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INTRODUCTION TO THE SYMPOSIUM ON ANNE VAN AAKEN & BETÜL SIMSEK, "REWARDING IN INTERNATIONAL LAW"

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For many international lawyers, the assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" is akin to an article of faith.[1] Yet candor compels the acknowledgement that, despite devoting substantial attention to analyzing compliance issues, the discipline still lacks reliable empirical data on compliance rates across many areas of international law, or satisfactory strategies for enhancing compliance.[2] Given a highly interdependent world, and an international legal system marked by a general lack of coercive enforcement mechanisms, questions surrounding how best to improve compliance are of critical and enduring importance.

Anne van Aaken and Betül Simsek's *Rewarding in International Law* is an important contribution to our understanding of compliance.[3] Breaking with dominant approaches that foreground negative incentives that raise the cost of non-compliance, van Aaken and Simsek direct our attention to the underappreciated potential of "rewards," or positive incentives, for states to join international legal efforts and comply with their international legal obligations. The paper develops a detailed typology intended to capture the full universe of positive inducements for cooperation. For example, the paper distinguishes between rewards as the benefits that accrue to a party upon joining a treaty ("internal" rewards) and additional benefits that may accrue outside of or in addition to those associated with joining the treaty ("external" rewards), as well as between rewards that occur at the time a party joins a treaty, and rewards that occur later in time in response to treaty compliance.

The paper makes a second important contribution. Standard economic analysis might suggest a rough equivalence between rewards and penalties; rational actors might find that a promise of US$100 to do X provides precisely the same incentive as a fine of US$100 upon failure to do X. A slightly more sophisticated line of economic analysis might suggest that penalties are superior to rewards because the credible threat of a penalty may be sufficient to induce compliance, and is therefore costless. Van Aaken and Simsek set out powerful challenges to this line of argument, in part by highlighting various costs associated with penalties, including the costs of maintaining the threat of a sanctioning mechanism, and the costs that enforcing states absorb when imposing penalties.

More importantly, the authors draw upon a large body of psychological and behavioral research to argue that both individuals and states will often respond quite differently to seemingly equivalent penalties and rewards. This research suggests that penalties are likely to trigger resistance and counter-threats, if not increased conflict, while

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[1] Louis Henkin, How Nations Behave 47 (2d ed. 1979).

[2] Useful surveys of the compliance literature include Jana von Stein, *The Engines of Compliance*, *in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 477 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* Handbook of International Relations 538 (Walter Carlsnaes et al. eds., 2001).

[3] Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AJIL 195 (2021).

rewards are more likely to be reciprocated, and decrease international tensions. Moreover, penalties may be perceived as unfair or illegitimate, particularly if they fall upon low-income states facing significant capacity restrictions, while rewards can enhance perceptions of fairness and legitimacy. The upshot of these, and related, arguments is that the apparent symmetry between rewards and penalties is misleading, and that rewards are in many cases the superior policy instrument.

This Symposium consists of five responses by leading authorities to van Aaken and Simsek's ground-breaking analysis. These contributions challenge, refine, or extend van Aaken and Simsek's categories in important and intriguing ways.

Rachel Brewster, of Duke University School of Law, leads off the Symposium with an essay that both extends and critiques van Aaken and Simsek's conceptual approach.[4] Brewster usefully distinguishes two different ways that rewarding can work. One is by enhancing a state's reputation for compliance among third parties. This boost in reputation, in turn, may enable the state to attract a greater number of treaty partners, or better terms in any treaty bargain. Thus, rewarding can bring material benefits. Alternatively, rewarding may boost a leader's or a state's self-esteem. This is also a valuable outcome, but unlike reputation, which requires an external audience, self-esteem arises out of a state's view of itself. Appreciating this distinction can help us understand how to use rewarding most effectively. Moreover, Brewster challenges *Rewarding*'s claim that rewarding is always Pareto-efficient, in that it makes both parties better off. Specifically, Brewster broadens the lens to incorporate the interests of third parties, and persuasively argues that, at least in some instances, providing a reward to state A may reduce the relative position of state B, placing it at a competitive disadvantage. Brewster thus highlights an important qualification to the argument in favor of rewarding.

