doi:10.1017/aju.2021.28

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

STATUS AS A REWARD

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Rewarding in International Law foregrounds a topic that has been in the compliance literature for years but, as Anne van Aaken and Betül Simsek point out, tends to get treated as the mirror opposite of penalizing and therefore of little distinct analytical significance. In this essay, I seek to engage with their argument not by way of critique but rather to highlight some gaps and build on their insights. I introduce the notion of "status" as a reward and identify institutional mechanisms for conferring status, arguing that this is especially important in the multilateral context where institutions tend to be more prominent than in bilateral, transactional relations.

Before turning to my main argument, I consider van Aaken and Simsek's conceptualization of the term "internal rewards" and suggest that it captures three distinct sub-categories that ought not to be conflated: gains from joining a treaty; compensation for costs associated with complying; and rewards "on top of the treaty." In the second part, I connect their argument to the idea of status, which arises out of a body of international relations and international law literature the authors mention but do not fully engage.[1] I claim that the concept of status reinforces some of the behavioral insights van Aaken and Simsek provide, but also exposes the need to look more closely at the micro-processes of how psychological factors affect state behavior. In the third part, I pick up on their under-explored observation that rewarding theory sheds new light on "treaty design" as well as compliance,[2] and I explain the role of institutions in dispensing status benefits as well as other types of rewards.

What is a Reward?

Van Aaken and Simsek state that rewards (both material and immaterial) can be situated along two axes: internal versus external; and entry versus compliance.[3] This categorization is helpful, especially for making the case that rewards and penalties are not two sides of the same coin.[4] But their understanding of what constitutes an "internal reward" seems to elide some important differences between three different types: cooperation gains from joining a treaty;[5] financial or technical assistance to facilitate compliance with treaty obligations;[6] and rewards that are

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[1] Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 Int'l Stud. Q. 487 (2001); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621 (2004).

[2] Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AJIL 195, 198 (2021).

[3] *Id.* at 195–96.

[4] *Id.* at 203.

[5] *Id.* at 205.

[6] *Id.* at 209.

"on top of but within the treaty."[7] One might question whether the term reward should even be applied to the first two. Are the gains from joining a treaty not simply what a party receives in exchange for the bargain made? When a customer buys a bag of groceries from a corner store, they do not normally say they have been "rewarded" with a quart of milk, loaf of bread, etc. On the second type, is financial assistance to meet a compliance target (such as those in the ozone treaty) really a "reward"? Is it not better described as compensation for costs incurred as a result of fulfilling treaty obligations? After all, the assistance simply puts the state in the same financial position it would be in had it not joined the treaty at all. That is not the same as "rewarding on top of the treaty," which improves the state's position.

This may just be a matter of semantics, but conflating them obscures some important analytical differences that could have policy implications. Consider an example the authors themselves introduce: the benefits to non-nuclear weapon states of joining the Nuclear Non-Proliferation Treaty (NPT), although they put this in terms of membership in the International Atomic Energy Agency (IAEA) rather than Article IV of the NPT. Framed in terms of the three types of rewards I describe above, non-nuclear weapon states receive: 1) the diffuse reciprocal security benefits derived from a world in which fewer states possess nuclear weapons; 2) financial and technical assistance to fulfill safeguards obligations; 3) assistance from the IAEA and nuclear weapon states to develop peaceful nuclear energy. These are all "internal rewards" within the authors' definition. But the first is likely not understood as a "reward" by the party but rather as reciprocal compliance. The second is unrelated to reciprocity, but the benefit only has value in the context of compliance with the treaty. If a country does not join the NPT, or if the NPT did not exist, then the safeguards assistance is irrelevant—the states would not want or need that assistance. By way of contrast, the third type of reward—assistance with peaceful nuclear energy—has inherent value separate from the terms of the treaty.

So, while it may be true that all of these "benefits" induce compliance, they do so in different ways and for different reasons. Conversely, withdrawal of these benefits would operate in different ways as "penalties" or make no sense as a penalty. IAEA withdrawal of safeguards assistance would never be threatened or perceived as a penalty in the way that withdrawal of peaceful nuclear energy would be.

"Status," Social Approval, and Compliance

Surprisingly, van Aaken and Simsek make only passing reference to a body of literature that is of direct relevance to their argument. They mention the power of global performance indicators as a form of social approval, citing Doron Teichman and Eyal Zamir, and Judith Kelley and Beth Simmons. They do not elaborate, nor do they develop the idea that social approval operates differently from "reputation" as that term is used in rational choice theory.

International relations theorist Alastair Iain Johnston posits that "back-patting" can reinforce a state's identity and status, pushing it in the direction of pro-norm behavior.[8] According to the theory, praise is an exercise in social influence that reinforces a sense of self-worth, unrelated to the material benefits that may accrue (just as shaming is a penalty in itself, separate from the material costs that may follow). That idea was imported into the international law literature by Ryan Goodman and Derek Jinks,[9] and Johnston himself references Thomas Franck's early theorizing about compliance.[10]

[7] *Id.* at 217.

[8] Johnston, *supra* note 1; *see also* Jeffrey Checkel, *Why Comply? Social Learning and European Identity Change*, 55 Int'l Org. 553 (2001).

