The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop

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THE VALUE VACUUM: SELF-ENFORCING REGIMES AND THE DILUTION OF THE NORMATIVE FEEDBACK LOOP

Claire R. Kelly*

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INTRODUCTION

A new international actor, the self-enforcing regime ("SER"),1 threatens the way states form and support values in the international

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1. See discussion infra Part III.A. I use the term “self-enforcing” to refer to a regime or institution capable of imposing meaningful costs for non-compliance with its rules with some degree of autonomy, such as the World Trade Organization (WTO). A non-self-enforcing regime, such as the International Labor Organization (ILO), lacks an autonomous method of securing compliance. A third type of regime is the non-conflictual regime. Non-conflictual regimes focus on coordination problems, such as the International Civil Aviation Organization, where compliance arises from successful coordination. See Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295; Lisa L. Martin & Beth A. Simmons,
arena. SERs "self enforce" by imposing direct costs on noncompliance. SERs secure compliance with their norms without resort to the "normative feedback loop."2

The normative feedback loop is both the mechanism states use to consult national values in their international actions and the bridge between national and international value formation. This article proposes that it also links the liberal and constructivist theoretical schools of international relations and, ultimately, suggests the middle ground of "modified constructivism."

A modified constructivist framework suggests that emerging SERs dilute the normative feedback loop.3 Although SERs may be desirable for many reasons, modified constructivism predicts that the dilution of the normative feedback loop potentially will have a multilayered effect on international norm development and national identity formation. This article does not propose to curtail, avoid, or disable SERs; rather, it proposes assessing and, where appropriate, responding to their effects on international and national value and identity formation.

To illustrate the normative feedback loop and modified constructivism, imagine Country X and Country Y seek to avoid the dangers of an anarchic struggle for power and to reap coordination benefits and efficiencies. Country X, a western, wealthy, relatively powerful and a once protectionist nation, joined the General Agreement on Tariffs and Trade ("GATT")4 in 1955, which evolved into the World Trade Organization ("WTO").5 In 1994, Country X signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").6 Country Y, a lesser developed and protectionist nation, joined the WTO in 1995, but resolved not to sign CITES.
Signatories to CITES are obliged to prohibit trade in products on Appendix I of CITES. Because Country X’s constitution requires it to enact domestic legislation in order to comply with treaty obligations, Country X passed a law prohibiting the importation of articles listed in Appendix I, which includes the Pantholops hodgsonii (the Tibetan Antelope). Country X’s ban prohibits products made from the Tibetan Antelope, including “shahtoosh;” a fine wool made from the hair of the Tibetan Antelope.

As a non-signatory to CITES, Country Y began to export shahtoosh, which is not allowed entry into Country X. The WTO generally prohibits the discrimination of “like products” by members. Problematically, both countries are members of the WTO, and shahtoosh wool is arguably “like” every other type of wool given unrestricted access into Country X.

When Country X tries to comply with its obligations under CITES to the detriment of Country Y’s rights under the WTO, modified constructivism suggests that both countries will attempt to balance their international obligations with their national constituency preferences and values. In doing so, they will employ the normative feedback loop and therefore reconsider constituency values in the context of this dispute. Country X will consider whether its constituency prefers the environmental values embodied in the CITES treaty and domestic legislation over the trade benefits that Country X receives as a member in good standing of the WTO. Presumably, Country Y already adheres to its constituency preferences by not agreeing to CITES. The question, however, remains whether Country Y’s constituency is willing to suffer whatever repercussions the environmental regime can impose upon non-parties. Consistent with its constituency preferences, if they remain unchanged since 1995, Country Y will seek the benefit of the WTO’s trading rules to secure its rights to export shahtoosh to other WTO members. Finally, all of these considerations will be influenced, in part, by each country’s material resources.

The WTO, however, unlike CITES, is a regime capable of imposing direct costs upon regime defectors. As a “self-enforcing” regime, the WTO discounts the normative feedback loop and some of its destabilizing effects, which diminishes Country X’s ability to act consistently with its constituency preferences. What effect the dilution of the normative

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7. Id. at app. I.
8. GATT, supra note 4, arts. I, III, XI.
feedback loop has in this example on both Country X’s and Country Y’s value and identity formation is the subject of this article.

This article proposes a modified constructivist theory, which links liberalism and constructivism through the normative feedback loop. Part I briefly explains traditional international relations theories such as realism, institutionalism, liberalism and constructivism. A modified constructivist perspective espouses the presence of two constants: (i) assertion of national preferences by constituents for whom the state acts as an agent in international relations, and (ii) social construction of state identities through interaction with other states in the international arena. Part I demonstrates how the normative feedback loop allows national values to enter international discourse and responds to the internalization of norms that arise from socially constructed state identities.

Part II explores regime compliance and competition, and demonstrates how the normative feedback loop mediates conflicts between regimes. Regimes seek compliance with their rules and norms in order to support their values. In a multiple regime world, international regimes like the WTO and CITES compete for state compliance, which is informed by the enforcement preferences of various states through the normative feedback loop. In other words, nations decide, consistent with constituency preferences, whether to promote a regime “rule,” like protecting endangered species. Thus, the normative feedback loop reintroduces national constituency preferences into both the international arena and the value and identity formation process through the selective enforcement of regime rules.

Part III explains the emergence of SERs. SERs are regimes capable of securing compliance with their own rules without resorting to the normative feedback loop. SERs include trade regimes such as the WTO or the North American Free Trade Agreement (“NAFTA”), but exclude regimes that must entreat nations to aid in the promotion of their values.

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10. See infra Part I.B.
11. Id.
12. See John Gerard Ruggie, International Responses to Technology: Concepts and Trends, 29 Int’l Org. 557, 570-74 (1975) [hereinafter Ruggie, International Responses to Technology] (defining regimes as “a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states”). Id. at 570
13. See infra notes 127-33 and accompanying text.
14. See infra Part III.A. SERs may not be completely “self-enforcing” in that they may require states to bring disputes to the regime in the first instance.
and enforcement of their rules. The labor regime, specifically the International Labor Organization ("ILO"), and the CITES regime, provide examples of non-SERs.  

Part IV concludes by hypothesizing that SERs create a value vacuum. As SERs evolve, their efficiency, autonomy, and authority increase. With greater institutional authority and autonomy, SERs dilute the normative feedback loop. A disabled normative feedback loop omits national values from the evolution of international identity, and distorts the mix of norms in the international community. SER norms will be over-represented and the social construction of states will be affected. To the extent that the normative feedback loop destabilizes regime functioning, however, its dilution may be desirable. A normative feedback loop nevertheless serves as a valuable mechanism to interpose non-SER values. The normative feedback loop may therefore alleviate fears that SERs thwart democratic preferences.

Several institutional modifications may compensate for the value vacuum. These modifications include: (i) an increase in the voice given to non-SER values within an SER through greater access or exceptions under the SER rules; (ii) the availability of direct access by non-state actors to SERs to compensate for the devaluations of the normative feedback loop, and (iii) a strengthening of the compliance mechanisms for non-SERs. None of these options will fill the value vacuum, but each may alleviate the deficit it creates. Perhaps the emergence of SERs and their implications are simply part of a transition in the evolution of international relations that will produce long-term benefits. Assuming that SERs will benefit international relations in the long run, however, there are short run consequences that demand consideration, monitoring, and in some cases, minimization.

16. See International Labor Organization Const. and Rules, June 18, 1919, 49 Stat. 2712, 225 Consol. T.S. 378, available at http://www.ilo.org/public/english/about/mandate.htm (last visited August 13, 2001) [hereinafter ILO Const.]. Although the ILO has more than 170 conventions relating to labor standards, it has no enforcement mechanism by which it can achieve compliance with the norms it propagates; instead, it relies upon the compliance mechanisms discussed in Part II.A. See Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 Int’l Org. 421, 434 (2000) [hereinafter Abbott & Snidal] (discussing ILO’s strategy to adopt non-legally binding instruments in guideline form).

17. The degree of distortion may depend upon where the SER surfaces. A self-enforcing regional trade agreement may distort less than a global SER such as the WTO. Likewise, the level of distortion may depend upon the relative material capabilities of the affected states.

18. See infra Part IV.B.
I. MODIFIED CONSTRUCTIVISM AND THE NORMATIVE FEEDBACK LOOP

Modified constructivism, a bridge between liberal and constructivist theories, is rooted in the four dominant international relations theories: realism, institutionalism, liberalism and constructivism. Realism posits that states act in their own interests, while constantly struggling to achieve and maintain power. Institutionalist theories start from a realist perspective, but add that states will work together within institutional regimes to maintain stability and reduce transaction costs. Institutionalists, like realists, believe that states' interests are given, i.e., unaffected by the inter-state system. Liberalism envisions that states act as agents for the benefit of their constituencies and are therefore subject to change through the liberal functioning of the domestic system. Constructivism, like liberalism, posits that state interests are endogenous (subject to


20. See infra notes 29–30 and accompanying text. As realist theory is primarily a descriptive theory, I do not explore its implications at length, although some basic understanding of realism will be necessary to grasp the parameters of the international relations theories that respond to it. Id. Additionally, it would seem that the material resources and power of states affects the functioning of the variables in each of the other theories.

21. See infra notes 31–36 and accompanying text.

22. See Moravcsik, Taking Preferences Seriously, supra note 19, at 522; Alexander Wendt, Collective Identity Formation and the International State, 88 Am. Pol. Sci. Rev. 384 (1994) [hereinafter Wendt, Collective Identity]. Thus, realists and institutionalists see states' interests as exogenous to the inter-state system. "Exogenous" in international relations literature refers to the notion that interests are pre-established, "so even engagement in institutions does not affect the identity of the actor, or even its perceived interests, but only its patterns of behavior." Jutta Brunnee & Stephen J. Toope, International Law and Constructivism: Elements of an Interactional Theory of International Law, 39 Colum. J. Transnat'l L. 19, 32 (2000) [hereinafter Brunnee & Toope]. In other words, theories which assume state interests are exogenous posit that a state's interests are developed outside of a regime and are not affected by the state's interactions within the regime.

23. See Moravcsik, Taking Preferences Seriously, supra note 19, at 516 (describing liberal theory's fundamental premise).
change), but constructivism views states acting as states (not merely as agents). Further, constructivists contend that states share and influence each other’s expectations and understandings of international law. Thus, the constructivist view seems to directly contradict the realist and institutionalist view that interests and identities are formed outside of the inter-state system. Although each of the above-referenced theories are distinct, they all represent some part of international relations and, in some areas, they overlap. This article suggests that the constructivist and liberal schools are explicitly linked by the normative feedback loop, and should therefore be viewed as working in tandem in a type of “modified constructivism.”

A. Traditional International Relations Models

Each of the traditional international relations models explains some part of state functioning, and therefore, is useful to predict and prescribe state conduct. Realism, a descriptive theory that depicts states in a constant power struggle, has dominated international relations discourse. Institutionalism, however, suggests that, despite the constant power struggle, states may sometimes find it in their interest to cooperate. Both realism and institutionalism view states’ interests as given. Neither realism nor institutionalism therefore aids in understanding how states change individually themselves or in their interactions with one another. Liberal and constructivist scholars provide explanations for these changes that realism and institutionalism either neglect and/or deny.

24. See Arend, Legal Rules, supra note 19, at 126–29 (outlining basic tenets of constructivist theory). See also Alexander Wendt, Anarchy Is What States Make of It, 46 Int’l Org. 391, 394 (1992) [hereinafter Wendt, Anarchy Is] (showing link between constructivist and liberal theories in that they “share a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction, rather than a rationalists-behavioral one in which they are exogenous”). “Endogenous” refers to the notion that “[r]ules and institutions have the . . . effect over time of shaping actor preferences.” Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 Mich. J. Int’l L. 345, 353 (1998) [hereinafter Kingsbury, The Concept of Compliance].


27. See id.

28. See generally Moravcsik, Taking Preferences Seriously, supra note 19 (demonstrating necessity of liberal theory to understand formation of interests taken by institutional and
Realists believe that nations, as the primary actors in the international arena, engage in a constant power struggle. In the international system, order arises from balancing state interests, preservation, and mutual quests for power. Without this balancing and pursuit of order, anarchy would prevail. Institutionalism arose as a rationalist response to realism because institutionalist theories acknowledge this power struggle as empirically true, but view cooperation through international institutions as a means of allowing order to emerge from the chaos of a power struggle.

Institutionalism explains state cooperation despite the never-ending power struggle because institutions coordinate efforts, collect information, create cognitive focal points, establish forums, reduce costs, and create stability. The Prisoner's Dilemma model illustrates one way in which institutions promote cooperation. Actors engaging in an isolated game having the option to cooperate will choose not to cooperate in order to minimize the other side's payoff and to maximize, to the extent

realist theories as givens); Wendt, Collective Identity, supra note 22, at 384 (explaining means by which identities and interests are transformed endogenously).


30. See Arend, Do Legal Rules Matter?, supra note 26, at 111–12 (explaining that in the structural realist's view of the international legal system, anarchy gives way to order through a balancing of interests as nations pursue power).


Scholars conceived regime theory as an answer to the perceived weaknesses in realist accounts of international cooperation. Regime theory combines the egoistic assumptions of realism with the insights of game theory to explain how international arrangements thrive in an anarchic world not dominated by any one national power or world government.

Id. See also, e.g., Krasner, Structural Causes, supra note 19, at 1, 2 (discussing various concepts of international regimes such as definitions, change, relationship between regimes and behavior, and basic causal factors used to explain regime development); Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 AM. J. INT'L L. 205 (1993) [hereinafter Slaughter, A Dual Agenda] (discussing, explaining and bridging the gap between institutionalism and liberalism); Kenneth W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, 14 YALE J. INT'L L. 335 (1989) [hereinafter Abbott, Modern International Relations] (tracing the formation of modern international relations theory and linking it to international law).

32. See Abbott, International Relations Theory, supra note 19, at 365–66 (explaining how institutions change "the context of interaction"); Arend, Do Legal Rules Matter?, supra note 26, at 120–22 (listing advantages to participating in international institutions).

possible, their own payoffs. Actors choose non-cooperation, even though cooperation benefits both players even more, because the player cannot be certain that her opponent will cooperate as well. Institutions promote repetitious games so that players can engage in a “tit-for-tat” strategy whereby they will cooperate initially, and thereafter match their opponent’s moves.\textsuperscript{34} It therefore becomes in each player’s rational self-interest to cooperate, rather than to defect. Moreover, by providing a forum, institutions increase communication, support the collection and dissemination of data, and reduce transaction costs.\textsuperscript{35}

In the earlier example, sufficient reason exists for both Country X and Country Y to join an institution such as the GATT/WTO. Membership will help both Country X and Country Y bring order to their trading relationships and reap the coordination and efficiency benefits that grow from the iterated game provided by the institution.

Realism and institutionalism presume that both Country X and Country Y’s interests are exogenous, i.e., unaffected by the inter-state system. If, however, their interests are exogenous, what motivates their desire to join the institution? They are both different nations with different material assets, (X is wealthy and Y is poor). How could the WTO promote both their interests? It is difficult to understand an actor’s desire to enter a conflictual regime without the expectation that its preferences or interests, or those of other countries, would change as a result of participating. Country Y might choose to join the WTO in an attempt to benefit from free trade and change its interests. Institutionalism fails to account for the possibility of the institution itself modifying states’ interests.\textsuperscript{36}

If one assumes that Country X and Country Y’s preferences are exogenous to the inter-state system, as realism and institutionalism do, regime stability is unexplainable. Regime stability likely results from states modifying their interests as a result of regime interaction (i.e., Country X and Country Y react to regime compromises by reassessing and modifying their expectations and interests). By reacting to the compromises, Country X and Country Y may both move away from their protectionist pasts.

Liberals believe that state interests are subject to change.\textsuperscript{37} Liberalism posits that values flow into the international arena as representations

\textsuperscript{35} See Arend, Do Legal Rules Matter?, supra note 26, at 120–22.
\textsuperscript{36} See id. at 117, 124 (noting that participation in the international system changes states’ interests).
\textsuperscript{37} Moravcsik, Taking Preferences Seriously, supra note 19, at 516 (stating “[l]iberal IR theory’s fundamental premise—that the relationship between states and the surrounding
of changing national constituency preferences. Such constituencies express their interests through national norm creating devices, which may include the following: constitutions, legislation, political acts, judicial and administrative decisions, social organizations, and religious institutions. The consideration and adoption of these interests give the nation a liberal identity. Liberals focus on the strength and nature of domestic and transnational society in which they are embedded critically shapes behavior by influencing the social purposes underlying state preferences.

