed by different international legal rules (countermeasures and use of force rather than jurisdiction). Their importance in securing compliance with international law is also contested. Most scholarship on international law compliance downplays enforcement.[199] Even rational choice scholars, whose theories rest on material incentives, devote relatively little attention to it.[200]

198. *See supra* note 34 and accompanying text.

199. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 3 (1995) (assuming that states have a propensity to comply with international law and emphasizing a managerial approach to securing compliance through measures such as treaty design, dialogue, and capacity-building); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (arguing that international law exercises a "compliance pull" that arises from its perceived legitimacy rather than from enforcement); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 112–55 (2009) (describing enforcement as largely irrelevant to human rights compliance and proposing a theory based on the impact of human rights treaties in domestic politics); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602–03 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (describing mechanisms through which international law becomes internalized in domestic law and politics); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 625–30 (2004) (classifying enforcement and other material incentives under "coercion" and privileging sociological explanations for compliance). A notable exception in the non-rationalist tradition is MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 10, 15–16 (2011) (rejecting rational choice assumptions while emphasizing the role of various forms of enforcement, such as unilateral and collective armed intervention, in the international legal system).

200. *See* GUZMAN, *supra* note 18, at 8–10, 47–48. A major exception to the general inattention to enforcement in rational choice theories is ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006), but Scott and Stephan's theory is mainly preoccupied with the contrast between "informal" bilateral enforcement of treaties and what they call "formal" enforcement by international courts and tribunals, not with the provision of enforcement as defined in this Article.

By contrast, the public goods perspective points to important connections between transnational and state-to-state enforcement. GPG theory recognizes that cooperation to provide public goods generates a second-order public good problem, because enforcing the agreement is costly and subject to free-riding.[201] Indeed, the problem is not unique to areas conventionally described as GPGs, such as climate change, but exists in any multilateral cooperation setting where participants have incentives to defect. Russia's invasion of Ukraine showed that many states are hesitant to impose sanctions in response to even a blatant violation of the UN Charter.[202] This free-rider problem exists in more institutionalized settings too. Bringing a WTO complaint against an illegal trade restriction, adjudicating the case, and imposing retaliatory measures all generate private costs for the enforcer. The benefits of remediation, however, accrue not only to that state but also to others affected by the same violation.

Rational choice theories of international law recognize the collective action problem that arises from what Guzman calls "retaliation."[203] This may be why such theories generally deemphasize retaliation, at least in a multilateral context, and instead focus on modeling cooperation as a series of bilateral equilibria, or on reputation as a compliance mechanism.[204] As a result, this literature has generally not drawn on leadership theory to analyze the provision of enforcement by powerful states. Instead, prominent rational choice models of international law, based on the Prisoner's Dilemma, usually assume homogenous states.[205] Although scholars

201. *See supra* notes 36–38.

202. Many states condemned the invasion and voted for a UN General Assembly resolution to this effect, but relatively few—mostly Western states—imposed sanctions or took other costly actions.

203. GUZMAN, *supra* note 18, at 34, 66 ("'Retaliation' . . . describes actions that are costly to the retaliating state and intended to punish the violating party . . . . Even if the threat to sanction a violation would be an effective deterrent, when it comes time to impose the sanction, each individual state has an incentive to free ride on the actions of others."). *See also* Bodansky, *supra* note 7, at 662 (asserting that "typically coercion is undertaken only when an individual state or small group of states has an incentive to do so, which is unusual").

204. Apart from the contributions already cited, this emphasis is made explicit in Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 507 (2006) ("Enforcement of international law is . . . mainly a bilateral phenomenon—a matter between violators and victims—and not a multilateral phenomenon."). Guzman, who is more optimistic about multilateral cooperation, grounds his theory explicitly on states' incentives to develop and sustain a reputation for compliance. Retaliation, and a reputation for willingness to inflict it, matters mostly in bilateral settings. *See* GUZMAN, *supra* note 18, at 46–48.

