

Robert E. Scott and Paul B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press, 2006), pp. i-viii, 1-255, index, \$70

Eric A. Posner

University of Chicago Law School

Over the last five years, public international law scholarship in the United States has increasingly reflected the influence of rational choice theory. The latest contribution is a book by Robert Scott<sup>1</sup> and Paul Stephan.<sup>2</sup> Stephan is a longtime contributor to international law scholarship, particularly the literatures touching on international business. Robert Scott is a newcomer to international law; he is best known in law and economics for his foundational contributions to the economics of contract law in the 1970s and 1980s. He has also written a number of important articles on the economics of contract law in recent years. The offspring of their respective areas of expertise, *The Limits of Leviathan* is an attempt to use the economic theory of contracts and contract law to shed light on international law.

The book will be rewarding to those who are committed to thinking about international law in rational choice terms. Even those who reject this methodology, or who do not embrace it as wholeheartedly as Scott and Stephan do, should find much of interest in it. In the course of developing their theory, Scott and Stephan address many contemporary methodological and substantive controversies in international law, and their views on these controversies are always illuminating. The book's topic—what the

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<sup>1</sup> Columbia Law School.

<sup>2</sup> University of Virginia Law School.

authors call “formal enforcement” of international law by independent courts and tribunals—is of great importance and the authors develop an original and interesting hypothesis concerning why states sometimes use formal enforcement and sometimes do not. The last chapter converts the positive hypothesis into a normative thesis about how states should use formal and informal mechanisms of enforcement, and, using this normative thesis, criticizes and defends some contemporary institutions and practices.

### The Argument

Scott and Stephan are interested in what they call “formal enforcement” of international law, or what they sometimes call “hard” law, which they contrast with informal enforcement or soft law. Enforcement is informal when states comply with international law because they fear retaliation from the victim of breach or they seek to avoid acquiring a reputation for disregarding international commitments. Enforcement is formal when an independent tribunal orders a state that has violated international law to come into compliance or engage in remedial action such as paying reparations. The crucial element of formal enforcement is the independence of the tribunal, which means that the decisionmakers do not take orders from a national government, jurisdiction is compulsory, the tribunal’s orders are legally binding, they have “direct effect” on individuals rather than applying to governments alone, and individuals have the right to bring claims rather than having to depend on governments to bring claims on their behalf. Formal enforcement can occur through the actions of international tribunals that have all of these attributes; it can also occur through the actions of domestic courts when those courts have the power to enforce international law.

Criticizing what they regard as the conventional view that more formal enforcement is always or usually better, Scott and Stephan argue that both formal enforcement and informal enforcement have their proper domains. Neither is intrinsically superior to the other; they are simply alternative mechanisms for achieving the ends of international cooperation—jointly welfare-maximizing outcomes for the states involved.

Informal enforcement works best when parties on both sides can easily observe each other's actions—or, at least, those actions necessary to generate the bargained-for cooperative outcome—and thus are in the position to retaliate if the other side fails to act properly. Against the baseline of informal enforcement, formal enforcement has benefits and costs. The main benefit is that the independent tribunal can discover facts that the states might otherwise conceal from each other. In a crucial step—one to which I will return—Scott and Stephan claim that formal enforcers, unlike victim states using informal enforcement, can extract otherwise hidden information from the parties by threatening to rule against them if they do not disclose it. This information, which is not available to informal enforcers, enables the tribunal to determine whether the states' activities in fact breached their obligations; the richer informational environment permits forms of international cooperation that are not possible with informal enforcement.

The main cost of formal enforcement, aside from the administrative cost of operating an independent tribunal or increasing the caseloads of domestic courts, is that the tribunal has limited capacity, relative to the states themselves, to evaluate information that is not concealed from the states. Borrowing from contract theory, Scott and Stephan draw a distinction between information that is verifiable by third parties such as tribunals,

and information that is not verifiable but known only to the parties themselves. The tribunal is assumed to be able to observe verifiable information only, so it can be effective only to the extent that the parties' optimal obligations turn on verifiable information. Thus, formal enforcement is most likely to be optimal when the nature of the cooperative relationship between the parties is such that the production of maximal joint value depends on complex, hard-to-observe but verifiable actions on each side. Otherwise, it contributes nothing, in which case reliance on formal enforcement simply creates costs—the cost of administering the tribunal, plus any risk resulting from judicial error (though Scott and Stephan do not emphasize this problem), plus some possible “crowding out” of informal cooperation.<sup>3</sup>

This analysis yields a hypothesis. States will set up formal enforcement for cooperative relationships involving substantial asymmetric and verifiable information; otherwise, they will rely on informal enforcement.