38. See id. at 516–21 (setting forth core assumptions of liberal international relations theory); Slaughter, A Dual Agenda, supra note 31, at 227–28 (explaining connection between liberalism and institutionalism); Slaughter, Liberal International Relations, supra note 25, at 727, 728 (drawing upon Moravcsik’s realization that state behavior is determined “not by the international balance of power . . . but by the relationship between . . . social actors and the governments representing their interests, in varying degrees of completeness”).


40. See, e.g., CONST. ARG. pt. I, ch. 1, art. 17 (Argentina, property values); FIN. CONST. ch. 2, § 6 (Finland, equality values); LA CONST. art. 1 (France, freedom of religion); S. AFR. CONST. ch. 2, §§ 22, 23 (South Africa, labor values). Even countries which would not be considered “liberal democratic states” formally incorporate values into their constitutions. See, e.g., ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution), art. 26 (1982) (PR.C.) (discussing environmental values).

41. See Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 Va. L. Rev. 1603 (2000) [hereinafter Scott, The Limits of Behavioral Theories] (“By imposing sanctions or granting subsides the law either expands or contracts the horizon of opportunities within which individuals can satisfy their preferences. In this way society can give incentives for desirable behavior.”). See, e.g., Sex Discrimination Act, 1965, c. 65 (Eng.). See also Scott, The Limits of Behavioral Theories, supra, at 1603 (2000) (explaining that no-smoking laws affect people’s behavior even where state does not commit resources to directly enforce laws); Harold Hongju Koh, Bringing International Law Home, 35 Hous. L. Rev. 623, 629–33 (1998) [hereinafter Koh, Bringing International Law Home] (describing norm internalization using the United States seat belt laws as an example).

42. See Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1578 n.4 (2000) (citing literature showing probability of casting decisive vote in a general election). Voting in national elections is an example of a non-economically motivated political act. Id. The effect of one vote cannot make it economically rational to vote in a general election. Id.

43. See Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2349 (1991) [hereinafter Koh, Transnational Public Law Litigation] (explaining that while public law suits may require damages and injunctive relief, they serve to announce normative values). See also id. at 2364–65 (referring to “growing acceptance by litigants of [the] United States courts as instruments of social change”). See generally, Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) (explaining that judicial interpretation involves giving expression to the values of the legal text and that the interpretive process is bounded by community, which gives the process authority).


45. See Slaughter, International Law, supra note 29, at 511, 529 n.57 (1995) (defining a liberal democracy as one which allows for representative government and a non-liberal state as
national interests to predict states' actions in the international arena. States remain important under the liberal theory, but are viewed as surrogates for individual and group preferences.

Adopting a liberal view shifts the perspective from a power struggle to an interest struggle. States' interests become subject "to capture and recapture, construction and reconstruction by coalitions of social actors." Liberal theory suggests that Country X recently signed CITES and Country Y did not because each country, in part, reacts to constituency values expressed through its domestic political structure. Perhaps Country Y's lack of action is a response to its constituency values; as a poor nation, an environmental agenda is likely not a high priority. Country X must enact domestic legislation to comply with CITES. Assuming that Country X is a liberal state employing a representative form of government with adequate process and procedure, domestic legislation directly expresses some constituency preferences.

one "that has neither a representative government nor a market economy"). Slaughter explains that liberal theory mandates "a distinction among different types of States based on their domestic political structure and ideology." Id. at 504.

46. Slaughter, A Dual Agenda, supra note 31, at 227–28 (explaining the core assumptions of liberal theory).

47. See Benedict Kingsbury, The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law, 5 Y.B. INT'L ENVT'L L. 1, 7–8 (1994) [hereinafter Kingsbury, The Tuna-Dolphin Controversy]. The groups represented in the liberal model include transnational actors. Id. at 7. A nation could not possibly represent all of the preferences of its people, but arguably the process by which it incorporates those which it does legitimizes the ultimate expression.

48. See Slaughter, Liberal International Relations, supra note 25, at 729. Andrew Moravcsik explains liberalism's three core assumptions: (i) individuals and private groups operate within domestic and civil society to pursue ideational and material interests; (ii) state interests pursued in the international arena represent a portion of these individual interests; and (iii) interdependent state preferences determine state behavior. Moravcsik, Taking Preferences Seriously, supra note 19, at 516–21.

49. Moravcsik, Taking Preferences Seriously, supra note 19, at 518.

50. See supra note 6 and accompanying text. Interestingly, the Bureau of National Affairs International Trade Reporter recently reported that "[e]ven though CITES has been in place since 1973, most of the 140 countries signed on to the convention still do not have legislation in place to implement the legislation and penalize those engaged in illegal trade." Officials Cite Need to Address Growing Illegal Environmental Trade, 18 Int'l Trade Rep. (BNA) 913, 924 (June 14, 2001).

51. See Slaughter, Liberal International Relations, supra note 25, at 728 ("State preferences are derivative of individual and groups preferences, but depend crucially on which individuals and groups are represented.") (citation omitted); Slaughter, International Law, supra note 29, at 508 (assuming while governments represent a subset of their constituency, they regulate activities of those not represented as well). Due to the pluralistic nature of society, a state will only reflect some constituency preferences, and the process by which it chooses which constituency preference to promote is subject to capture. Id. Moravcsik acknowledges the possibility for specific groups to "capture" a democratic government when the balance of representation is in their favor. See Moravcsik, Taking Preferences Seriously, supra note 19, at 530 ("The key variable in republican liberalism is the mode of domestic political representation, which determines whose social preferences are institutionally privileged.").
Theoretically, each nation's decision to join the WTO was, in itself, an expression of constituency preferences. Because Country X and Country Y joined at different times, however, their actions may signify different interests. The intervening evolution of GATT to the WTO may suggest differing constituency preferences for each country. Country X joined when GATT operated under a negotiation model, whereas Country Y joined when the trading regime shifted to an adjudication model. Although, Country X remained in the regime, it is not clear whether both countries held uniform constituency preferences. Delineating those preferences requires a conflict or dispute forcing Countries X or Y to take action, which would cause either country to reconsider constituency preferences depending upon the circumstances. Where such preferences change, either country may find it undesirable to support the values and accept the obligations of the WTO.

Liberal theory, in short, can help explain things that institutionalism and realism cannot. Liberalism, as well as constructivism, characterizes states' interests as endogenous, and thus it illuminates what Friedrich Kratochwil and John Ruggie refer to as the ontological and epistemological conflict of regimes.\(^2\) Ontologically (the nature of), regimes focus on actors' intersubjective expectations.\(^3\) Epistemologically (the source of knowledge of), regimes are generally positivistic,\(^4\) and thus promote behavior through objective forces.\(^5\) Liberalism helps explain the contradiction between the objective epistemology of regimes and the intersubjective ontology of regimes by reference to endogenous preferences. The nature of the regime therefore changes as a result of changing preferences, and contradicts its epistemology. Although a regime may seek to act objectively, its nature is forever linked to the evolution of subjective preferences. Its epistemology can either change, thus becoming less positivistic, or the regime can cease to respond to its nature. If the

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\(^2\) See Kratochwil & Ruggie, International Organization, supra note 19, at 764–66 (explaining apparent ontological and epistemological contradiction within regimes).

\(^3\) Id. at 764.

\(^4\) Id. (explaining conflict between prevailing positivist epistemology of regimes and intersubjective ontology used to explain nature of regimes and their functioning).

\(^5\) Id.
epistemology changes, then regime-promoted values will change with constituency preferences.

Liberalism also provides an explanation for regime stability as a function of domestic interest realignment with regime rules and values. Domestic preferences not only influence regimes, but promote domestic investment in that regime and embed regime preferences within the domestic sphere. Liberalism thus helps explain the reciprocal reality existing between national and international preferences. When Country X joined GATT it may have had a host of protectionist trade policies designed to benefit various constituencies. Over time, however, other constituencies may have recognized particular trade investments as profitable depending on GATT’s success. Those constituencies invested in the new system which caused Country X to shift its preferences.

Liberalism, however, cannot fully explain why Country X enacted its domestic endangered species legislation. Assuming the changing preferences of Country X lean toward environmentally conscientious behavior, the choice to protect the Tibetan Antelope remains unclear. Logically, Country X’s constituency would start protecting species indigenous to Country X first, and consider the Tibetan Antelope later. Perhaps Country X’s constituency is a globally sensitive constituency, but if so, the means by which it became sensitized is uncertain.

Constructivist theory rightly suggests part of Country X’s decision to protect the Tibetan Antelope arises from its experiences in the international arena. Constructivism posits that “an authentic community of actors exists in international politics, and that these actors construct their

56. See Moravcsik, Taking Preferences Seriously, supra note 19, at 537 (explaining that stability results when domestic groups adjust their preferences to make policy reversal more costly).

57. Wendt, Collective Identity, supra note 22, at 385. Wendt explains that constructivism makes the following core claims:

(1) states are the principal units of analysis for international political theory;
(2) the key structures in the states system are intersubjective, rather than material; and
(3) state identities and interests are an important part constructed by these social structures, rather than given exogenously to the system by human nature or domestic politics.

Id. Although constructivism may complement other theories, as Wendt point outs, “[t]he second claim opposes realism” while “[t]he third opposes systemic theories that are rationalist in form.” Id. at 385. The first claim opposes liberalism, as liberalism sees states acting as agents for their constituencies, whereas constructivists see states acting in their own interests. Wendt, Anarchy Is, supra note 24, at 394 (noting liberals and constructivists agree, and oppose rationalists, in seeing that liberal interests are endogenous). Nevertheless, although a complete critique of constructivism is beyond the scope of this article, it seems difficult to deny that material resources will play an important role in interest and identity formation.
own social structure and then live and interact within it."58 Put simply, international actors operate within a social structure,59 influencing and learning from each other,60 contributing to each other's identity.61 As both liberal and constructivist theories suggest, state identities are subject to change, and norms collected at the international level contribute to those identities.62

Constructivists view the formation of state identities as collective and intersubjective, based on more than material capabilities.63 Intersubjective identity operates within and without institutions, and aids in defining material capabilities as well.64 The constructivist approach is sociological as well as economic;65 it recognizes that states' material and non-material elements form the international infrastructure while simultaneously intermingling other states' material and non-material elements in the international arena.66


59. See Martha Finnemore, International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy, 47 INT'L ORG. 565, 566 (1993) [hereinafter Finnemore, International Organizations as Teachers] (arguing that international organizations, such as UNESCO, influence states). It is at least arguable that non-state actors may influence the social construction of states in the international arena. See id.

60. Id. at 576–91 (demonstrating how UNESCO influenced nations to adopt norms supporting science policy).


63. Wendt, Collective Identity, supra note 22, at 389 (noting that "[I]ntersubjective structures give meaning to material ones, and it is in terms of meaning that actors act"). Material ingredients include resources and assets that give a nation power, such as "military might, economic resources, natural and physical resources and the like." Arend, Do Legal Rules Matter?, supra note 26, at 127.

64. See Wendt, Collective Identity, supra note 22, at 389. See also Ruggie, What Makes the World Hang Together?, supra note 61, at 879 ("[T]he building blocks of international reality are ideational as well as material; that ideational factors have normative as well as instrumental dimensions."); Arend, Do Legal Rules Matter?, supra note 26, at 127–29.

65. Wendt, Collective Identity, supra note 22, at 385 (asserting that since constructivists are more interested in "construction of identities and interests," they necessarily "take a more sociological than economic approach").

66. See, e.g., AREND, LEGAL RULES, supra note 19, at 127. Not only are international relations socially constructed, but the components included in the mix are both material (assets) and non-material (values and norms). Id. at 128.
Constructivism helps explain the impact of other countries' views on Country X. We can speculate that Country X's protection of the Tibetan Antelope is in some way connected to CITES, which represents a conglomeration of a variety of state preferences and identities. Likewise, we can suppose that the repeated discourse and iterated play in the GATT/WTO plausibly moves both countries along the protectionist continuum toward freer trade. Eventually, Country Y may assume the role of protector of the Tibetan Antelope either because its own national values have shifted towards an environmentally conscientious stance or because of what Harold Koh calls "norm internalization," the process by which the domestic agenda accepts international values and norms. Country Y, like Country X, may ultimately recognize the international norm to protect the Tibetan Antelope and validate that norm through similar domestic political structures.

B. Modified Constructivism and the Normative Feedback Loop

This article proposes a modified constructivist theory, which links liberalism and constructivism through the normative feedback loop. A modified constructivist perspective espouses the presence of two constants: (i) assertion of national preferences by constituents for whom the state acts as an agent in international relations and (ii) social construction of state identities through interaction with other states in the international arena. The link between these two factors is the normative feedback loop, a mechanism by which states consult national values in their international actions.

67. Koh, Bringing International Law Home, supra note 41, at 642–55. Harold Koh's theory of transnational legal process is related to the international relations constructivist theory. Id. at 675. Koh explains that "[l]egal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three." Id. at 642. The process of internalization occurs over time and may involve state and non-state actors. Id. at 642–48. Professor Koh illustrates the process of internalization using China's signing of the International Covenant on Civil and Political Rights in the fall of 1998. Id. at 676.

Once Chinese executive officials have agreed to accept those norms, however grudgingly, the transnational process forces described earlier will begin to put pressure upon China—with the assistance of both governmental and nongovernmental actors—in various international fora to comply with various norms associated with that treaty. As international sanctions begin to attach to those norms, a process of vertical internalization will predictably commence, however slowly. China's domestic institutions will have an incentive to adopt default rules that avoid routine noncompliance with the international rule. Thus, over time, acceptance of the international rule should have a liberalizing impact, even upon states that have proven relatively impervious to external influence.

Id. at 676. (citations omitted).
Like the liberal agency model, and unlike constructivism, modified constructivism accepts (and requires) that states act as agents for their people. As a descriptive matter, the truth of the liberal agency model seems apparent, though incomplete; states’ interests reflect the desires of their constituency. First, states’ interests must change in order for states to adapt to changing contexts because, otherwise, no hope would exist for institutions, regimes, compromise or progress. Change, however, is not always for the better because it can also propel a nation away from compromise or progress. Second, states’ interests change as a result of several motivating factors such as the investment made by constituencies in change. When Country Y joins the WTO, for example, its constituencies may feel free to invest in the production of shahtoosh wool, knowing that trading rules protect their efforts. As constituencies invest in the production of shahtoosh wool, their preference for a trading regime with predictable and stable rules increases. Thus, the investment in an international institution sews the values of that institution into the domestic fabric. Other motivators of change include increased information, exposure to issue networks, norm internalization, and national norm evolution.

Liberalism, however, cannot operate independently nor fully explain Country X’s and Country Y’s state identity formation without a constructivist element. Liberalism alone will likely not explain why Country X chose to protect the Tibetan Antelope. Without international influences, people in Country X would likely not use any resources to protect the Tibetan Antelope. Although well-traveled or well-informed citizens of Country X perhaps saw the beauty of the Tibetan Antelope and shared their appreciation for the species, it seems likely that Country X’s concern for the Tibetan Antelope is partially influenced by international norms emanating from CITES or other international issue networks. Modified constructivism accepts the constructivist idea that states affect the interests and identities of other states through interaction in the international arena.

68. See generally, supra notes 36–67 and accompanying text.
69. Moravcsik, Taking Preferences Seriously, supra note 19, at 518–22. Wendt, Anarchy Is, supra note 24, at 394 (arguing state interests are endogenous).
70. Wendt, Collective Identity, supra note 22, at 391 (explaining that the evolution of a community, such as a trading community, is explained only by examining “the effect of practice on interests and identities”).
Constructivism likewise suggests an important place for liberalism and the evolution of domestic preferences.\textsuperscript{73} Constructivist theory is indeterminate and impossible to verify empirically.\textsuperscript{74} Therefore, liberal theory may, by connecting international norms to national constituency preferences, explain why some norms grow popular while others fail.\textsuperscript{75} As Andrew Moravcsik notes, “without a theory of domestic preference formation, how can a constructivist specify which feedback processes of socialization matter...?”\textsuperscript{76} Modified constructivism therefore suggests that referencing national norm preferences helps gauge the potency of an international norm.

Scholars note that deficiencies exist in both constructivism and liberalism.\textsuperscript{77} Both theories fail to completely explain state behavior.\textsuperscript{78} Arguably, both theories discount too greatly the importance of power and material assets. Perhaps the descriptive truth of the realist and institutionalist accounts explains the deficiencies of the liberal and

\textsuperscript{73} See Moravcsik, Taking Preferences Seriously, supra note 19, at 539 (arguing for more consideration of liberal theories).