Cosette Creamer, a political scientist at the University of Minnesota, extends the analysis in yet other directions.[5] First, she shifts our attention from compliance per se to issues of treaty design, a topic that van Aaken and Simsek mention but do not elaborate. Creamer then foregrounds the issue of temporality, and in particular the complexities that arise from the fact that treaties address behavior that often extends over long time periods. Her central insight is that, to be effective, rewards must align with what targeted states seek at a particular point in time. Yet values and needs shift over time, rendering it difficult to craft effective rewards at the time a treaty is negotiated. Creamer argues that this challenge places difficult demands upon treaty drafters, including the need for both greater precision in certain types of treaty clauses, and greater flexibility in others. In short, Creamer usefully identifies important and underappreciated tradeoffs between the ex ante costs associated with more sophisticated efforts at treaty design, and the ex post benefits of greater international cooperation over the longer run.

Andrew Guzman, of the USC Gould School of Law, and Kal Raustiala, of UCLA School of Law, offer both conceptual and empirical reflections on the *Rewarding* framework.[6] As a conceptual matter, they, like Brewster, challenge van Aaken and Simsek's conceptualization of rewarding. Yet, where Brewster can be read as suggesting that van Aaken and Simsek's conceptualization is too narrow, Guzman and Raustiala suggest that the conceptualization is too broad. Specifically, they argue that what van Aaken and Simsek consider "internal rewards" are more usefully seen as simply the benefits of the bargain among the parties, and that adding the category of "rewarding" to these brings little value added. They also suggest that rewarding is likely to be quite rare in practice. Among other difficulties, rewarding creates a moral hazard problem, as states may opportunistically threaten breach to induce other actors to provide "rewards" for compliance. Moreover, providing rewards to induce

[4] Rachel Brewster, *Reputation, Self-Esteem, and Competitive Rewarding*, 115 AJIL Unbound 210 (2021).

[5] Cosette D. Creamer, *Rewarding in International Law: It's About Time*, 115 AJIL Unbound 216 (2021).

[6] Andrew Guzman & Kal Raustiala, *The Rarity of Rewarding*, 115 AJIL Unbound 221 (2021).

compliance by another state may trigger political backlash in the rewarding state, as domestic constituencies will object to paying another state to fulfill an obligation that it already has a legal duty to discharge.

Ian Johnstone, of the Fletcher School of Law and Diplomacy at Tufts University, provides an alternative conceptualization of rewarding.[7] Like Guzman and Raustiala, Johnstone questions whether certain benefits from joining a treaty should properly be considered "rewards," but Johnstone refines the analysis by arguing that different types of rewards induce compliance in different ways and for different reasons. This is an important insight with significant policy implications. Like Brewster, Johnstone analyzes how a concern with status can induce compliance, yet extends the analysis by drawing upon the literature on acculturation to identify the microprocesses by which states experience psychological rewards. In addition, Johnstone directs our attention to the institutional mechanisms associated with rewarding strategies, and argues that they will be more effective in the multilateral setting, where institutions tend to be more prominent, than in bilateral settings.

Finally, Siobhán McInerney-Lankford, a Senior Counsel at the World Bank, offers a perspective informed by her wide experiences in the human rights field.[8] Specifically, McInerney-Lankford foregrounds several features of international human rights law that may limit the utility of rewarding in this field. First, it is enormously difficult to measure (and hence reward) human rights performance, in part because "compliance" involves evaluation of both implementation efforts (such as enacting legislation and adopting policies) and the short- and medium-term impacts of these efforts, and in part because many human rights are subject to the principle of "progressive realization." Moreover, unlike many other areas of international law, compliance with human rights norms depends largely upon *intra*state, rather than *inter*state, compliance mechanisms. As a practical matter, in many cases it is not clear that domestic actors have "rewards" that they can bestow upon states or their rulers. Finally, conferring rewards for increased respect for human rights runs the risk of suggesting that human rights have a certain monetary value, and therefore undermining the normative grounding of human rights. For these reasons, McInerney-Lankford is skeptical that rewarding will ever be a primary driver of compliance in the human rights area.

Both individually and collectively, the contributions to this Symposium expand on van Aaken and Simsek's analysis, highlighting possible gaps in and extensions of the *Rewarding* framework. Whether readers are ultimately persuaded by the analysis, the extensions, or the critiques, the *Rewarding* framework has successfully provoked stimulating new thinking about one of international law's oldest problems. For that, we are indebted to van Aaken and Simsek, as well as the Symposium contributors.

[7] Ian Johnstone, *Status as a Reward*, 115 AJIL Unbound 226 (2021).

[8] Siobhán McInerney-Lankford, *Rewarding in International Human Rights Law?*, 115 AJIL Unbound 232 (2021).