205. *See* Hausken & Plümper, *supra* note 9, at 62–63 ("For more than three decades the huge majority of theorists analyzing collective action problems have assumed homogeneous actors . . . . Thus, the standard theories of international cooperation usually treat very large and very small actors as equal partners in a prisoner's dilemma."). Goldsmith and Posner, unlike other rational choice theorists, explicitly model coercion by a powerful state as one possible cause of behavioral regularities in international relations, but they model this behavior as bilateral and exploitative; they do not appear to consider that coercive enforcement can generate third-party benefits. GOLDSMITH & POSNER, *supra* note 19, at 28–29.

sometimes mention the possibility that powerful states may play a disproportionate role in enforcing international law, they do not develop this insight, and appear to see it as more theoretical than real.[206]

Of course, the reality is that states differ dramatically in both their capacity to engage in state-to-state enforcement and their ability to capture the benefits of international regimes. Moreover, as discussed above, other compliance mechanisms—such as reciprocity and reputation—suffer from significant weaknesses that limit their impact.[207] These considerations suggest that the role of state-to-state enforcement ought to be revisited, in a manner that takes into account state heterogeneity and incorporates insights from leadership theory and from GPG models that emphasize greater contributions by some states. Although fully developing such an analysis is beyond the scope of this Article, the discussion that follows reveals that it would, in many respects, parallel the analysis of transnational enforcement developed above.

First, for much the same reasons that powerful states emerge as transnational enforcement leaders, they are also predisposed to become state-to-state enforcement leaders. On the cost side, they possess many preexisting resources that can be used for enforcement: large economies to which valuable access can be cut off; powerful armies raised for national defense; and extensive diplomatic and intelligence networks. Moreover, the transnational interdependence hubs they control, such as financial and communications networks, can be deployed against states as well as non-state actors.[208] This was made clear recently, as the United States and members of the European Union cut Iranian and Russian banks off from international payment networks, and later seized the Russian Central Bank's foreign reserves as well as private oligarchs' foreign assets held in their financial institutions.[209] As for transnational enforcement, powerful states plausibly derive economies of scale as they develop these tools and gain experience using them.

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206. For example, Eric Posner and Alan Sykes mention in their discussion of enforcement the possibility that "the free rider problem will be less acute when some states are large enough to capture a considerable portion of the joint gains from enforcing the agreement," but they do not develop the idea in detail. POSNER & SYKES, *supra* note 19, at 24; *see also* GUZMAN, *supra* note 18, at 68. For a rare example in the legal literature of characterizing international enforcement as a public good, see Bodansky, *supra* note 7, at 663. *See also* Magnuson, *supra* note 84, at 542–44 (applying public goods analysis to transnational corporate regulation).

207. *See supra* notes 127–131 and accompanying text.

208. *See supra* notes 98–101 and accompanying text.

209. *See* Philip Blenkinsop, *EU Bars 7 Russian Banks from SWIFT, but Spares Those in Energy*, REUTERS (Mar. 2, 2022), https://www.reuters.com/business/finance/eu-excludes-seven-russian-banks-swift-official-journal-2022-03-02/; Jeff Stein, John Hudson & Amanda Coletta, *U.S. Intensifies Push to Use Moscow's $300 Billion War Chest for Kyiv*, WASH. POST (Oct. 11, 2023), https://www.washingtonpost.com/business/2023/10/11/us-intensifies-push-use-moscows-300-billion-war-chest-kyiv/.

One important difference is that the legal and political environment for state-to-state enforcement is more restrictive. Article 2(4) of the UN Charter prohibits the international use of force, with limited exceptions.[210] However, collective self-defense under Article 51 can be, and often is, invoked to defend the legality of military intervention.[211] Many economic sanctions are, legally speaking, mere denials of access to the sanctioning state's markets and do not violate international law.[212] Even where they do, the law of countermeasures can often provide legal justification.[213] Politically, unilateral sanctions often face diplomatic resistance and evasion that compromise their effectiveness, but they are nevertheless frequently used.