\textsuperscript{74} Arend, Do Legal Rules Matter?, supra note 26, at 134–35 (addressing the criticism that constructivist theory lacks empirical support). Jutta Brunnee and Stephen J. Toope have attempted to respond to this criticism by proposing a research agenda that employs a non-positivist conception of law, specifically an “interactional” understanding of law based upon the work of Lon Fuller. Brunnee and Toope, supra note 22, at 24. Brunnee and Toope believe that this course of study can help to explain why some norms are more influential than others. Id.

\textsuperscript{75} Moravcsik, Taking Preferences Seriously, supra note 19, at 539–40 (explaining that liberal hypotheses offer “a theory of when the transnational transmission of ideas matter”). Other disciplines may be useful in overcoming this indeterminacy. Martha Finnemore argues that sociology’s institutionalism may be useful in telling us not only that social structures matter (as constructivism does) but also how they matter. See generally Martha Finnemore, Norms, Culture and World Politics: Insights from Sociology’s Institutionalism, 50 INT’L Org. 325 (1996) [hereinafter Finnemore, Sociology’s Institutionalism]. Sociology’s institutionalism should not be confused with international relations institutionalism; indeed, it is more closely related to constructivism. Id. at 326.

\textsuperscript{76} Moravcsik, Taking Preferences Seriously, supra note 19, at 539 (arguing for more consideration of liberal theories in order to avoid omitted variable bias).

\textsuperscript{77} See Arend, Legal Rules, supra note 19, at 132–34 (discussing three criticisms of constructivism: the apparent lack of empirical evidence supporting its claims, the inherent difficulty in determining exactly how the state affects the institution, and that constructivism can only be understood using truly intersubjective law because its meaning naturally differs from culture to culture). See also Moravcsik, Taking Preferences Seriously, supra note 19, at 514–15 (outlining a critique of liberalism); Slaughter, A Dual Agenda, supra note 31, at 237–38 (same).

\textsuperscript{78} See, e.g., Arend, Legal Rules, supra note 19, at 132–34 (explaining that under constructivism, it is often difficult to discern how states affect institutions and vice versa). Slaughter suggests that the lack of an ability to make deductions from the core assumptions of liberalism, and the possibility that the theory will contribute no more than rationalism and institutionalism already have, are two possible flaws of liberalism that must be overcome. See Slaughter, A Dual Agenda, supra note 31, at 237. The normative feedback loop proposes to fill both of these gaps.
constructivist views. Additionally, this article proposes another possible means to help complete these theories. This article suggests that the normative feedback loop fills the void in each theory while linking the two schools together.

Nations, in response to regimes, balance the value of rule compliance against other interests they may have by means of the normative feedback loop. The normative feedback loop may take the form of a nation's decision to:

(i) comply with a regime rule which would require it to act (or not to act);

(ii) encourage another nation to comply (or not) with a regime rule;

(iii) enact (or refuse to enact) domestic legislation to promote regime values.

Where compliance implicates a conflict between regime values, the normative feedback loop aids in the ordering of regime hierarchies and allows the states to insert their norms into the international system.

First, the normative feedback loop may take the form of a nation's decision to comply with a regime rule, which would require it to act (or not act). The Tuna-Dolphin Dispute under GATT, which involved provisions of the Marine Mammal Protection Act ("MMPA"), illustrates the availability of different choices to support or reject regime norms. The MMPA provided for the protection of dolphins by prohibiting the importation into the United States of tuna caught in a manner that endangered and killed dolphins. Two GATT panels found the MMPA violated GATT Article XI's prohibition on import bans. The United States, however, prevented adoption of the GATT Panel Reports. The protection of animals from a horrible and unnecessary death was a value that the United

79. Additionally, the normative feedback loop operates in the absence of regime conflict as a check on state activity in light of changing constituency preferences.

80. See Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 11-13 (discussing Tuna-Dolphin controversy). The MMPA is an example of a domestic legal structure supplying the normative feedback loop and, as Benedict Kingsbury notes, "[t]he actual imposition of sanctions [under the MMPA] followed court orders obtained by environmental groups against the executive branch." Id.


82. See Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 11-13 (noting that neither Tuna-Dolphin Panel Report was adopted); Raj BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 199 (2d ed. 2001) (noting blocked Panel Reports lack the force of law) [hereinafter BHALA].
States refused to forgo in order to support the value of the trading regime. Thus, the normative feedback loop supported non-compliance with GATT norms.

Second, the normative feedback loop may also take the form of a nation’s decision to encourage another nation to comply with a regime rule. This use of the normative feedback loop illustrates the overlap of the realist and liberal accounts. Prior to the Uruguay Round, for instance, the United States used the threat of unilateral retaliation to change policies which affected United States commerce. As the nation imposing the sanction, the United States held sole discretion and capability to utilize unilateral retaliation. Thus, prior to the Uruguay Round, Country X might have coerced Country Y to stop trading in the Tibetan Antelope, if it so desired.

Finally, the normative feedback loop may impact domestic legislation that specifically adopts or implements a particular set of regime values. The United States’ Generalized System of Preferences (“GSP”) legislation, for example, which affords trade preferences to developing nations, incorporates international labor standards. As domestic legislation, the GSP statute implicates the normative feedback loop, because in a liberal state, national legislation considers constituency values and preferences. A country may similarly refuse to enact domestic legislation designed to promote compliance with a regime rule as a result of its normative feedback loop.

The normative feedback loop allows a nation to revisit its policy decisions concerning the weight or vitality of constituency preferences. In other words, a nation’s initial belief that it is within its interests to join a regime does not demand the conclusion that it will forever be committed that specific regime’s norms. Robert Hudec explains the need to revisit such decisions in the context of GATT:

83. See Philip M. Nichols, Trade Without Values, 90 Nw. U. L. Rev. 658, 678–79 (1996) [hereinafter Nichols] (explaining dolphins caught in tuna nets were often drowned, ground to death in ship’s winch gears or eaten alive by sharks).

84. See John H. Jackson, The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results, 36 Colum. J. Transnat’l L. 157, 183 (1997) [hereinafter Jackson, The Great 1994 Sovereignty Debate]. Typically, this unilateralism was accomplished through the infamous Section 301 legislation, 19 U.S.C. § 2411. During the Uruguay rounds, negotiators sought to persuade the United States to give up Sec. 301 in exchange for the new Dispute Settlement Understanding (DSU). See generally Bhala, supra note 82, at 1267–55. Although the DSU came to be, the United States did not repeal Sec. 301. Id. It has, however, refrained from using it. Id.

85. GSP deviates from WTO/GATT foundational theory by allowing for preferential treatment for less developed nations.

86. See supra notes 39–41 and accompanying text.
The kind of liberal trade policy expressed by the GATT rules has never commanded universal approbation. The fact that governments were able to agree to these rules meant simply that the forces in each government favoring the rules were, on balance, stronger than those opposing. Support for the rules once written has been the product of a similar balance, a balance quite capable of shifting from case to case.  

Applying Hudec’s theory, Country X’s decision to enter the trading regime in 1955 and to remain in the trading regime when the GATT evolved into the WTO does not necessitate the conclusion that it wishes to promote trade values at the expense of the Tibetan Antelope. The normative feedback loop accounts for both the decision to join the GATT and to stay in the WTO. Under a modified constructivist framework, the normative feedback loop should likewise inform Country X whether it wishes to accept its WTO obligations at the expense of the Tibetan Antelope when a dispute arises with Country Y.

The normative feedback loop has not only the potential to directly affect the ordering of regime hierarchies, but also has a signaling effect. The normative feedback loop challenges (or supports) the values of the international arena and, by doing so, sends a message about national values. Although the normative feedback loop may not be outcome determinative in such situations, it plays an informational role that furthers the processing of other actors’ future cost-benefit analyses. Likewise, the normative feedback loop also signals constituency preferences in the absence of conflict, such as in coordination regimes. Although its function in non-conflicting situations is not outcome determinative, it is still important for discourse and information to aid traditional compliance factors even without regime competition.

Problems, however, exist within a modified constructivist framework. Modified constructivist theory is subject to attack as it contradicts

88. Cf. Wendt, Anarchy Is, supra note 24, at 404–05. Wendt explains that the first step in forming an intersubjective understanding is a "social act," which consists of signaling, interpreting and responding. Id. In order to demonstrate this process, he constructs a hypothetical situation consisting of two actors, "ego" and "alter." In the hypothetical, "ego" signals by making a gesture affecting "alter." "Alter" interprets the signal using two factors, the physical qualities of "ego" and the gesture, and "alter's" belief about what it would have intended had it done the same thing. Then, "alter" responds, completing the social act. Id. The repetition of a "social act" creates expectations about future behavior. Id. at 404–05.  
89. Id. (The "process of signaling, interpreting and responding completes a 'social act' and begins the process of creating intersubjective meanings").  
90. See infra Part II.A (discussing traditional compliance factors).
the realist and institutionalist descriptive accounts. Perhaps, however, modified constructivism can take greater account of the importance of power in the inter-state and domestic systems. Modified constructivism recognizes states’ interests and identities as affected by liberal functioning and social construction. Domestic preferences may also be “constructed” and the inter-state system may operate as a liberal system itself. Whether interests or identities are constructed or expressed through a liberal system, it seems possible that power and material resources can affect the evolution of those interests and identities. Mapping the effect of the material assets in any given situation may be extraordinarily complex, if not impossible, but the complexity of the formula is no reason to ignore its variables.

Additionally, assuming the principles of modified constructivism hold true as a descriptive matter, the question of whether they are normatively desirable remains. The notion of states acting as the liberal agents of constituencies certainly seems desirable, as it is consistent with notions of representative government and democratic accountability. It does, however, raise the problem of capture; if states represent constituency interests, then they only represent a part of them. As a normative matter, therefore, the model is desirable only where a liberal state exists that employs fair process, representation, and access. Finally, the normative feedback loop has the potential to destabilize regime functioning. A routine disregard of regime commitments by nations because of domestic preferences threatens regime benefits.

The effect of one nation on another nation under modified constructivist theory presents both benefits and detriments. Global pluralism likely will lead to a beneficially healthy and legitimate discourse. Increased inclusiveness promotes legitimacy and compliance.

91. Cf. Wendt, Anarchy Is, supra note 24, at 391–92 (differentiating between liberal and constructivist theories and realist or rationalist theories); see also Moravcsik, Taking Preferences Seriously, supra note 19, at 514 (responding to criticism that liberal theory is “utopian”).

92. See Slaughter, International Law, supra note 29, at 511. Although “liberal democracy can be defined in many ways,” Slaughter defines it as “some form of representative government secured by separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law. These particular features of domestic political structure are important determinants of the interaction between the State and individual and group actors in domestic and transnational society.” Id.

93. Moravcsik, Taking Preferences Seriously, supra note 19, at 518 (noting states represent some subset of domestic society).

94. See id.


96. See id. at 30 (“The more plausible a community’s perception of a rule’s legitimacy, the more persuasive that rule’s claim to fairness, the stronger its promotion of compliance, and
Detrimentally, however, powerful states will arguably dominate the discourse and have an undue influence on identity formation. To some extent, access, process, and transparency ameliorate these effects. The danger of a hegemonic influence nonetheless exists despite placing that danger in a realist, institutionalist, liberal, constructivist or modified constructivist framework.

II. REGIME COMPLIANCE AND COMPETITION AS MONITORED BY THE NORMATIVE FEEDBACK LOOP

The modified constructivist model provides the opportunity to hypothesize how states balance their interests when one regime conflicts with another, by using the normative feedback loop. Various compliance models suggest that different factors promote state adherence to regime rules (e.g., legitimacy, reputational pressure, or the threat of economic sanctions). State compliance with regime rules is often an issue rooted in regime competition, which exists because regimes' theoretical foundations conflict with each other. Modified constructivism suggests that the normative feedback loop influences the compliance factors of any given compliance model, and by doing so, reintroduces national constituency preferences into international value and identity formation.

A. Regime Compliance

The normative feedback loop mediates compliance among regimes. Regimes seek the aid of nations to enforce regime rules. Although na-
tions enter regimes, nations maintain other interests, and compliance issues may therefore arise depending on the goals of a regime. The existence of international law, discourse, regime legitimacy, fairness, and dispute settlement and enforcement mechanisms influence compliance. These compliance factors operate to counterbalance resistance that may arise from competing interests.

The necessity of a compliance mechanism depends on the regime's agenda. Regimes may perform informational, managerial, and executive functions. Coordination regimes usually generate automatic compliance by providing benefits to all participants through coordination efficiencies. Conflictual regimes raise enforcement issues because the benefits of non-compliance challenge the benefits of compliance, which relate directly to national constituency preferences, and thus rely upon the normative feedback loop. In the Country X and Country Y example, the WTO is a conflictual regime. Although adherence to WTO norms secures benefits for both Country X and Country Y, defecting from the CITES regime may offset the benefit of compliance with the WTO rules of non-discrimination.

Despite that an actor voluntarily enters a regime, some form of compliance mechanism may be necessary to secure compliance in conflictual regimes. As Friedrich Kratochwil and John Ruggie point out, because convergent expectations form the basis of the regime, the ontology of the regime "rests upon a strong element of intersubjectivity." The intersubjective nature of regimes suggests that compliance issues within regimes arise because regime participants possess different values and expectations of regimes.

\[\text{ties to support an international trade regime depend on marshaling popular support.}\]  
\text{Id. (citations omitted).}


101. \textit{See infra} notes 108–21 and accompanying text.

102. \textit{See Ruggie, \textit{International Responses to Technology, supra} note 12, at 571–74 (explaining various functions of regimes).}

103. \textit{See id. (observing regimes may gather and report information, allocate resources and effectuate a normative order).}

104. \textit{See Kingsbury, \textit{The Concept of Compliance, supra} note 24, at 350–51 (referring to coordination regimes as virtually self-enforcing). The regimes are self-enforcing because they provide for "multiple Pareto-optimal equilibria," whereas non-coordination regimes have "equilibria that are not Pareto-optimal." Martin & Simmons, \textit{supra} note 1, at 744.}

105. \textit{See Downs, \textit{Enforcement, supra} note 97, at 324.}


107. AREND, \textit{LEGAL RULES, supra} note 19, at 135–36. Anthony Clark Arend discusses that intersubjective terms exist in the international arena. \textit{Id.} He provides three examples of
Given the many opportunities to comply or defect from regime norms, different schools of thought have attempted to construct compliance models. The international legal process school, for example, argues that the process of engaging in international law constrains state behavior. Alternatively, the "managerial model" suggests that treaty regimes contribute to the process of persuasion. The managerial school overlaps with the "transformational school," which views compliance and enforcement through a constructivist lens. Transformationalists argue for de-emphasizing enforcement in favor of negotiated and managed compliance.

A different model suggests that compliance is directly linked to legitimacy. Thomas Franck argues that legitimacy promotes compliance. Franck posits that four indications of legitimacy support intersubjective concepts, namely, states, jurisdiction and international law. Conflict may nonetheless play a role because diverse actors may disagree on "whether a particular entity is a state," whether or not a "particular state has jurisdiction," or "there may be disagreement about the content of particular legal rules." Despite these conflicting beliefs, no international actor would claim that states, jurisdiction or international law do not, in fact, exist. Id. (arguing that intersubjective understandings exist among states).

Within these regimes, there is conceptual space for international law: law plays a critical role both in stabilizing the expectations and in reinforcing the restraints that regimes seek to foster. Among rational states, legal rules promote compliance with regime norms by reducing transaction costs, providing channels for dispute-settlement, triggering retaliatory actions, signaling states when negative responses by other states may ensue, and requiring states to furnish information that will highlight defections on their own part.

Koh, Transnational Legal Process, supra note 98, at 200.


Under the managerial model, nations generally comply with regime rules because of efficiency, national interests, and regime norms. Id. (identifying considerations supporting the assumption that nations tend to comply with their treaty obligations in order to better understand problems of noncompliance). Further, the iterative process and the discourse created by the treaty regime promote compliance. The regime guides "the evolution of the normative structure in the direction of the overall objectives of the regime." Id. at 229 (noting that the institutionalist account fails to consider the transformationalist function of regimes). See also Slaughter, Tulumello & Wood, New Generation, supra note 19, at 371. "Supranational institutions may not always be able to promulgate and enforce law, but they can and do frequently generate norms that are disseminated by nongovernmental organizations (NGOs) to pressure domestic political actors." Id. This model discounts, perhaps too greatly, the value of enforcement mechanisms. See Downs, Enforcement, supra note 97, at 328-36 (challenging managerial school's position that enforcement is irrelevant to compliance).