[9] Goodman & Jinks, *supra* note 1.

[10] Thomas Franck, The Power of Legitimacy Among Nations (1990).

Drawing on sociology and psychology, Johnston describes the process as a "pressure to conform," which is felt as a "desire to maximize status, honor and prestige." He points out the distinction between rational choice and social influence by suggesting there are three motives for maximizing status: i) material rewards; ii) reputational effects; and ii) "status as a good in itself"—the psychological benefits to an actor of a sense of their self-worth.[11] Importantly, the psychological benefits depend on public affirmations of that status, tied to association with a referent group (a club) with whom one identifies or wishes to identify. Thus, some countries identify as "global good Samaritans." Others care about their status as rising powers. Courtney Fung claims that China self-identifies as both a "great power" and a "leading member of the Global South" and thus seeks social approval from both referent groups.[12]

In transporting these ideas to compliance theory, Goodman and Jinks describe a process of "acculturation" by which an actor adopts the "behavioral patterns of the surrounding culture."[13] They distinguish acculturation from coercion, both of which involve sanctions and rewards: when coercion is at play, the social costs translate into material costs; when acculturation is at play, the social costs themselves influence thought and action. Drawing on Johnston, they also distinguish acculturation from persuasion: social pressure can lead to public conformity without private acceptance.[14] In other words, acculturation (unlike persuasion) does not require internal acceptance of the beliefs or norms. All that matters is the degree of identification you feel (or want to feel) with some referent group.

Bringing this back to *Rewarding in International Law*, the notion of "identity" or "status benefits" sharpens the distinction between material and psychological rewards. As noted above, the former may not be experienced as a reward at all but rather simply as "what I bought" or as compensation for losses accrued from efforts to comply. "Status" cannot be confused with either.

Moreover, the status/acculturation literature can help tease out the microprocesses by which states experience "psychological" rewards. Van Aaken and Simsek address this mainly by claiming the leap they are making is no greater than the leap rational choice theorists make by assuming states are rational actors. Fair enough, but Goodman and Jinks put some flesh on the bones with their theory of states as social organizations that, like corporations, have a tendency towards "isomorphism," i.e., they emulate standardized models of structural organization.[15] They claim the extent of isomorphism (structural similarities) across states can *only* be explained by acculturation, as opposed to coercion and persuasion. They do not specify exactly how but suggest three possibilities: government leaders are directly acculturated; members of special interest groups are acculturated (and they in turn persuade government leaders and domestic audiences); or domestic audiences are acculturated (and they persuade or coerce government leaders).

More generally, treating states as social organizations opens an interesting line of inquiry into the social environment in which states operate—namely international institutions. The psychological phenomena that both van Aaken/Simsek and Goodman/Jinks seek to describe are tied to the institutional environment in which actors operate, whether individual actors within a state, or state actors within an international institution. That brings me to my third comment.

[11] As Johnston explains, the strength of back-patting and praise depends on a) ones's self-categorization as a certain kind of actor and b) which other actors, "by virtue of this self-identification, become important, legitimate observers of behavior." Johnston, *supra* note 1, at 501.

[12] Courtney Fung, China and Intervention in the UN Security Council: Reconciling Status 6 (2019).

[13] Goodman & Jinks, *supra* note 1, at 638.

[14] *Id.* at 642–45.

[15] *Id.* at 648.

Rewarding Through Institutions

Van Aaken and Simsek are correct in claiming their analysis has as much to say about treaty design as it does about compliance. While their article focuses on the latter, they hint at a broader research and policy agenda in the conclusion by calling for a shift in focus "from a penalty-oriented system to governance mechanisms between states."[16] What might those mechanisms be? Conceivably, neither formal nor informal institutions are necessary. Rewarding could be (and is) done through the functional opposite of countermeasures, i.e., states rewarding each other with financial assistance, praise, etc. Drawing on the logic of social influence, one can imagine that the referent group one identifies need not be institutionalized, as long as it is perceived as a group (e.g., "great powers" or the "Global South").

But institutions help, in various ways, especially with respect to multilateral treaties. Here it is worth noting that, while *Rewarding* purports to be as much about multilateral as bilateral treaties, the differences between the two are not teased out. Indeed, by stating that "the international system relies mainly on self-help and counter-measures," the authors seem to adopt a transactional understanding of international law and relations.[17] Yet multilateral institutions (whether formal or informal) serve a variety of purposes that don't apply in the bilateral context. They are the "social environment" states inhabit, without which there would be no possibility for social approval or opprobrium.[18] They are sites for dialogue where states can present evidence of their good behavior and seek advice on how to further improve it. They make acting in a particular way more public by creating a focused arena not only for observing behavior but also for naming and praising. More concretely, they channel financial and technical assistance, sharing whatever burden that creates for donors.