On the benefit side, these states' larger size and broader involvement in cross-border activity inherently allow them to capture a larger share of the benefits than other states. In addition, enforcement leadership generates considerable private benefits. Admittedly, recouping fines or other penalties directly from the target is less common in state-to-state enforcement than against non-state actors.[214] The ability to set international norms, however, is a vital private benefit of enforcement. By investing selectively in enforcing regimes that benefit their interests, and specific rules within these regimes, powerful states can shape norms to their advantage.

As noted above, these incentives exist even in highly institutionalized multilateral regimes, such as international trade law. In these settings, enforcement leaders invest not in kinetic weapons or surveillance systems, but in legal expertise and resources that allow them to litigate strategically and advance their preferred systemic outcomes. Krzysztof Pelc has shown how European nations and the United States "invest" in WTO cases with low economic stakes, often against smaller states, to create favorable

210. U.N. Charter art. 2, ¶ 4.

211. It was, for example, the main U.S. legal justification for the legality of air strikes against ISIS in Syria.

212. *See* Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 89 BRIT. Y.B. INT'L L. (forthcoming) (Sept. 22, 2020) (manuscript at 11–16), https://academic.oup.com/bybil/advancearticle/doi/10.1093/bybil/braa007/5909823?login=true.

213. *See Report of the International Law Commission on the Work of Its Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, at ch. IV(E), art. 49–54, at 129–39, U.N. Doc. A/56/10 (2001) (providing the text of the relevant articles of the Int'l L. Comm'n's Articles on the Responsibility of States for Internationally Wrongful Acts).

214. In principle, the law of state responsibility allows states affected by a breach of international law to obtain full reparation of their injury, including through financial compensation. *Id.* art. 31, at 91. This right, however, is rarely enforced in interstate cases: courts and tribunals typically impose non-monetary remedies. The WTO Dispute Settlement Understanding theoretically provides for monetary compensation, but that remedy is voluntary, and that provision is virtually never applied. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. In any event, the right to compensation in international law likely does not cover enforcement costs.

precedents to use in higher-stakes cases.[215] For example, the EU initiated several low-stakes cases challenging Korean safeguards on powdered milk and Argentine safeguards on shoes, in which it successfully argued that states imposing safeguards must show that the surge in imports was caused by "unforeseen circumstances." The EU then successfully cited these precedents in high-stakes cases against U.S. steel safeguards.[216] More generally, states that contribute more to enforcement within a regime likely benefit from a greater voice in setting the rules of that regime.

As in the case of transnational enforcement, the presence of a leader may improve outcomes by mitigating the collective action problem inherent in state-to-state enforcement. It can also catalyze the creation of cooperative regimes. The leader can coerce other states into contributing to the regime, effectively "imposing itself as a centralized authority able to extract the equivalent of taxes."[217] The leader can also break distributive deadlocks that inhibit cooperation by coercing or bribing holdouts.[218] It is thus unsurprising that, as noted above with respect to the FCPA and Swiss tax examples, transnational enforcement can shade almost imperceptibly into state-to-state enforcement. In both cases, the challenge was to overcome free-rider and distributive obstacles to cooperation. To do so, the United States used transnational enforcement tools: criminal prosecutions against foreign firms and banks. But, leaving legal and diplomatic considerations aside, the United States might have used economic sanctions or threat of force to the same effect: coercing the relevant target states into adopting laws, and joining international regimes, against these practices.

Thinking in terms of public goods and leadership reveals that the World Police Paradox exists not only for transnational enforcement but for state-to-state enforcement too. The presence of an enforcement leader can improve outcomes by facilitating the creation and maintenance of

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215. *See* Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547 (2014).