Advocates of this school see strong enforcement mechanisms as detrimental because they reduce the inclusiveness of the regime and harm the transformational process by weakening the regime discourse.

See Franck, Legitimacy in the International System, supra note 97, at 706 (arguing that "compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed").
The "legitimacy" and "pull" of a rule: 113 determinacy (the clarity of the textual language), 114 symbolic validation (the lineage or pedigree which has a signaling effect), coherence (the consistent application of the rule), and adherence (the rule's relation to a normative hierarchy). 115

Alternatively, the political economy school explains the "political economy" or "institutionalist" theory of enforcement and compliance as a "deterrence strategy designed to maintain cooperation by preventing noncompliance from ever taking place." 116 The level of punishment, or enforcement, as one part of the strategy, 117 relates to the "depth of cooperation" in that agreement. 118 The depth of cooperation is "(1) the amount of behavioral change that an agreement requires of signatories or (2) the magnitude of the behavioral change that an agreement has actually brought about among signatories." 119 Enforcement can also take the form of incentivizing behavior whereby regime benefits are either conditioned upon compliance, 120 or the regime's existence may shift investment preferences such that compliance is its own reward. 121

113. See id. at 712.
114. Id. For example, the Montreal Protocol and CITES both "impose relatively precise obligations." Harold K. Jacobson and Edith Brown Weiss, Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project, 1 GLOBAL GOVERNANCE 119, 139 (1995)[hereinafter Jacobson & Weiss]. Thus, it is "relatively easy to judge whether or not states...are fulfilling these obligations." Id.
115. Franck, Legitimacy in the International System, supra note 97, at 712. Franck situates these elements as the "lawyer's approach to larger sociological, anthropological and political questions: what conduces to the formation of communities and what induces members of a community to live by its rules?" Id. at 713. Franck has also argued that the fairness of international rules contributes to compliance. FRANCK, FAIRNESS, supra note 95, at 6 (observing that in the "post ontological" age of international law the most important question for international lawyers is not only law's enforceability, but its fairness). The compliance pull of a rule is directly related to its fairness, which results in part from process. Id. at 22.
117. See id. at 321 (indicating punishment is part of enforcement strategy that responds to a violation).
118. See id. at 332.
119. Id. at 332–33 (emphasis omitted).
120. See Keohane, Two Optics, supra note 72, at 500 (noting material benefits of compliance). For example, the IMF and the World Bank work in tandem to provide incentives to their 183 members to promote international monetary cooperation, to maintain stability and to promote international trade. To be a member of the World Bank, and receive the benefits of membership, a nation must also be a member of the IMF. Members seeking assistance from the IMF in meeting financial obligations are often required to undertake economic reforms consistent with the policies of the Fund and the World Bank. These "reforms" thus define the regime norms. The economic aid for compliance with these norms operates as incentives. See generally http://www.imf.org/external/about.htm and http://www.worldbank.org/html/extdr/regions.htm. Commentators have objected to this type of incentive as unfair. For example, Nancy Alexander of the Globalization Challenge Initiative argues that the reform process of the World Bank and IMF have detrimental effects on the countries that apply them. John F. Ince, Symbol of Controversy, UPSIDE MAG., April 1, 2001, at 2001 WL 2023065.
121. See Keohane, Two Optics, supra note 72, at 490.
Choosing among the various compliance models problematically employs indeterminable empirical evidence. Difficulties arise, for example, when evaluating the reasons for the United States' refusal to comply with a rule promulgated by the human rights regime that prohibits subjecting minors to capital punishment. Perhaps the United States does not feel like a member of the human rights regime, that the rule has not received open and fair review to justify appropriate compliance pull, or that it is simply not in the United States' utilitarian interest to comply. The question remains whether the availability of any meaningful sanctions would make a difference. Arguably, however, the issue may reside hopelessly entrenched within national politics that render international compliance mechanisms or theories irrelevant.

The prospect of evaluating these alternatives is overwhelming. Moreover, any compliance theory must consider the pluralism of regimes and the actors within them. In considering compliance, one must account for "the character of the activity, the character of the accord, country characteristics, policy history, leadership, information, the role of nongovernmental organizations (NGOs), actions of other states, and the roles of international governmental organizations (IGOs)."

Each compliance model nevertheless suggests a place for the normative feedback loop. Factors influencing compliance include the existence of international law, discourse, regime legitimacy, fairness, and dispute settlement and enforcement mechanisms. The extent to which a nation

Subtler instrumentalist arguments recognize that rules, as part of the environment faced by a state, exert an impact on state behavior. They do so, in this view, not because the norms they reflect persuade people that they should behave differently. Rather, they alter incentives, not merely for states conceived of as units, but for interest groups, organizations, members of professional associations, and individual policymakers within governments.


123. See, e.g., Koh, Why Do Nations Obey?, supra note 100, at 2655 ("In the human rights area, treaty regimes are notoriously weak, and national governments, for reasons of economics or realpolitik, are often hesitant to declare openly that another government engages in abuses.").

124. Jacobson & Weiss, supra note 114, at 124 (listing several factors affecting a nation's compliance with international agreements, including a country's characteristics, policy history and leadership).

125. Id.
engages in discourse, articulates treaty obligations, or supports enforce-
ment of treaty obligations is informed by the normative feedback loop.

B. Regime Competition

Problems surrounding compliance often derive from regime competi-
tion. The various explanations for compliance assume that a reason exists not to comply. Another regime's conflicting norms may provide one reason for non-compliance, i.e., the conflicting regimes will compe-
te for a nation's compliance. Values related to the theoretical foundation of a regime such as labor, environment, and cultural identity values, for example, may clash with trade regime values. Because of the difficulty in reconciling different theoretical foundations, regime competition is likely inevitable.

The power to regulate a sovereign's behavior within one sphere may involve specifically protecting that sovereignty within another sphere (e.g., trade rules affirmatively protecting state sovereignty with respect to environmental rules). Direct conflicts may arise as a result of conflicting directives on behavior.


127. See Kingsbury, The Concept of Compliance, supra note 24 (discussing compliance under various theories of international law).

128. See Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 10 ([The number of] “international rules and institutions constructed by sovereign states . . . makes it perfectly possible for international standards to conflict, and in extreme cases for a state to owe incompatible obligations to different groups of states.”).

129. See Nichols, supra note 83, at 691 (noting that despite favorable WTO changes, there still exists conflict between societal and trade values with which WTO has not dealt).

130. See Kingsbury, The Tuna-Dolphin Controversy, supra note 47 at 9–10 (“As more and more governance regimes are established, this kind of trade-off becomes harder to maintain.”).

The CITES treaty may prohibit trade in a particular species while the GATT/WTO may preserve the right to trade in wool from any source, even the Tibetan Antelope.\textsuperscript{132} Alternatively, a conflict may arise where one regime attempts to enforce its values using methods that encroach upon another regime; the use of trade sanctions to promote human rights provides an example. To the extent that a value conflict emerges, regime competition arises. The winner is the regime capable of validating its values through compliance, which may take the form of action or inaction depending upon the status quo.

Regime conflict is inescapable because different regimes are based upon different theoretical models.\textsuperscript{133} For example, Richard Shell situates this conflict among various trade models. He notes, the two dominant models of the trade regime "rely heavily on normative commitments to economic theory as a foundation for legal interpretation."\textsuperscript{134} At the same time, however, these trade values may pose a threat to distributive fairness or procedural justice, which may provide the theoretical basis for another regime, such as the labor regime.

Modified constructivist theory suggests that the normative feedback loop mediates the above conflicts. It informs the traditional compliance factors through reintroducing national constituency preferences within a particular context. The operation of the normative feedback loop relies

\textsuperscript{132} See generally id. This conflict has not arisen, but the facts of the Shrimp-Turtle case illustrate how it could. CITES protects trade in sea turtles themselves, but not trading of shrimp, whose capture incidentally killed sea turtles. See WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS38/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999), available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter Shrimp-Turtle AB]. A species could be considered an exhaustible natural resource under the Article XX exceptions of the GATT. Likewise, the Montreal Protocol allows for trade sanctions against parties and non-parties to secure compliance with its provisions. Arguably, a party to the Montreal Protocol should not be able to complain about trade sanctions, but a non-party would presumably take its complaint to the WTO. See James Cameron & Kevin R. Gray, Principles of International Law in the WTO Dispute Settlement Body, 50 INT’L & COMP. L.Q. 248, 266 (2001) [hereinafter Cameron & Gray](noting opportunity Shrimp-Turtle Panel and AB had to consider plethora of environmental agreements implicated by dispute).

\textsuperscript{133} Cf. Shell, supra note 31, at 907–11 (assessing theoretical foundations of various trade models in light of non trade values). The WTO Foreign Sales Corporation (FSC) Dispute exemplifies a particularly troublesome trade conflict pitting tax policy against free trade principles. See Daniel Pruzin, WTO Panel Issues Preliminary Ruling Against the United States in FSC Dispute, 18 INT’L TRADE REP. (BNA) 979, 984–85 (June 28, 2001) (discussing latest development in E.U. challenge to United States Foreign Sales Corporation (FSC) tax system as illegal subsidy under WTO).

\textsuperscript{134} See Shell, supra note 31, at 907 (assessing the normative foundations of regime management model and the efficient market model). Shell proposes a “stakeholder’s model,” which would include a place for non-trade preferences. See id. at 910–11; see also infra notes 167–170 and accompanying text.
on the inability of a regime to independently secure compliance with its rules. As Part III, infra, notes, however, SERs disrupt the functioning of the normative feedback loop by often independently securing compliance with their rules.

III. SERs and the Dilution of the Normative Feedback Loop

SERs change the landscape of value and norm development by discounting the normative feedback loop. SERs become capable of propagating values based not only on their existing compliance factors, but also on their own enforcement mechanisms. Although non-SERs will continue to promote their values, the vitality of their persuasion diminishes through the continual reinforcement of SER values, with or without a direct conflict between two regimes. Thus, the emergence of SERs will tear down the existing framework for value propagation and identity formation, thereby allowing a new framework to emerge. This framework will include (i) SERs; (ii) non-SERs (in their weakened state); and, (iii) SERs which contain exceptions or accommodations for the values of other regimes (namely, regimes within regimes in the form of “side agreements”). This article does not suggest that SERs are undesirable; rather that this evolution will have significant effects for value development under the modified constructivist model. These effects and possible responses to them are discussed in Part IV.

A. Self-enforcing Regimes

SERs are a new source of international authority that can bypass the normative feedback loop. Thus, SERs secure a high level of compliance with regime rules by means of coercion, independent from any hegemonic influences, and in addition to pre-existing compliance mechanisms. SERs may evolve slowly, sometimes starting as consensus-based regimes and organizations operating on a utilitarian model while gradually gaining autonomy. Once formed, SERs impose costs upon deviations from SER rules with a certain level of autonomy. As a

135. See supra Part II.A.
136. Cf. Down, Danish & Barsoom, supra note 96, at 486–87 (explaining that under the Chayes & Chayes approach, regimes have resources to pressure states into compliance).
137. See George W. Downs, David M. Rocke & Peter N. Barsoom, Managing the Evolution of Multilateralism, 52 INT'L Org. 397 (1998) (noting “many multilateral organizations start out with substantially smaller memberships and generally expand over time”). See also Downs, Danish & Barsoom, supra note 96, at 465 (“Evidence is also presented that suggests that as multilaterals increase their level of cooperation over time (e.g., in the manner of the E.U. or WTO), they also increase their level of enforcement, a fact for which managerial theory provides little explanation.”).
result, SERs promote their values and norms without having to resort to the normative feedback loop. SERs simultaneously maintain the standard methods of compliance that non-SERs have, including persuasion, legitimacy, and dispute settlement and enforcement mechanisms. These compliance mechanisms are, however, strengthened by virtue of a regime's self-enforcing capabilities.\(^{138}\)

SERs are not created; rather, they evolve from non-SERs.\(^{139}\) SERs may start as simple issue networks or regimes based upon rational efficiencies.\(^{140}\) As institutionalism demonstrates, nations cooperate within regimes because it is in their interests to do so.\(^{141}\) Groups may coalesce around a treaty, or a formal institution, or simply the continued relationships and set of shared expectations among the parties.\(^{142}\) Treaties or institutions may set standards, some specific and some hortatory. There may be a dispute settlement mechanism based upon a variety of models including negotiation, arbitration, or adjudication.

Where a dispute settlement mechanism exists, the regime may lack any meaningful enforcement apparatus or method to secure compliance.\(^{143}\) Incorporating enforcement mechanisms into a regime is difficult where the regime is conflictual. In particular, regimes that encounter iterated prisoners’ dilemmas constantly pose opportunities for members to benefit by deviating from regime norms. In the early stages of the regime, when distrust is high, enforcement threats may chill a nation's

\(^{138}\) The dilution of the normative feedback loop should not be confused with the "direct effect" of international law. Under the United States system only self-executing treaties have direct effect under domestic law. Under the doctrine of incorporation, however, international law should be incorporated into national law, and acts of Congress, where possible, should be interpreted in a manner consistent with international law. The doctrine of incorporation is not always followed. See generally Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L. J. 479 (1998).

\(^{139}\) Cf. Downs, Enforcement, supra note 97, at 320, 323–24 (showing that as "multilaterals [SERs and non-SERs] increase their level of cooperation over time . . . they also increase their level of enforcement").

\(^{140}\) The initial regime will likely begin as an "issue network" where there is a core group of actors concerned about a specific set of norms and values.

\(^{141}\) See supra notes 32–35 and accompanying text.

\(^{142}\) See Abbott & Snidal, supra note 16, at 446–47 (discussing how international understandings and agreements may begin as "soft law" and evolve over time).

\(^{143}\) See Kenneth W. Abbott, The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice, 1992 Colum. Bus. L. Rev. 111, 144 (1992) [hereinafter Abbott, The Uruguay Round and Dispute Resolution] (discussing EC-US Oilseeds Case). Under the GATT system, for example, even if a dispute was brought before a panel and the Panel Report was adopted (meaning the losing state did not "block the adoption of the report" as it had a right to do), securing compliance with the adopted report was sometimes difficult. Id. (discussing European Economic Community Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991)).
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The normative feedback loop may also prevent or hinder a nation's compliance with, or participation in, a regime. However, just as the initial formation of an institution increases benefits to members by virtue of coordination and efficiencies, the strengthening of the institution through effective dispute settlement increases benefits to members by providing for stability and predictability. When investment of a critical mass in the regime is complete and the benefits of the regime begin to accrue, there will be sufficient benefits to members who remain in the regime. These benefits that arise from an effective enforcement mechanism will outweigh the negative effects that an enforcement action would impose upon any one member. Indeed, the existence of a dispute settlement mechanism may have a chilling effect on deviant behavior. It is therefore not surprising that institutions, where possible, will move towards "authority" based coercion.

In using the term "authority," I adopt John Ruggie's concept of authority that goes beyond the "rational-legal Weberian notion of authority . . . usually depicted by the ideal type of hierarchy of pyramid,"\textsuperscript{145} which does not require formal subordination.\textsuperscript{146} "[I]nternational authority may be conceived as a transordinate structure"\textsuperscript{147} where collective interests operating within regimes form joint obligations. These obligations evolve into compliance norms that dictate national behavior.\textsuperscript{148} Because SERs can impose significant costs upon either non-compliance or exit, they attain authority without formal subordination.

Effective enforcement mechanisms, along with traditional compliance factors, make the above authority model possible. As noted above, collective interests, persuasion, a sense of joint obligation, fairness, and legitimacy contribute to "authority" within regimes. Regimes that can adjudicate and coerce, however, will have more authority (and autonomy) than those capable only of discussing, recommending, and persuading. Moreover, the coercive power of SERs increases the difficulty of studying and assessing other compliance pulls. For example, one criticism of Franck's legitimacy model is that it cannot be isolated from other authoritarian elements; however, Franck suggests that isolation is

\textsuperscript{144} See Downs, Enforcement, supra note 97, at 323 (noting coordination based agreements, which do not suffer from mistrust as do Prisoners’ Dilemma agreements, are easier to achieve).

\textsuperscript{145} Ruggie, International Responses to Technology, supra note 12, at 579 (referencing Max Weber’s work entitled “Bureaucracy”).

\textsuperscript{146} Id. at 581.

\textsuperscript{147} Id.