The existing literature on institutional design offers a long list of devices and instruments that might be used for rewarding, some but not all of which are identified by van Aaken and Simsek:

- State self-reporting, which works best when there is little incentive to lie.[19]
- Publicizing best practices, which is not only a way of accruing reputational benefits, but also offers a model for other states to mimic.[20]
- Performance indicators and rankings.[21]
- Formal monitoring and verification mechanisms, such as fact-finding commissions, special rapporteurs, and inspection agencies.
- Informal monitoring and verification mechanisms, for example when NGOs monitor state behavior.[22]
- Venues for constructive dialogue, such as the UN human rights treaty bodies.
- Technical, financial, legislative, and other forms of capacity-building assistance.
- Membership rights, observer status, and other forms of inclusion.[23]

[16] Van Aaken & Simsek, *supra* note 2, at 241.

[17] *Id.* at 195. Similarly, the rationale for rewarding that they present applies more to a bilateral transaction than to an enduring multilateral treaty. *Id.* at 197.

[18] Johnston, *supra* note 1, at 502.

[19] Barbara Koremenos, The Continent of International Law 271 (2016). On the impact of self-reporting generally, see Cossette Creamer & Beth Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AJIL 1 (2020).

[20] Goodman & Jinks, *supra* note 1, at 687.

[21] Judith G. Kelley & Beth A. Simmons, *Politics by Number: Indicators as Social Pressure in International Relations*, 59 Am. J. Pol. Sci. 1146 (2015).

[22] Koremenos, *supra* note 19.

[23] This is the opposite of "outcasting." Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 Yale L.J. 252 (2011).

Typically, these devices are situated in or facilitated by an institution. The institution may be quite informal, such as a system of information-sharing among a club of states. It may even be an NGO that ranks states, such as Transparency International, or one that monitors behavior, such as Human Rights Watch. Alternatively, the institution could be a formalized intergovernmental body such as the Organization for the Prohibition of Chemical Weapons described at some length in *Rewarding*. A deeper dive into these institutional design issues could help to answer the following questions:

- How does dispute settlement fit in? Just as losing a dispute can impose reputational costs and financial penalties, winning a dispute provides reputational rewards as well as compensation. On the spectrum from good offices and mediation to arbitration and adjudication, are some dispute settlement mechanisms better than others for bestowing rewards?
- Are informal institutions and soft law better than formal institutions at meting out "status rewards"? There is reason to believe that naming and shaming is more impactful for hard law than soft (think of efforts to shame states for violating a soft norm like the right to development as opposed to a hard law like the prohibition against torture). Conversely, if "naming and praising" is more effective for soft law,[24] pushing to codify soft norms into a precise, binding treaty that delegates monitoring and enforcement to a third party may be mistaken.
- Does the size of the institution matter (i.e., the number of members)? Presumably it would because the financial burden of rewarding can be spread more widely, and the more states from one's referent group patting one's back, the better it "feels."[25] That presumption might also have implications for voting rules. Are rewards more meaningful when dispensed on the basis of consensus than majority vote?
- Are there ways of drawing non-state actors into the rewarding process? The role of NGOs in the human rights regime suggests that a stamp of approval from a credible human rights NGO can serve as a reward just as public shaming operates as a penalty.

Finally, there is reason to believe that discursive interaction within institutions impacts rewarding in ways that go beyond the dispensing of benefits. International organizations can serve as venues for dialogue and deliberation, i.e., talk-shops.[26] Such interaction forges intersubjective understandings about what constitutes normatively acceptable behavior. It also shapes the "identity" of states, including their identity as a member of a particular referent group. The deeper a state becomes immersed in the institutional environment, what even counts as a "reward" may change. Consider the European Union. Aspirants to the EU may originally be driven by material incentives—the economic benefits of membership. But as their economies become more intertwined with those of other European states, social approval—the "status" benefits associated with membership—may become more important. This happens not simply because the marginal utility of the economic rewards declines as the aspirant's economy grows, but also because its preferences and identity change through social, discursive interaction. The status of membership in the European club comes to be seen as a reward in itself.

Tying this to the compliance literature, discursive interaction is not only a way to mobilize shame, but can also operate as a more positive exercise in persuasion and social learning.[27] Most states are not seeking to avoid most of their legal obligations most of the time, to turn Louis Henkin's famous phrase on its head.[28] The rewarding argument of van Aaken and Simsek implicitly acknowledges that states often want to comply with international law, and

[24] Goodman & Jinks say yes, *supra* note 1, at 689.

[25] Johnston says yes, *supra* note 1, at 510.

[26] Ian Johnstone, The Power of Deliberation: International Law, Politics and Organizations (2011).

[27] For a similar argument about the acquisition of European "citizenship" norms in Ukraine, see Checkel, *supra* note 8, at 574.

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

want to be seen to comply. Rewarding taps into that desire through "naming and praising," constructive dialogue, and other devices. By responding positively to those inducements, a state reinforces its status as a good faith participant in the legal and institutional regimes it values.

Conclusion

To conclude, states are motivated in part by a desire for status—whether as a great power, member of a regional club, global good citizen, or some other identity. Because status depends on social approval, the institutional environment in which states live matters—that is where social approval and opprobrium are dispensed. But international organizations operate as sites for social influence not so much because they dispense status rewards and penalties in a mechanistic way, but because they affect how states define themselves—the type of actor they see themselves as being—and what value they place on the opinions of which other actors.