216. *Id.*

217. Snidal, *supra* note 9, at 588; *see also* Lake, *supra* note 9, at 467–68. This will be beneficial to the leader up to the point where an increment of coercion produces a positive benefit to the leader greater than that which would be produced by providing the public good itself. (For this reason, the leader is most likely to target those states that have the greatest capacity to provide some of the public good themselves.) Because the target states would have otherwise engaged in free riding, such behavior makes them relatively worse off. *See* Snidal, *supra* note 9, at 588; Lake, *supra* note 9, at 467–68. That form of coercion, however, likely makes the rest of the world better off by ensuring a greater supply of the public good. William Bianco and Robert Bates develop a more specific model that shows how leadership can facilitate cooperation. Bianco & Bates, *supra* note 9. In their model, a leader is empowered to allocate the benefits of cooperation among the players. They show that if the leader has the capacity to identify cooperators and defectors and target rewards and punishments accordingly, the presence of a leader makes it easier to establish and sustain a cooperative equilibrium. *Id.* at 142–44. Although leadership enables cooperation, "the followers' payoffs under full cooperation with a leader are lower than their payoffs when they achieve cooperation by themselves." *Id.* at 139.

218. *See supra* note 159–168 and accompanying text.

international regimes. The same tradeoffs also arise: the leader can use its power to exploit other states; it has greater opportunities to shape norms, shifting the distribution of benefits in its own favor; and it can neglect the interests of less powerful states, generating a system in which the norms they favor, even though legally binding, are underenforced. On the other hand, the leader's actions are constrained by the same considerations noted above: creating and sustaining cooperative regimes requires considering other states' interests, and other states can resist—including by refusing assistance or obstructing enforcement—if the leader goes too far.

VI. CONCLUSION

This Article has drawn on economic theories of GPGs and leadership to analyze enforcement in the international system and explain salient patterns in state behavior. The application of these theories generates new avenues for research. For example, more sophisticated models could provide insights on the role of less powerful states and the strategies they employ. Does enforcement by leaders preempt their interests, or does it leave them free to focus on practices that harm them and are overlooked by leaders? Another important set of questions relates to the efficiency of international enforcement, that is, the extent to which it promotes welfare-enhancing outcomes. Answering them will require linking the leadership theory developed here with economic theories of enforcement.[219]

Transnational enforcement leadership also calls for empirical research. This Article has explained the theory, provided illustrative examples, and described broad patterns of behavior around international enforcement that appear consistent with the theory. It has not, however, systematically tested whether the predicted patterns prevail across different areas of international activity and across time, how and why they may change, or what other factors may affect them. It therefore opens multiple avenues for empirical investigation, which might focus on specific international regimes (who enforces the law of the sea, trade agreements, corporate human rights, or international criminal law?) or on the role of specific states (do regional powers in fact take on enforcement leadership in areas neglected by global enforcement leaders?).

A larger question that looms in the background is the impact of structural changes in the international system. Leadership theory assumed a

219. *See, e.g.*, COOTER & GILBERT, *supra* note 7, at 461–502; Nick Friedman, *Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence*, 41 OXFORD J. LEG. STUD. 289 (2021); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997). The literature on enforcement is voluminous; for a list of foundational contributions on corporate liability design, see Friedman, *supra*, at 293.

unipolar world in which a single leader provided public goods.[220] Can it explain behavior in a world of multiple powerful states competing for leadership and pursuing divergent visions of international order? Although this question cannot be answered here, this Article implies not only that the theory can explain such behavior, but also that it fits today's world better than the models of horizontal cooperation that dominate existing rationalist accounts of international law. As prospects for horizontal cooperation among the world's leading powers decline, hierarchical relationships will likely become more salient, especially among states aligned with each leader. Leadership theory, after all, did not emerge at a time of uncontested U.S. hegemony. It emerged during the Cold War.

220. *See, e.g.*, KINDLEBERGER, THE WORLD IN DEPRESSION, *supra* note 9, at 305.