\textsuperscript{148} Id. (explaining that a sense of joint obligation may emerge when a regime furthers the collective interests of member states and that as a result norms of compliance may emerge). This theory of authority reflects constructivists’ principles. See supra notes 57–67 and accompanying text.
not a problem in the international arena because the international arena lacks a coercive element. However, SERs provide a coercive element and render legitimacy research more elusive. Finally, because states are affected by their interactions with other states, the dominance and effectiveness of SERs will draw states toward greater assimilation, thus contributing to greater SER autonomy.

Some regimes are more likely to gravitate toward SER status. Trading regimes, for instance, are most likely to become self-enforcing because they control an effective retorsion: the denial of trade preferences. Coercion rests upon the ability of one nation to impose sanctions upon another. Although military sanctions are undesirable for obvious reasons, reputational or diplomatic sanctions may prove effective in some cases. Economic sanctions, too, have great potential to induce compliance. Imposing economic sanctions, however, is feasible only when the imposing nation controls something of value such as foreign aid or a preferential tariff rate with a market for goods. Trading regimes control preferential tariff rates and the movement of goods in general. Other regimes cannot use tariff or trade preferences to coerce behavior without violating trade regime norms. Thus, trading regimes can easily become self-enforcing while, conversely, other regimes will have difficulty in doing so because they do not possess easy access to economic sanctions.

Andrea Kupfer Schneider has charted the various enforcement levels and methods in trade dispute settlement mechanisms. She notes that trading regimes recently evolved into a system of dispute settlement more akin to a domestic court in that they are able to “remedy harm and [are] also narrowly tailored to punish each particular violation.” “Negotiation Regimes,” which rely upon consultation and diplomacy, are the least effective compliance regimes within the trading system as they rely upon first-order compliance. “Investment Arbitration” regimes rely

149. See Franck, Legitimacy in the International System, supra note 97, at 710.
150. See infra Part IV. The social institutionalist agenda also supports this hypothesis. See Finnemore, Sociology’s Institutionalism, supra note 75, at 338–339 (positing that empirical expectations stemming from sociological institutionalism “would be for continuing and even increasing adherence to multilateralism—even when it runs contrary to expressed national interests—because it embodies some set of values central to the larger world culture”).
151. See supra note 97 and accompanying text.
152. GATT, supra note 4, art. XXI(c). This is not to say that economic sanctions are not used to promote non-trade values; rather GATT/WTO allows for an exception to its rules for members to comply with United Nations obligations. Id.
154. See id. at 703–04, 713–14 (evaluating judicialization of negotiation model).
upon the enforcement of domestic courts. The "International Adjudication" regime provides "supremacy under international law, transparency of decisions, and, increasingly, a wider range of remedies . . . and enforcement that is limited to international law." The "Supranational Court" regime gives the greatest level of enforcement and access by "providing direct effect, standing for private actors, supremacy, transparency, and enforcement with strong remedies."

The WTO exemplifies an SER and would be characterized as an "International Adjudication" regime under Schneider's model. Under the WTO's Dispute Settlement Understanding ("DSU"), nations agree to submit disputes to a WTO panel should consultations between the parties fail. The panel applies regime rules and an Appellate Body ("AB") reviews legal appeals from the panel's decision. The losing party has a limited period of time to comply with the decision. Although the DSU explicitly states that compliance is preferred, the losing party's failure to comply may afford the winning party the ability to institute sanctions by means of retaliatory tariffs. Thus, the system possesses "automaticity," not only because the decision is recognized as international law, but

155. See id. at 703–04, 718.
156. Id.
157. Id. at 704.
158. Id. at 719. Other trading regimes have similar dispute systems. Chapter 20 of the North American Free Trade Agreement (NAFTA), for example, provides for consultation, commission intervention and arbitration before a five-member panel. NAFTA, supra note 15, at arts. 2003, 2006–2007. The arbitration report is due within a reasonable time, usually 120 days of the request for arbitration and there is no review mechanism for the report. NAFTA, supra note 15, at art. 2017. The arbitration report is not "binding" in the sense that the losing party has to comply; however, the process is self-enforcing to the extent that if the losing party does not come into compliance the winning side may take retaliatory action to obtain compensation. NAFTA, supra note 15, at art. 2019. NAFTA parties have the option of referring a dispute to the WTO dispute settlement mechanism. Environmental, certain health and safety, and product standard disputes may not be referred to the WTO if the responding party objects. See generally R. FOLSOM & W.D. FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS ch. 5 (1996).
159. DSU, supra note 9.
160. Id. art. 21(3).
161. Id. art. 21(1). Commentators disagree on whether compliance with WTO decisions is required or merely preferred. See John H. Jackson, The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligations, 91 AM. J. INT'L L. 60, 60–63 (1997) [hereinafter Jackson, Understanding-Misunderstandings] (arguing that the DSU report represents international law, not a choice to comply or pay damages). But see Judith Hipler Bello, The WTO Dispute Settlement Understanding: Less Is More, 90 AM. J. INT'L L. 416 (1996) [hereinafter Bello] (arguing that DSU reports are not binding and rely upon voluntary compliance). In other words, some argue that a nation has the option of complying or simply paying the cost of non-compliance. The view that the WTO only requires that a nation pay the cost of non-compliance would seem to preserve the normative feedback loop and prevent the creation of a "democratic deficit."
162. DSU, supra note 9, art. 22.
also the availability of sanctions or retaliation without resort to the normative feedback loop promotes compliance.\textsuperscript{63}

The WTO also retains traditional compliance factors to aid enforcement. Applying the legitimacy model of compliance, for example, the WTO promotes compliance through the use of determinate, clear rules.\textsuperscript{164} Clear rules encourage "gratification deferral"\textsuperscript{65} whereby members obey a regime rule notwithstanding harm to their short-term interests because, as a useful rule, it will likely benefit their long-term interests.\textsuperscript{166} Other traditional compliance factors also exist within the WTO.\textsuperscript{167}

An SER possesses the ability to promote its values more often than a non-SER. The WTO, for example, promotes trade values through its dispute settlement mechanism. Richard Shell provides a comprehensive explanation of the potential legal models of the WTO regime, explaining their normative foundations and viewing the WTO normative implications through three different models: the "regime management model," the "efficient market model," and the "trade stakeholders model."\textsuperscript{168} As for the regime management model:

Legalists favoring the Regime Management Model see the WTO legal system as a means to generate legitimate normative standards around which states will bargain with one another to gain wealth through more open trade while retaining the control they need to achieve the domestic political objectives that call for limiting trade.\textsuperscript{169}

Proponents of the efficient market model seek to minimize government interference and give businesses direct access to international trade

\textsuperscript{163} See Jackson, Understanding-Misunderstandings, supra note 161, at 63; see also Jackson, The Great 1994 Sovereignty Debate, supra note 84, at 175–77 (noting the DSU's "automaticity" as one of the triggers in the sovereignty debate). Under the prior GATT regime, sanctions could be authorized, but rarely were. See Bhala, supra note 82, at 200.

\textsuperscript{164} Franck, Legitimacy in the International System, supra note 97, at 713. As Franck points out, clarity should not be confused with simplicity. Id. at 721.

\textsuperscript{165} Id. at 716.

\textsuperscript{166} Id. (explaining that a rule's legitimacy increases with its clarity because clear rules encourage actors to defer the short term gains of non-compliance in favor of long term gains resulting from clear obligations). Consider also Franck's discussion of the GATT's coherence through the Adoption of a Generalized System of Preferences to give integrity to the preferential treatment afforded to lesser-developed nations, in view of the GATT national treatment rule. Id. at 750.

\textsuperscript{167} See, e.g., Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement Annex 3, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31 (1994). The WTO promotes the compliance factor of discourse not only by means of the panel proceedings (which now occur in a timely fashion), but also through the Trade Policy Review Mechanism ("TPRM") and various committees. Id.

\textsuperscript{168} See Shell, supra note 31, at 858–94, 907–27.

\textsuperscript{169} Id. at 835–38.
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But as Shell points out, either model of international trade seeks to promote trade values such as economic efficiency and comparative advantage over different values from other regimes. Shell proposes a trade stakeholders model, which would incorporate fairness and justice values. Notably, the underlying values of an SER are reinforced to a greater extent than a non-SER because of the SER's efficacy. Thus, if the WTO truly operates on an efficiency model, the presence of efficiency values in international discourse increases as the WTO achieves greater authority.

Criticism exists for the characterization of the WTO as a "self-enforcing" regime. Arguably, the WTO is not self-enforcing; rather, it merely allows for economic retaliation automatically once a complaint has been brought to it and resolved by it. As some commentators note, these regimes are "legalized" such that they contain rules and dispute settlement mechanisms, may issue binding decisions and are capable of imposing a cost for non-compliance. However, the regime has no army, no jail, and no means to compel enforcement. Although the WTO cannot "make" Country X rescind its protection of the Tibetan Antelope, the WTO can penalize it for the harm that its protection causes Country Y.

This model emphasizes broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade. Like the Efficient Market Model, the Trade Stakeholders Model is based on liberalism's insight that individuals, not states, should be the primary subjects of international law. Unlike the Efficient Market Model, the Trade Stakeholders Model sees trade legalism as an opportunity for domestic and transnational interest groups of all kinds, non-business as well as business, to participate with nations in the activity of constructing common economic and social norms that will make global trade a sustainable aspect of a larger transnational society.

Even the trade stakeholders model, however, will promote trade values and norms at the outset.

170. See id. at 837.
171. See id.
172. Id.
173. See Bello, supra note 161, at 418 (noting that in a dispute settlement ruling against a member of the WTO, it "may choose to comply, to compensate, or to stonewall and suffer retaliation against its exports").
174. See, e.g. Slaughter, Tulumello & Wood, New Generation, supra note 19, at 370 ("Further, much institutionalized cooperation has taken an increasingly 'legalized,' 'judicialized' or constitutional form. . . . [I]nternational regimes, from the World Trade Organization (WTO) to the North American Free Trade Agreement (NAFTA), to the World Bank, depend increasingly on legal dispute mechanisms."). Id.
175. Bello, supra note 161, at 417. "When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement." Id. "The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas." Id. See also Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 54 INT'L Org. 457, 466–67 (2000)(hereinafter Keohane, Moravcsik & Slaughter).
Arguably, Country X retains the power to violate the WTO rules and protect the Tibetan Antelope. The WTO, however, quantifies and collects a cost of non-compliance like a traffic summons "enforces" traffic laws. Although a driver may choose to disregard the law, a cost is nonetheless imposed and collected. Thus, the additional costs promote a higher level of compliance and move the regime toward self-enforcement without armies or jails.

NAFTA Chapter 11 disputes provide an example of the effect of the cost of non-compliance with SERs. Although NAFTA incorporates environmental values, parts of the treaty threaten them. Under NAFTA's Chapter 11, investors of member nations are entitled to both protection of their property and compensation for any expropriation, which may constitute a "regulatory taking." A foreign investor may claim the existence of an expropriation and seek arbitration under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) Additional Facility, or the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL). If a party refuses to comply with an award, a Chapter 20 dispute settlement proceeding may govern the matter upon referral.

NAFTA's Chapter 11 provisions gave rise to a case of regime competition in the 1998 dispute involving S.D. Myers, Inc. and S.D. Myers (Canada), Inc. The companies claimed that Canada expropriated their property by banning exports of polychlorinated biphenyl (PCB) wastes from Canada. S.D. Myers (Canada), Inc. could no longer ship its waste products to its related treatment facility in Ohio as it had done in the past. Canada banned the exports in order to comply with its obligations under both the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, and a bilateral agreement with the United States concerning Hazardous Waste. S.D. Meyers attempted to demonstrate unfair treatment and that, as a result, it was entitled to compensation for the Chapter 11 expropriation. The panel

176. See infra note 236 and accompanying text.
179. NAFTA, supra note 15, art. 1136(5).
180. See David A. Gantz, Reconciling Environmental Protection and Investor Rights under Chapter 11 of NAFTA, 31 ENVT'L. L. REP. (Envtl. L. Inst.) 10646 (2001) (discussing this case as well as other Chapter 11 disputes).
181. Id.
agreed, illustrating the strength of an SER despite the presence of a widely recognized and accepted environmental treaty.

The claim that some regimes self-enforce is arguably untrue because nations are free to leave SERs, and therefore no coercive power exists. Although the choice of whether to comply notwithstanding automatic sanctions remains with the state actor, the sanctions directly modify that actor’s rational analysis.\(^8\) And while nations may withdraw from an SER in order to avoid the cost of non-compliance, withdrawal from certain types of regimes may impose other significant costs. If, for example, the WTO operates on a game theory model, the consequences of exit are prevalent.\(^8\)(3) The evolution of the regime and its increased efficacy raises the costs of defection for any one player. Where that cost becomes prohibitive, the regime is undeniably self-enforcing.

SERs may also progress to the point where they represent public interests. Commentators argue that institutions can reflect public values.\(^8\) Kenneth Abbott argues that GATT, for example, during the Uruguay rounds leading to the formation of the WTO, possessed several characteristics of a public interest community, one of which was an independent vision for the common good.\(^8\) Public interest institutions

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182. One can see this behavior modification in the emergence of seat belt legislation. The National Highway Traffic and Safety Administration reports that:

while the first seat belts were installed . . . in the 1950s, seat belt use was . . . only 10 to 15 percent nationwide. . . . From 1984 through 1987, belt use increased from 14 percent to 42 percent, as a result of the passage of seat belt use laws in 31 States.

From 1990 through 1992, belt use increased from 49 percent to 62 percent, as a result of a national effort of highly visible enforcement and public education.


183. See generally ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY 98–105 (1970) (discussing exit, loyalty and public goods); Aceves, supra note 33, at 247 (explaining that nations are not likely to risk losing their investment in a regime). See also Abbott & Snidal, supra note 16, at 437 (explaining how enmeshment makes it difficult for nations to withdraw from regimes). Indeed, sometimes there exists no real choice whether to enter the regime, either. As John Jackson pointed out, while countries like the United States and the E.U. engaged in debate over whether to join the WTO for months, smaller countries like Costa Rica debated less than an hour. Jackson, The Great 1994 Sovereignty Debate, supra note 84, at 167 (“To stay out of the new trade system could put whole economies in jeopardy, give up ‘rule based’ leverage that the new procedures might afford small nations, and prevent participation in the development of new rules, as well as the elaboration and interpretation of the extensive U.R. [Uruguay Round] texts.”).


185. Kenneth W. Abbott, GATT as a Public Institution: The Uruguay Round and Beyond, 18 BROOK. J. INT’L L. 31, 33 (1992) (arguing “that GATT is, or is becoming, a public institu-
move beyond the private interests of the individual members and generate norms that promote the good of the institutions, in addition to norms that resolve disputes among the parties.

Thus, SERs discount the normative feedback loop and elevate themselves as a new form of international authority. SERs may enforce their values and norms with limited direct input from state actors and their constituencies. The existence of SERs creates a chilling effect on non-compliance with regime rules and values. Admittedly, the normative feedback loop still exists, but SERs increase the cost of using it in a manner inconsistent with SER values. Cost, however, is relevant and, at some point, cost may become prohibitive. At that point, it seems irrelevant whether one labels a regime “self-enforcing” or not.

B. The Dilution of the Normative Feedback Loop

The devaluation of the normative feedback loop reorders regime hierarchies with SERs at the top, and creates collateral effects on regime functioning. This reordering results from four factors: (1) SERs are often capable of enforcing norms and benefiting from repeated compliance; (2) an increased number of disputes brought to SERs provide more enforcement opportunities and strengthens their legitimacy; (3) SERs are a forum for inter-regime conflicts; and (4) continued iteration of the SERs’ norms leads to greater domestic internalization. There will also be two collateral effects: (1) SERs will increasingly become capture targets, and (2) support for the values that arise from a rule-based system.

First, SERs will be able to enforce their own values. SERs automatically impose a cost upon non-compliance with limited reliance upon individual regime members. In the WTO Shrimp-Turtle dispute, for example, the United States violated GATT Article XI’s prohibition on import bans. Although the United States legitimately sought to protect turtles by differentiating between shrimp caught with Turtle Excluder
Devices ("TEDs") and those caught without TEDs, the WTO found that the United States violated the trading regime rules. Although the United States subsequently brought its legislation into compliance, its failure to do so would have allowed affected nations to seek compensation from the United States for the cost of the ban.\footnote{See DSU, supra note 9, art. 22. Compensation could have exceeded $200 million dollars per year. Press Release, Sea Turtles Restoration Project, Environmentalists Blast International Trade Panel Decision Which Places Sea Turtles and U.S. Endangered Species Act At Risk (Mar. 19, 1998) (citing the National Fisheries Institute), at http://www.seaturtles.org/press_release2.cfm?pressID=20. National Fisheries Institute, a fisheries industry trade organization, estimated the cost of the ban at $200 to 500 million annually. Id.; see also Legal Briefs, MARINE TURTLE NEWSL. 76 (Sea Turtles Restoration Project), 1997, at 25–30, at http://www.seaturtle.org/mtn/archives/mtn76/mtn76p25.shtml.}

The dispute between Country X and Country Y presents a similar dilemma. Although Country X has obligations under both WTO and CITES, the WTO allows Country Y to retaliate against Country X for the breach of WTO obligations.\footnote{See DSU, supra note 9, art. 22. The WTO envisions that Country X will withdraw its offending legislation. If it does not withdraw it, the parties will attempt to agree upon compensation. If they cannot agree, Country Y will be able to retaliate. Id.} If Country X fails to bring its laws into conformity with its WTO obligations, Country Y can seek compensation or retaliation.\footnote{See id.} The WTO supersedes CITES because of Country Y's ability to utilize WTO sanctions automatically to protect its trading rights.

Although somewhat unpersuasive in the SER context, questions concerning the effectiveness of sanctions to enforce norms exist.\footnote{See Chayes & Chayes, supra note 109, at 2–3, 31–33. Chayes & Chayes explain the problems with sanctions, such as slow results that may not be "particularly conducive to changing behavior." Id. at 2. They further note the high amount of political effort needed to sustain such efforts. Id. Also, they observe, "efforts to impose sanctions will be intermittent and ad hoc" because of the high political costs. Id. As a result, "sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used." Id. at 32–33.} Sanctions are often ineffective because of a weak political will to impose them and a lack of uniform application. Both of these problems, however, arise from the operation of the normative feedback loop. SERs are immune from such deficiencies. Indeed, SERs are desirable because they provide more stabilized, predictable, and legalized forums than non-SERs. The Shrimp-Turtle dispute stands in stark contrast to the Tuna-Dolphin dispute under GATT,\footnote{See infra notes 213–15 and accompanying text.} where the United States blocked the panel decisions holding it had violated its GATT obligations.\footnote{See infra notes 255–57 and accompanying text (noting nations could nevertheless choose non-compliance, as the E.U. did in the Beef Hormone Dispute). The cost of non-compliance will, however, be substantial. Non-compliance in the face of such enforcement may serve to strengthen the outer regime values in the long run. One could argue that the...}
the United States would have complied with the Shrimp-Turtle decision even without the threat of retaliation. United States past practice, however, specifically in the Tuna-Dolphin controversy, suggests otherwise.

Second, SERs will likely entertain more disputes than non-SERs. Under the GATT system (a non-SER), for example, actors who lacked the capacity to secure compliance with their trade rights may have forgone the option of pressing disputes before the regime. Instead, the nation might have chosen to negotiate a solution or simply not initiate a dispute. Under the WTO system, developed and developing nations take advantage of the dispute settlement mechanism. Increased participation appears to be a desirable advancement of SERs, but is not without collateral consequences.

Even the managerial model of compliance, which eschews sanctions, demonstrates how the increased number of disputes within SERs will promote compliance with regime values through discourse and the iterative process. SERs encourage a greater level of discourse by employing an accessible adjudicatory rule-based system.

Third, SERs will offer a forum for balancing multiple non-SER interests. SERs will not only be able to impose their rules without resort to the normative feedback loop, but also balance outer regime interests with their own. States may view SERs as an attractive forum. Actors may pursue the logic of consequences to seek the best result for their investment,

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195. See Sevilla, supra note 184, at 15 (noting the increase in the number of GATT complaints).


197. See supra notes 109–10 and accompanying text.

198. See Chayes & Chayes, supra note 109, at 25.
rather than logic of appropriateness, which seeks the most just or fair result.199

Fourth, greater SER discourse and enforcement will inevitably lead to a higher rate of norm internalization.200 The modified constructivist approach, consistent with the constructivist and transnational legal process schools, suggests that repeated interactions in the international arena lead to the domestic internalization of norms.201 Internalization alters the identities and interests of the state actors in a manner that increases investment in the SERs. Thus SERs will likely provide a high level of enforcement and compliance, while increasing discourse and thereby promoting greater norm internalization.

Collateral effects, although generally beyond the scope of this article, are noteworthy. First, if a regime is an SER, then the group that captures that SER will distort regime functioning. The logical result of the possibility that SERs will increase in dominance exponentially is that rent-seekers will realize the greatest opportunity for return on their investment in those regimes.202 Second, although a self-enforcing adjudicatory system accentuates the norms of that system, collateral norms are nonetheless promoted. Arguably, a rule-based system promotes fairness and equality for nations that lack the power from a realist perspective to enforce norms that inure to their benefit.203 The promotion by rule-based systems of predictability and stability as values multiplies in the presence of a self-enforcing regime.204 Finally, although SERs may independently impose costs upon non-compliance, the rules of the SERs limit those costs. Previously, unilateral retaliation was subject only to the capabilities and discretion of the sanction-imposing nation.205 The

199. See Stephen D. Krasner, Sovereignty: Organized Hypocrisy 5–6 (1999). Krasner discusses how the logics of consequences, which “see political actions and outcomes, including institutions, as the product of rational calculating behavior designed to maximize a given set of unexplained preferences,” dominate the logic of appropriateness. Id. Appropriateness “understand[s] political action as a product of rules, roles, and identities that stipulate appropriate behavior in given situations” in the international environment. Id.

200. See supra notes 71–72 and accompanying text.

201. See Koh, Bringing International Law Home, supra note 41, at 642–54 (explaining how norm internalization works).

202. See supra notes 71–72 and accompanying text.

203. See, e.g., Shell, supra note 31, at 848 (positing that developing countries favor the more legalistic system as it improves their ability to negotiate with wealthier nations).

204. See id. at 833-34 (recounting the debate between trade legalists and trade pragmatists). See also Young, supra note 196, at 396–406 (discussing the shift from a diplomacy approach to a rule based approach in the WTO).

development of a multilateral rule-based system is one of the many positive attributes of emerging SERs.  

As previously stated, the purpose of this article is not to decry the emergence of SERs; it is to articulate some of the collateral effects that SERs have on international and national value and identity formation. The emergence of SERs will change the contribution of the normative feedback loop as well as its resulting norm hierarchies. The ability of SERs to discount the normative feedback loop will result in their domination of other regimes. New hierarchies will emerge and non-SERs will resort to new means of reasserting and reconstructing their values within these hierarchies.

C. Normative Feedback Loop Remnants

Although their influence may fade, the norms and values of non-SERs will continue to exist and persuade primarily through their existence as separate regimes. Also, SERs may occasionally accommodate non-SER values through exceptions. And, although SERs may marginalize certain values, the prevalence and power of these regimes make it possible for them to reincorporate those values. Nevertheless, it remains clear that because SERs operate with set default rules, exceptions or incorporation attempts will take place in a biased setting.

Despite their lack of power to enforce norms, non-SERs hold a persuasive effect on the development of international law. The persuasive

206. Perhaps the dilution of the normative feedback loop is a good thing. Its existence permitted the ad hoc unilateralism of hegemonic states such as the United States to dominate world policy. Perhaps as we move beyond hegemony the normative feedback loop becomes less important. Subjecting regimes to the normative feedback loop undermined their stability and predictability. If regimes seek to promote stability and predictability, perhaps the dilution of the normative feedback loop is a welcomed event.

207. Cf. Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 16 (noting nations will bargain away certain preferences where community norms lack means to prevent it).

208. See, e.g., Shell, supra note 31, at 907–25 (recommending that a trade stakeholder model, based upon notions of civic republicanism, should be adopted to allow for more diverse participation within the trade regime to account for non-trade values). Shell attributes his adoption of civic republicanism to Mark Seidenfeld. See id. at 913–14 discussing Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1512 (1992).

209. See Koh, Transnational Legal Process, supra note 98, at 194 (arguing “transnational legal process” enforces international law). Harold Koh explained compliance in the absence of strict enforcement:

Just because the 55 mph speed limit is not strictly enforced does not mean that that law lacks all power. When the speed limit is 55, people tend to drive 65, not 85. The law may be underenforced, it may be imperfectly enforced, but it is enforced, not by a simple domestic process of legislation, adjudication, and executive action, but by a process of complex enforcement that transpires in a variety of public and pri-
effect that non-SERs retain through the traditional compliance factors may, however, diminish when a nation fails to comply with a non-SER norm in order to avoid SER sanctions or enforcement. Arguably, Country X damages its reputation less by failing to comply with its CITES obligations in the presence of threatened WTO retaliation, rather than in the absence of a separate enforcement mechanism. Whether the strengthening of SER values diminishes the pressure to comply with non-SER values remains questionable. The strength of the WTO's compliance pull relative to the compliance pull of CITES may essentially make the latter seem less compelling. Alternatively, perhaps the strength of SERs may engender support for international institutions in general, thus strengthening the compliance pull of non-SERs. Although these questions await empirical testing, logic suggests that SER compliance threatens to overshadow traditional compliance factors that support non-SERs.

The NAFTA Chapter 11 dispute involving S.D. Myers, Inc. and Canada's attempt to comply with the Basel Convention illustrates compliance problems non-SERs face in an SER world. Although, as a widely recognized environmental convention explicitly mentioned by NAFTA, the Basel Convention has significant compliance pull, Canada faced significant economic consequences for its Chapter 11 violation. Although a rational proposition, only speculation provides an answer to the question of whether the S.D. Myers dispute will have a chilling effect on Canada's future environmental agenda. The allowance of exceptions within SERs represents one possible way to strengthen the normative feedback loop. Exceptions recognize that, under specific circumstances, SER values may appropriately bow to the values of another regime. The exceptions found in Article XX of GATT/WTO should not be confused with affirmative assertions of non-trade values. For example, although Article XX contains an exception for prison labor (countries may restrict the importation of goods made with prison labor), the GATT contains no

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vate fora, under a variety of domestic and international laws, triggered by a variety of governmental and nongovernmental actors.

Id.

210. See NAFTA, supra note 15, art. 104.

211. See GATT, supra note 4, art. XX. GATT/WTO has also addressed environmental issues indirectly through the Application of Sanitary and Phytosanitary Measures (SPS) (relating to human, animal and plant health and safety in agriculture) and the Technical Barriers to Trade (TBT) (relating to technical standards and regulations). Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994); Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994).
affirmative ban on prison labor.\textsuperscript{212} Likewise, Article XX provides environmental exceptions, which may allow Country X to claim that its protection of the Tibetan Antelope is permitted, even if otherwise inconsistent with GATT/WTO. Country X, however, will face the burden of showing that its action promotes a valid environmental goal and represents the least restrictive measure available. “Exceptions”, therefore, cannot adequately take the place of the normative feedback loop.

Through the Article XX exceptions, environmental values have nevertheless gained recognition in the GATT/WTO regime. The documented evolution of the environmental values within the Tuna-Dolphin controversy\textsuperscript{213} indicates that the first Tuna-Dolphin panel rejected the assertion that the United States could protect dolphins outside its borders. According to one commentator, however, the second Tuna-Dolphin panel used a narrower ground upon which to base its decision:

The second panel’s shift to a narrower ground of decision that held out a theoretical possibility of cross-border environmental regulation, even as it struck down the embargo provisions of the [Marine Mammal Protection Act] MMPA, served to enhance overall regime stability by asking for less political commitment from its regime members as the price of regime membership.\textsuperscript{214}

The above discussion demonstrates at least an attempt by the GATT to accommodate non-trade values.\textsuperscript{215} Arguably, the WTO AB’s recent Asbestos Report\textsuperscript{216} signals a greater commitment to non-trade values by way of Article XX exceptions.\textsuperscript{217} The Asbestos case represents the first time a panel, and subsequently the AB, permitted a ban on imported

\textsuperscript{212} See GATT, supra note 4, art. XX. Indeed, some experts have suggested the trading regime is not the place to enforce non-trade values. See Richard H. Steinberg, Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development, 91 AM. J. INT’L L. 231, 239 n.45 (1997) [hereinafter Steinberg] (citing confidential interview with member of WTO Secretariat).

\textsuperscript{213} See generally Shell, supra note 31, at 872–77 (discussing Tuna-Dolphin dispute).

\textsuperscript{214} Id. at 877.

\textsuperscript{215} But see Cameron and Gray, supra note 132, at 265 (discussing relationship between Multilateral Environmental Agreements (MEAs) and GATT in the Tuna-Dolphin dispute, where the Panel held that MEA not concluded by the parties was irrelevant for GATT interpretation).


goods pursuant to Article XX(b). In the Asbestos Dispute, the AB ruled that a French decree prohibiting the importation of white asbestos from Canada because of health concerns was "necessary to protect human . . . life or health" under Article XX(b). The AB further found that the decree did not violate "national treatment" because the Canadian chrysotile asbestos fibers and the asbestos-substitute products used in France were not "like products" under Article III:4. The AB determined that it was permissible to account for health risk factors when resolving whether two products were "like." In this case, the AB ruled that the health risk of asbestos is part of the inquiry because "carcinogenicity, or toxicity, constitutes . . . a defining aspect of the physical properties of chrysotile asbestos fibers." Arguably, the extreme nature of the Asbestos dispute eased the panel's and AB's decisions to bow to non-trade values. Nevertheless, the AB could have reached the same result without the like product analysis. Because the AB could simply have relied on the XX(b) exception, the WTO arguably permitted health values to trump trade values.

NAFTA includes several provisions that operate as exceptions to its trade-based rules. The agreement includes language to conditionally protect strict environmental health and safety standards to avoid viewing them as trade barriers inconsistent with NAFTA. NAFTA places the burden of proof on the party challenging an environmental standard as inconsistent with the treaty. In the presence of inconsistency, NAFTA specifically bows to the values articulated in the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their

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218. See Julie Paltrowitz, Note, A "Greening" of The World Trade Organization? A Case Comment on The Asbestos Report, 26 BROOK. J. INT'L L. 1789 (2001) [hereinafter Paltrowitz] (offering complete history of attempts to use Article XX(b)). Other attempts to use Article XX(b) of the GATT, though unsuccessful, include several disputes. See Shrimp-Turtle Report, supra note 131; Shrimp-Turtle AB, supra note 132; Tuna-Dolphin I, supra note 81; Tuna-Dolphin II, supra note 81. See also Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1990).

219. Asbestos AB, supra note 216, at IV ¶ 58.
220. Id. at VI(D) ¶¶ 125, 131, 148.
221. Id. at VI(D) ¶¶ 113–114.
222. Id. at VI(D) ¶ 114 (emphasis in original).
223. See Paltrowitz, supra note 218, at 1830–31 (citing the uncontested dangers of Asbestos).
224. See Asbestos Report, supra note 216. The Panel Report found in favor of the French decree while finding that the products were "like products." Id. The AB Report found that the toxic nature of the asbestos prevented it from being considered a "like product." See Asbestos AB, supra note 216.
225. See NAFTA, supra note 15.
226. See id. arts. 712, 904.
227. See id. arts. 723(6), 914(4).
Disposal, and CITES. Despite its specific inclusion, the Basel Convention did not appear to trump S.D. Myers Chapter 11 rights discussed above.

"Exceptions" within an SER remain an unattractive means for promoting non-SER values. The amount of value integration can only be incremental. Moreover, assuming norm creation is a balancing exercise, the balancing mechanism undeniably influences the balancing exercise. The balancing forum creates default rules to which it is predisposed. The availability and attractiveness of the forum will simultaneously determine the likelihood of using the forum, and the recurrence of its default rules. Exceptions are indeed an unattractive mechanism because the regime will influence the balancing of interest so as to favor SER values. The number of disputes heard in any regime increases as the regime becomes self-enforcing. The number of disputes analyzing these exceptions will therefore likely increase and the iterative process will further affect the strength of non-SER values.

In recognition of SER strength, some call for the inclusion of other regime values within the SERs through "side agreements." SERs tempt parties to include non-regime agreements for a variety of reasons. First, "[t]he clustering of numerous related issues under a single regime . . . facilitates side payments: 'more potential quids are available for the quo.'" Second, the strength of SERs' compliance mechanisms make them attractive forums for litigating disputes. Finally, proponents of non-SER values hope to offset the strength of an SER by obtaining some leverage within the SER, however peripheral.

228. See id. art. 104.
229. See supra notes 180–81 and accompanying text.
230. See Shell, supra note 31, at 910 (suggesting that the WTO can be used "as a base on which to build a new, more inclusive institution . . . [whereby] those seeking progress on social and environmental laws may seek incremental changes within the WTO structure to broaden the base of participation and enrich the set of free trade and political norms now in ascendance").
231. See generally Steinberg, supra note 212, at 240 (explaining that the WTO dispute settlement process adjudicates trade-environment disputes to ascertain whether environmental laws are trade friendly, not whether they are from an environmental standpoint).
232. See supra notes 195–96 and accompanying text.
NAFTA provides for a self-enforcing dispute settlement regime while simultaneously recognizing values outside the regime by providing for two side accords: the North American Agreement on Labor Coopera-

tion (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). Indeed, the creation of NAFTA side agreements was a direct result of the normative feedback loop. These accords work through cooperative initiatives and consultation between the three NAFTA parties to improve environment and labor conditions in North America, and to mediate disputes that may arise because of implementing NAFTA. The side accords, however, lack NAFTA’s enforcement strength.

The NAAEC’s objectives include “avoiding the creation of trade distortions or new trade barriers, enhancing compliance with, and enforcement of, environmental laws and regulations, and fostering environmental protection and pollution prevention.” It created the Commission for Environmental Cooperation (CEC), comprised of a Council, a Joint Advisory Committee, and an independent Secretariat, to increase environmental cooperation among the parties by creating a forum to discuss environmental issues. The side agreement also contains a dispute enforcement mechanism for individuals and governments to address a party’s failure to enforce environmental laws.

The NAALC’s objectives include “promoting 11 basic Labor Principles, promoting international cooperation in the labor arena, improving working conditions and living standards, and ensuring the effective enforcement and transparent administration of labor laws.” It created the Commission for Labor Cooperation (CLC), which includes a Council of Ministers and an international Secretariat, to further its goals and, like the NAAEC, provides a dispute mechanism to settle cases where one party alleges that another party is not enforcing its labor laws.

237. See generally McFayden, supra note 233 (discussing labor and environmental concerns raised during the NAFTA negotiations).
239. NAAEC, supra note 236, arts. 8, 10(1)(a).
240. Id. arts. 22–36.
242. NAALC, supra note 235, arts. 8, 27–47.
Promoting effective enforcement of the labor laws primarily prevents the exploitation of workers as a means of gaining a comparative advantage or securing direct foreign investment. \(^{243}\) The NAALC also allows the use of trade sanctions against a party that fails to effectively enforce its labor laws. \(^{244}\)

Although both agreements provide dispute mechanisms to resolve environmental and labor issues, a long process impedes the imposition of fines or sanctions. \(^{245}\) Under either agreement, the amount of tariff retaliation cannot exceed the benefit conferred by the preferential NAFTA tariff rates. In addition, the commissions established by the agreements cannot make new laws nor override existing laws. \(^{246}\) Rather, they can only monitor the laws passed by the parties, and a commission mandate may be rendered meaningless through a lack of specificity. \(^{247}\) Both of these accords are nevertheless helpful because they provide a forum for consultations regarding labor and the environment, and an opportunity to collect information, consult, and coordinate efforts. \(^{248}\)

The emergence of SERs changes the functioning of the normative feedback loop under a modified constructivist framework. SERs dilute the effectiveness of the normative feedback loop. Although remnants of the normative feedback loop remain, a vacuum now replaces the role constituency preferences played in influencing state actions and identities.

\(^{243}\) See BHALA, supra note 82, at 1570–71 (addressing benefits as well as concerns about NAALC).

\(^{244}\) NAALC, supra note 235, art. 3(g).

\(^{245}\) NAAEC, supra note 236, art. 34; NAALC, supra note 235, art. 39.

\(^{246}\) NAAEC, supra note 236, art. 37; NAALC, supra note 235, art. 42.

\(^{247}\) Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, The Concept of Legalization, 54 Int'l Org 401, 414 (2000) (noting the NAALC's standard of promoting labor rights grants a great deal of discretion to the affected actors such that it is difficult to meaningfully assess compliance). This provision stands in stark contrast to the directives within NAFTA to prevent the expropriation of investor property. A proposed free trade agreement between the United States and Jordan is currently being criticized in the United States Congress, because it contains language which would allow for international dispute resolution of claims that either party does not enforce its labor or environmental standards. See Rossella Brevetti, Gramm Vows to Block Jordan FTA Unless Sovereignty Concerns Addressed, 18 Int'l Trade Rep. (BNA) 1123, 1159 (July 19, 2001) (noting Senator Phil Gramm called for an amendment to the Jordan FTA which would prohibit any tribunal from interfering with United States law).

\(^{248}\) See NAAEC, supra note 236, arts. 13–14; NAALC, supra note 235, art. 21. See also, Steinberg, supra note 212, at 249–51 (discussing successes of NAFTA's environmental efforts); Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 26 (noting NAAEC provides normative and institutional means to address environmental problems). Nevertheless, the NAAEC did not have any relevance in the S.D. Myers dispute, which pitted investor rights against environmental regulation. See supra notes 180–81 and accompanying text.
IV. THE VALUE VACUUM

The modified constructivist theory demonstrates how SERs create a value vacuum by discounting the normative feedback loop's role as arbiter of inter-regime conflicts. Although weakening the normative feedback loop may strengthen regime stability, it also restricts the ability of national values to enter into the international arena and influence norm/identity formation. From an institutionalist perspective, SERs will likely dominate non-SERs. SERs will become greater capture targets only to skew the formation of norms and values within SERs. The mix of values for identity construction and subsequent norm internalization will tilt toward SER values. The pieces of the value vacuum culminate once the skewed norm internalization process affects what remains of the normative feedback loop. Domestic values will therefore mirror the internationally dominating values, namely the SERs' values. Possible response mechanisms may compensate for displaced constituency preferences. These mechanisms, however, will fall short of filling the normative void created by SERs.

A. Modified Constructivist Implications of the Dilution of the Normative Feedback Loop

Upon utilizing the principles of modified constructivism, some deleterious effects of emerging SERs arise. The constant assertion of national preferences by constituents for whom the state acts as an agent in international relations will diminish following the dilution of the normative feedback loop. The social construction of state identities through interaction with other states in the international arena will skew due to dominant SERs. As a result, a value vacuum arises whereby norms, preferences, and values previously inserted into decision making and identity formation are not included in the process to the extent they once were included. Assuming that Country X's constituency prefers to protect the Tibetan Antelope despite the competing norm of non-discriminatory trade treatment, the potential for WTO imposed sanctions for non-compliance may undermine Country X's essential desire. The WTO's dominant institutional position will ultimately increase and, over time, the WTO's dominant position will change the identities and preferences of both Country X and Country Y.

249. See supra notes 200–01 and accompanying text.
An SER’s increased efficiency leads to repetitious enforcement of SER values, which has instrumentalist and normative consequences. Repetitive enforcement engenders greater SER legitimacy while depreciating the non-SER norms. Greater legitimacy promotes internalization of preferred (SER) norms within nations. States will thereafter adapt their interest attainment strategies. The repetitious enforcement of SER values transforms state identities, which offers states greater reason, in addition to rationalist interests, to comply with SER norms.

The dilution of the normative feedback loop and the resulting dominance of SER values may debilitate states’ representations of constituency interests in the international arena. Once a state enters an SER and agrees to the operating rules or principles of the SER, then the state’s ability to consider the normative feedback loop decreases substantially. The process could excise the normative feedback loop altogether. SER rules may dictate an outcome that is not subject to alteration by reference to constituency preferences. Although states can reconsider constituency interests by deciding to exit an SER, game theory indicates that the nature of the SER and its ability to enforce its own rules make departure expensive. The SER’s dispute settlement mechanism specifically renders it more efficacious at providing benefits for repeat players; players who exit the SER face a severe disadvantage.

States may arguably reinforce constituency preferences by challenging SER values despite great costs. In the E.U. Beef Hormone Dispute, for example, the E.U. violated its WTO obligations by banning beef grown with certain hormones. Despite being subject to millions of dollars in retaliatory tariffs, the E.U. clung to its ban. Possibly, the E.U. did so because its constituencies prefer public health values, despite substantial costs and traditional compliance factors.

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250. See Keohane, Two Optics, supra note 72, at 489–94 (explaining instrumentalist and normative optics in which states use international law as an instrument to (i) attain interests and (ii) express, develop and promote norms).

251. See supra notes 112–15 and accompanying text.

252. The discounting of the normative feedback loop in conflicting situations may even affect its efficacy in non-conflictual situations. As value infiltration through domestic sources becomes difficult, new sources like national and international NGOs arguably become more relevant.

253. See supra notes 182–83 and accompanying text.

254. Perhaps no liberal agency deficit exists because a state’s decision to enter an SER reflects constituency preferences. Because SERs usually evolve, however, membership in an SER may not reflect a constituency preference to forever relinquish all other values in favor of SER values.


256. See Julian Nundy, French Stage Big Mac Attack Farmers Protest Start of Tariffs, USA TODAY, July 29, 1999, at O3B; Helene Cooper, U.S. Seeks $200 Million Sanction in EU
dispute represents the normative feedback loop still at work. The existence of the SER (the WTO) arguably served to strengthen non-trade values. The E.U. Beef Hormone dispute, alternatively, may exemplify a proper balance between SER and non-SER values. Nations receive the benefit of a rule-based and efficient trade regime where, in a unique or extreme situation, democratic preferences may trump regime rules. It is not clear, however, how many similar battles the WTO could endure before imploding. If every dispute pushed the regime’s limits, the regime might disintegrate.\textsuperscript{257} Nor is it clear that smaller countries could afford to mount such a challenge.

Diplomatic instrumentalities also experience the cost of the normative feedback loop deficit. The ability of a nation to threaten action in negotiations with other states lessens when an SER prohibits that threat. For example, when the United States pressured Japan, South Korea and Taiwan to stop high sea drift net fishing in the South Pacific, the countries complied with international standards in part due to United States political pressure and the threat of trade sanctions.\textsuperscript{258} Where trade sanctions are effectively proscribed outside of the WTO, the threat of sanctions diminishes significantly. This result may be welcomed in some cases, but not others.

Another consequence of emerging SERs is that state values and preferences will favor SER values as constituency interests gradually shift to align with international preferences. This realignment occurs, in part, as a result of internalization. Because states internalize norms from the international arena,\textsuperscript{259} the dominant norms enforced on a regular basis

\textsuperscript{257} Arguably the threat SERs pose to sovereignty and to the model of embedded liberalism is so great that SERs may cause their own implosion. This event, however, is unlikely because investment in these regimes is so great that exit may become nearly impossible. The inability to exit SERs results from their evolution. Duncan Snidal explains that institutions start off not constraining the state, but subsequently impose constraints. See Duncan Snidal, \textit{Political Economy and International Institutions}, 16 INT’L REV. L. & ECON. 121, 127 (1996). As constraint increases over time, the cost of exit increases as well. Thus, a regime, which was not costly to exit, may evolve into one that is costly to exit.

\textsuperscript{258} Kingsbury, \textit{The Tuna-Dolphin Controversy}, supra note 47, at 21–22.

\textsuperscript{259} See Koh, \textit{Bringing International Law Home}, supra note 41, at 626. Koh sees this internalization process as part of the key to understanding why nations obey international law. Id. Koh distinguished between three types of internalization:

Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm, and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into
become increasingly internalized. SER norms and values also reproduce efficiencies and greater returns for states investing themselves in those regimes. Regimes cause national value preferences to shift because individuals realign their investments to take advantage of the regime. Further, as states commit to enforcement of international norms they, in turn, become constrained by those norms. Although international goals may relate back to national interests, a greater investment by states into international legal order causes international legal order, and the preferred SER values, to emerge as a national interest.

SERs will move towards greater autonomy and authority as a result of their increased efficacy. Where effective dispute settlement mechanisms exist, states may arguably rely on them as alternatives to the political process. Moreover, institutions traditionally promote coopera-

the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.


260. See supra notes 71–72, 121 and accompanying text.

261. Shell, supra note 31, at 896 (noting that the efficient market model suggests that "nations are losing control over economic matters to global market forces").

This phenomenon appears to be most apparent at present in regional trade regimes such as the NAFTA and the EU. The governance structures of both the NAFTA and the EU demonstrate that within these regional trade spheres states must yield large areas of legal control to supranational tribunals and rules to accommodate the needs of transnational business. Systems such as the New York Convention and the ICSID demonstrate that these same economic forces are at work to achieve a similar result at the global level.

Id. at 896 n.321.

262. See Keohane, Two Optics, supra note 72, at 495–96.

An implication sometimes drawn from instrumentalist argument is that more demanding international rules are likely to be more vulnerable than rules requiring less extensive cooperation. . . . [Some] assume that states, being instrumentalists, will break rules when it is advantageous to do so. . . . They fail to consider the possibility that demanding rules . . . would alter participants' conceptions of their interests. . . . International institutions may affect states' formulations of their own interests. If interests become "endogenous" in this sense, institutions with demanding rules could be less, rather than more, vulnerable to reneging, as the increasing authority of the European Union would appear to suggest.

Id.

263. N.D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 8 (1996) (noting some theorists in rationalist school would concur that institutions may progress toward a type of world government).

264. An example is the GATT/WTO. Between 1948 and 1989 there were 207 complaints filed (229 if one counts the cases with multiple complainants) in the GATT. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT SYSTEM, 296 tbl. 11.14 (1993). The staggering number of complaints brought in the WTO (under its dispute settlement mechanism) within the past seven years dwarfs this number. See WTO, Overview of the State-of-Play of WTO Disputes, at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Aug. 8, 2001) (summarizing complaints, active cases, Appellate Body Reports, Panel Reports and settled or inactive cases).
tion through efficiencies and increased payoffs in the absence of a governmental structure. As SERs gain autonomy and authority, they evolve into quasi-governmental structures. Although the effect of such quasi-governmental structures on the traditional efficiency model (for both SERs and non-SERs) is uncertain, it seems logical that SER efficiency will increase.

Efficacy in one regime can impose costs in another. Seres operate to promote their values without pareto superiority. The trading regime, for example, imposes costs on non-trade regime values because when a trade regime value, such as non-discrimination, conflicts with a non-trade regime value, such as environmental protection, the trading regime can impose a tax for non-compliance with its values. This tax is therefore added to the standard costs of compliance with the environmental values to the detriment of the environmental regime.

Constituency preferences may be sacrificed when self-enforcing institutions increase efficiency. Arguably, a value vacuum may replace the mechanism that once incorporated constituency preferences. The vacuum is perhaps desirable in some cases. Indeed, state actors may join institutions to avoid balancing competing norms in the face of political pressure. Institutions allow politicians to avoid pressure from domestic constituencies. Benedict Kingsbury has suggested that nations may desire adverse institutional rulings to relieve them of domestic political pressure. Kingsbury gives the example of the Reagan administration’s use of a GATT panel ruling to deflect pressure to reenact a law to protect the United States printing industry. Perhaps the mechanisms that fill this vacuum are less subject to capture or political pressure. Or, these mechanisms may be subject to capture and pressure on a different, and/or broader, level particularly by businesses. Throughout the world, business and multinational firms “have begun to resemble states.”

265. See supra notes 126–34 and accompanying text.
266. The damaging effect that SERs may have on other regimes is compounded when SERs are not inclusive. For example, the WTO’s theoretical foundations sometimes exclude parties affected by trade. Shell, supra note 31, at 908 (citing Lawrence Susskind & Connie Ozawa, Negotiating More Effective International Environmental Agreements, in The International Politics of the Environment 142, 158–59 (Andrew Hurrell & Benedict Kingsbury eds., 1992)).
267. See, e.g., Abbott & Snidal, supra note 16, at 438 (noting that France and Canada experienced dilution of autonomous cultural policies as a result of NAFTA and WTO).
268. See Martin & Simmons, supra note 1, at 752 (explaining long-term benefits may be achieved where institutions set policy free from domestic political pressures).
270. Id.
271. See supra note 202 and accompanying text.
In the Bananas Dispute, business interests were the true interests at risk. Although the United States lodged a complaint against the E.U., the real parties in interest were Chiquita Brands International ("Chiquita") and its competitors. The United States does not produce bananas for export in any meaningful way. The only place bananas are grown in the United States is Hawaii where they are, for the most part, locally consumed. Chiquita, however, which employs no American production workers, invested heavily in Latin American banana production. It hoped the European market would stop favoring its former colonies like Jamaica, Dominica, St. Lucia, the Ivory Coast, and the Cameroons through a protectionist quota regime. Chiquita destabilized the banana market by flooding the market and driving prices down. When the E.U. tightened its quota system further, Chiquita sought the intervention of the United States government to challenge the E.U. system, which violated GATT/WTO rules. The cost of that intervention was reportedly over six million dollars paid to republicans, democrats, and Washington lobbyists by representatives or affiliates of Chiquita. The intervention worked; the United States pressed an all out war in the WTO, even threatening a Section 301 action for a product it does not export. Some European imports, including handbags, lithographs, and bath oil, were consequently subject to retaliatory tariffs that threatened to put United States importers of those products out of business. One industry analyst suggested that Chiquita did not want an open banana market at all. Chiquita wanted a larger quota. As a result, the WTO threatened $191 million worth of

Moravcsik & Slaughter, supra note 175, at 463–64 (explaining that although access to WTO is nominally controlled by states, in practice, industries are closely involved in the process).


274. See Mary Footer, Developing Country Practice in the Matter of WTO Dispute Settlement, 35 J. WORLD TRADE 55, 92 (2001) (noting one might conclude the bananas dispute “has little to do with developing countries per se and everything to do with the interests of large commercial operators”). See also Donald L. Bartlett and James B. Steele, How to Become a Top Banana, TIME MAGAZINE, Feb. 7, 2000 at 43 [hereinafter Bartlett & Steele].

275. Bartlett & Steele, supra note 274, at 45.

276. See id.

277. Id. at 56.

278. Id. at 52–56. See Rossella Brevetti, U.S. Lifts Retaliatory Duties on EU Imports in WTO Banana Case, 18 Int'l Trade Rep. (BNA) 1017, 1033 (July 5, 2001) [hereinafter Brevetti](noting tariffs have since been withdrawn and settlement has been reached).

sanctions against E.U. products, which eventually pressured the E.U. to adopt a new licensing system. The Chiquita story demonstrates how SERs change the rationalist formula used by nations to measure the benefits of compliance or non-compliance. SERs affect the price of behavior. Rationalist consequences, however, sometimes presuppose that state interests are exogenous and fixed. Assuming state interests are endogenous, as the modified constructivist model does, SERs may also affect identities and interests.

SERs affect state identities to a greater extent than non-SERs. Norms influence state behavior and state identities. Assuming norms are themselves persuasive, then preferred norms multiply their own persuasion. The SERs’ norms strengthen and grow, not only because it is costly to violate those norms, but also because the very (re)enforcement of those norms exponentially increases their value.

If a norm protects an endangered species, such as the Tibetan Antelope, that norm has some effect on state behavior, although it may not determine the outcome in a particular dispute. The normative feedback loop informs that effect of the norm. Assuming norms persuade in the presence of a normative feedback loop, two questions remain. First, does the norm have the same persuasive effect where there is a conflict with another norm or value? The answer would seem to be “no.” In such a case, one would assume that the normative feedback loop would resolve conflicts. When, for example, the WTO norm of non-discrimination challenges the norm to protect the Tibetan Antelope, each norm loses some persuasive value. That loss results from the normative feedback loop, which balances the norms of the two regimes in light of current constituency preferences.

Second, in the presence of conflict, does the norm have more persuasion in the absence of a normative feedback loop? The answer would seem to be “yes.” Discounting the normative feedback loop removes

280. See Brevetti, supra note 278, at 1033.
281. See supra notes 173–74 and accompanying text.
282. See Wendt, Collective Identity, supra note 22, at 384 (explaining rationalist “two-step” interests “[a]re formed outside the interaction context, and then the latter is treated as though it only affected behavior”). Wendt notes that some rationalists may see interests as exogenous although not necessarily constant. Id.
283. Cf id. at 389 (arguing changes from rising interdependence as well as emergence of a “common Other” will not only affect rationalist concerns but also identities/interests of states involved).
284. Cf. Keohane, Two Optics, supra note 72, at 494–501 (explaining both normative and instrumentalist optics are necessary to explain state functioning, and each optic connects to interests, reputations and international institutions). Keohane’s explanation of the dual optic, the instrumental and normative optic, demonstrates that norms (as well as interests) influence international actors. Id.
some competitive forces. Thus, SERs’ norms will be enforced more frequently than non-SER norms leading to: (i) greater (re)investment in SER norms, providing more economic incentives to comply with those norms; and, (ii) greater persuasion of those SER norms due to their constant repetition. Further, the dilution of the normative feedback loop results in: (i) less resistance to the persuasive effect of the already reinforced norm, and (ii) fewer conflicts with other norms and thus a greater persuasive reinforcement of SER values.  

Norm competition and norm hierarchies will make non-SERs less powerful within the modified constructivist framework. How debilitating the effect is on the non-SERs, however, depends upon a number of factors, including the strength, history, and context of the norms involved and their relationship to other norms. The debilitating effect of the multiplication of SER norms therefore depends upon the characteristics of the non-SER norms and the strength of the compliance factors discussed above.

Modified constructivism suggests that SER norms will be internalized domestically at a greater rate than non-SER norms. Internalization occurs for all international norms to some extent as a function, or a consequence, of compliance. Thus, international discourse inevitably helps

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285. The extent of the distortion may depend upon the scope of the SER. A global SER presumably would be more distorting than a regional SER.

286. Cf. Cass Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 939–40 (1996). Sunstein examined the impact of social norms on behavioral choices and listed several factors that may be analogized into the regime context:

The extent of its effect will depend on five factors: (1) the intensity of the norm (exactly how much opprobrium attaches to a violation?); (2) the nature of the norm (what kind of attitude is signaled by a violation? what kind of attitude is provoked by violators?); (3) the agent’s attitude toward the norm and the opprobrium occasioned by its violation (does the agent like to be seen as a defiant person? how does the agent react to social opprobrium?); (4) the possibility of social approval or forgiveness among relevant subgroups (will the agent’s peer group support the norm-defying act?); and (5) the nature and weight of the other ingredients in choice, including competing norms, intrinsic value, and effects on self-conception (what must a norm-complier sacrifice?).

Id.

287. Analyzing the level of SER effects within any particular regime is beyond the scope of this paper. However, one can speculate that certain regimes, such as labor regimes, are particularly vulnerable. Additionally, compliance factors may also be influenced by the material resources of the actors involved in any given dispute.

288. Koh, Why Do Nations Obey?, supra note 100, at 2646 (arguing that actors seek not only to coerce compliance “but to internalize the new interpretation of the international norm into the other party’s internal normative system”). Id.
to construct national identities. Where a high level of compliance exists, a high level of internalization is likely present.

Additionally, the internalized norm will eventually alter the preferences relayed by the normative feedback loop. Once an individual internalizes a norm, that actor continues to abide by that norm. Assuming "national identities are not givens, but rather socially constructed products of learning, knowledge, cultural processes and ideology," then internalization has an effect on national norm evolution. Because the normative feedback loop has an important signaling effect of what states value, the dilution of the normative feedback loop decreases the frequency of the signaling effect. As noted, the normative feedback loop "signals" national preferences, which provides other international actors with important information about a nation's constituency preferences. If internalization alters national norm formation, however, the remaining normative feedback loop will eventually mimic SER values. "When norms become internalized in actors, actors are no longer choosing to conform to them in any meaningful way." Internalization will lead to increased observance and conformity of SER norms; these norms will "signal" the international community.

B. Response Mechanisms

Several possible responses to the value vacuum exist, such as increased inter-regime integration, recognition, and subservience to non-regime values within SERs; greater procedural process; greater access; and independent efforts to improve non-SER compliance. Although

289. See id. at 2603, 2658 (reflecting upon the modern transformation of the domestic legal system and the resulting effect that international law will have on national identities). Koh posits that internalization explains why nations ultimately obey international law. Id.

290. Id. at 2656 (explaining that various types of "internalization" increase when there is a high level of obedience to a rule).

291. Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INT'L ORG. 887, 904-05 (1998) (arguing that when legal norms are internalized, conformity is almost automatic) [hereinafter Finnemore & Sikkink, International Norm Dynamics].


293. See supra notes 88–89 and accompanying text.


296. See Wendt, Collective Identity, supra note 22, at 404-05 (discussing signaling). The practice of compliance with SER rules will reinforce those rules, transforming them from soft to hard law. David Bederman notes "[w]hen international actors develop a standard of conduct, and even when it is expressly couched in the idioms of aspiration or informality, the inevitable trend is that soft law hardens into legal obligation." Bederman, Review Essay, supra note 58, at 484 (criticizing Arend's positive constructivism which rejects soft law).
these cannot fill the value vacuum, they may serve to ameliorate its effects.

Accommodating non-SER values by integrating those values, or linking them to SER values may fill the value vacuum. Integration or linkage of non-SER values gives those values and constituencies a "voice" in the SERs. Commentators suggest integration may foster the inclusion of non-SER voices within SERs by adopting a more holistic approach and incorporating the norms and agreements of transnational civil society. The steps involved in arriving at this reconceptualization, however, are unclear. Incremental steps, such as increased participation in SERs, greater transparency, and a willingness of the SERs themselves to bow to non-SER norms seem necessary prerequisites.

Without a holistic approach, difficulties may arise when attempting to increase regime integration. A regime may lack the institutional structure or competence to incorporate non-regime values. Although, for example, the WTO recognizes environmental values through exceptions, it lacks a social clause to account for human rights values. While environmental values receive a voice in the WTO, human rights do not. Little incentive exists for a regime operating at optimal output to decrease its effectiveness simply to reach pareto superior results. To do so could hurt the constituents of that regime. Arguably, integration may prevent the implosion of an SER, and serve the long-term benefit of its constituents. Thus, egoism and altruism may overlap depending upon one's time frame notwithstanding rationalistic functioning. What is altruism this year might be egoism over the next thirty years. Additionally, inefficiencies flow from imperfect information, therefore, an increased voice for non-SERs may ameliorate some of the negative externalities for non-regime values. Nevertheless, there is no guarantee that anyone will listen once non-regime values receive a voice in an SER. Lastly, the integration within effective SERs may lead to "jurisdictional creep" and "increased centralization" that will only increase SER power.

298. Id. at 10, 27 (noting WTO's lack of substantive environmental standards).
299. See GATT, supra note 4, art. XX. Article XX does provide an exception for legislation "relating to the products of prison labour" Id. Article XXI provides an exception to allow nations to comply with obligations under the United Nations Charter "for the maintenance of international peace and security." Id. art. XXI.
SERs could alternatively bow to norms created by other regimes under specific circumstances. A party to both the WTO and CITES should reasonably forgo complaining to the WTO if another nation sanctions it for non-compliance to CITES. The consequences to Country Y, however, are unclear. Perhaps the recognition of CITES as a near-universally accepted agreement should preclude Country Y from seeking relief in the WTO. Maybe the WTO should bow to the generally accepted international agreement. In reality, difficulties may arise when attempting to attain such restraint from the SERs. Efforts to do so through regime exceptions and regime side agreements illustrate the difficulties of attaining such restraint.

The integration and the subjugation alternatives suggest that as international regimes move toward autonomy and authority, thereby diminishing the value of the normative feedback loop, they may take on the status of international actors. Despite that international law recognizes only states as international actors, perhaps room exists for regimes to negotiate with each other in order to resolve integration and subjugation issues. If some regimes move toward supra-national governmental status, a radical change in the traditional international relations analysis may result.

Increased process within SERs may help account for non-SER values. Increased process would certainly lead to greater legitimacy. The "fairness compliance pull" of SERs may therefore rise to the level of the actual compliance achieved by enforcement. Allowing for greater transparency and broader concepts of standing increases process and fairness.

301. Nichols, supra note 83, at 660 (arguing WTO interpretations should allow non-trade values to trump free trade norms in certain cases). Nichols would permit non-trade societal values to trump a trade value when the "the impediment to trade [is] incidental." Id. As Richard Shell points out, "Nichols's proposal is broadly reflective of Trade Stakeholder Model values and would, in effect, protect trade stakeholders' voices at the domestic level by assuring that their efforts to assert legitimate, nonprotectionist interests would be respected by the WTO." Shell, supra note 31, at 921.

302. See Jackson, The World Trading System, supra note 196, at 584 (discussing possible scenarios where obligations under two international agreements may collide).

303. Cameron & Gray, supra note 132, at 266 ("[N]on-parties to a subsequent agreement are not bound to those obligations unless the treaty codifies customary international law.").

304. See supra Part II.C.


One potential solution to the effects of SERs flows from their ability to avoid the normative feedback loop. The existence of these institutions allows individuals to bypass their government in voicing their preferences. As SERs open their doors to non-state actors, however, questions of legitimacy and democratic accountability arise. The liberal agency model feeds upon notions of accountability and legitimacy, which are based on a sovereignty framework. The ability to bypass the sovereign structure is not new, but it may become more appealing as traditional liberal routes dissolve. This latest development in globalization, in some ways, represents a new perspective on the struggle between state sovereignty and human values. While previous views focused on the direct conflict between state sovereignty and natural rights, this new conflict deals with who will speak for the individual’s interest in the institutional arena.

Greater efforts, such as funding and strengthening non-SER enforcement provisions, can strengthen non-SER regimes. Funding efficacy in non-SERs is one option. In negotiating NAFTA, for example, the United States and Mexico formed the Border Environment Cooperation Commission and North American Development Bank to help finance greater environmental infrastructures in border areas. The Montreal Protocol Multilateral Fund likewise aids developing parties with their compliance.

Another option focuses on increased efforts to make the dispute settlement mechanisms of other institutions stronger. To the extent that non-SERs rely upon the traditional compliance mechanisms, other than coercion, some effort could strengthen these mechanisms.

307. See Finnemore & Sikkink, International Norm Dynamics, supra note 291, at 893 (arguing that where norm entrepreneurs are a domestic minority, they may seek to use international norms to strengthen their position).


A world that moves beyond states as legal actors faces an infinite number of possible participants. The problem is to manage participation of non-state actors both to satisfy norms of democratic legitimacy (crafting mechanisms for deciding who really represents whom, something formally assumed about states and their citizens/subjects), as well as to channel their participation to allow for manageable decision-making (too many players at the table and the real decision-making moves elsewhere).

Id.


Issue networks may also contribute to improving traditional compliance factors by increasing publicity disincentives of non-compliance with non-SER norms. All of these options can be explored in greater detail theoretically and empirically.

In the interim, a value vacuum seems to be present in the dispute between Countries X and Y. If Country X’s constituency truly wants to protect the Tibetan Antelope, it may pay a heavy price (one that the WTO can impose) for that desire. Country Y, and other countries for that matter, will see that investment in an SER provides stability and predictability. The identities of both Country X and Country Y will change as a result of the forgoing, and they will bring these new identities to their next dispute.

CONCLUSION

A new transformation is occurring in the constitutive structures of international relations. Modified constructivism explicates potential consequences of SERs and gives some insights into how to change the institutional model to compensate for the value vacuum—if indeed that is desirable. Perhaps, however, focusing on the links between SERs, non-SERs, domestic institutions, and various interest groups is appropriate. Identifying the design features that facilitate the type of inter-state interaction most likely to positively transform identities and interests around a preferred international norm may also help. Consider also compensating rationalistic forces by increased process, integration, and subjugation. Each approach presents the same substantive difficulty of how to balance different regime values.

Whatever the approach to balancing regime values, the effect that balancing has on national identity and value formation remains important. The “normative, dynamic and constitutive”312 effects that SERs may have on the internalization process demands consideration if, as some suggest, the preferred method of compliance is internalization of norms.313 SERs engender more norm internalization than non-SERs and discount the normative feedback loop to promote their values at the cost of non-SERs and potential constituency preferences. The SERs’ effects require empirical confirmation that may take some time to materialize.

311. See Kingsbury, The Tuna-Dolphin Controversy, supra note 47, at 11 (noting that although states are important actors, they are not the only ones).
313. Id. at 2645–46 (concluding that both the fairness and managerial models of compliance suggest “the key to more compliance is better internalized compliance”).
The foregoing hypothesis, however, suggests some areas where assessment of SER implications should begin. This, too, will raise a number of questions for empirical research.

Will national actors find it more in their interest to bypass the national forum in favor of the international forum? What effect will this have on national norm development? Does the dilution of the normative feedback loop forever bias the modified constructivist equation? Will the values of SERs multiply exponentially? Can institutions respond to fill the value vacuum created by the dilution of the normative feedback loop? It is too early to answer these questions, but it is time to ask them.