### Critique

Scott and Stephan make standard law-and-economics assumptions about how states operate and why they create international law—assumptions most familiar to international law scholars from the “rational institutionalist” strain of international relations scholarship. States are unitary actors; they seek (more or less) to maximize the

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<sup>3</sup> The crowding out hypothesis is based on two arguments. The first draws on some cognitive psychology articles, which suggest that in some contexts people who reciprocate because of a psychological inclination to do so will be less willing if failure to reciprocate is punishable with formal sanctions. The second is based on a signaling theory, according to which formal enforcement deprives people of opportunities to signal their willingness to cooperate, and thus can reduce cooperation. In both arguments, formal legal sanctions for failure to cooperate have the paradoxical effect of reducing the overall level of cooperation—a theme of the literature on law and social norms. I do not have the space to address these arguments, which in any event do not seem essential to Scott and Stephan's thesis. I will say only that the cognitive psychology evidence is rather thin, and can be transported from ordinary social relations to international relations only with difficulty, and that the signaling theory is only sketched out, and not supported by much evidence, and so is hard to evaluate.

welfare of their citizens; when gains from international cooperation exist, states obtain these gains by cooperating with other states, typically by making treaties; and states comply with treaties in order to avoid retaliation from the treaty partner or to maintain a reputation for complying with treaties so as to be an attractive treaty partner in the future. Scott and Stephan address and reject the familiar objections to these assumptions. As these controversies are well-known, I will not discuss them here.

Scott and Stephan's main contribution is to place international dispute resolution within this framework. Suppose that states comply with treaties in order to avoid retaliation; what is the benefit of a tribunal? A traditional answer is that tribunals generate information that enhances the ability of states to cooperate but that also may introduce bias and error, and the extent to which tribunals are desirable depends on the balance of these benefits and costs.<sup>4</sup> Although Scott and Stephen's argument is not inconsistent with this traditional view, they distance themselves from it, arguing instead that the key contribution of tribunals is formal enforcement.

In making this argument, Scott and Stephan find themselves compelled to lump many tribunals, such as the ICJ and the WTO's DSM, with other forms of informal enforcement, such as tit-for-tat style retaliation. Formal enforcers, by contrast, include the ICC, the NAFTA review tribunals, and domestic courts. Scott and Stephan make this distinction because they think that enforcement matters more than the trappings of legality.

But the distinction between formal and informal enforcement is not as clear as Scott and Stephan suggest. To understand why, consider how Scott and Stephan

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<sup>4</sup> For a discussion, see Eric A. Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 *Calif. L. Rev.* 1 (2005).

motivate their analysis by drawing an analogy to contract law. Contract theorists recognize a distinction between formal legal enforcement of contracts by courts and informal enforcement of contracts through reputation and similar nonlegal mechanisms. Scott and Stephan claim that this distinction can be carried over to the international arena, but the problem with this claim is that there is no such clear distinction between third-party enforcement and second-party enforcement in international relations. As there is no world government, there is no analogy to the domestic court, with its power of coercion.

This matters a great deal to the analysis. Because there is no world government with enforcement powers similar to those of national governments, states can ignore the formal tribunals Scott and Stephan discuss, just as they can ignore informal tribunals. If the ICC, which according to Scott and Stephan has formal enforcement powers, orders a state to yield a defendant to its control, and a state ignores this order, it may suffer a reputational harm—as a state might if it disobeys the order of the “informal” ICJ—but it cannot be compelled to act. Governments can even ignore their domestic courts that rule against them. Western democracies generally do not; but nothing prevents them from doing so aside from the reputational consequences. American courts are sensitive to the opinions of the executive branch on questions of international law presumably because courts are aware of this possibility and want to avoid it. In most of the world, where courts enjoy little or no independence, formal enforcement, as Scott and Stephan define it, cannot take place through domestic courts at all.

If I understand Scott and Stephan’s argument correctly, formal enforcement is not necessarily “stronger” than informal enforcement. The key point is that the formal tribunals, whether domestic or international, have the power to compel states to divulge

verifiable information concerning the activities that allegedly constitute breach of treaty. The power to compel is important: if the tribunals cannot compel the states to reveal information, presumably by threatening to rule against them if they do not, then they do not serve their information-forcing purpose. But on what grounds should we assume that the tribunals have the power to compel the states to divulge information?

Here, Scott and Stephan's theory becomes murky. Perhaps their view is that states divulge information in response to a judicial order because if they do not, and they therefore lose the case, they will fear retaliation from the other state, reputational harm, and the other sanctions connected with informal enforcement. If this is the story, then the distinction between a formal and informal tribunal disappears. Consider the ICJ, which Scott and Stephan treat as informal because it cannot force states to comply with its judgments. But the ICJ can rule against a state that refuses to provide relevant evidence, and in doing so, it may harm that state's reputation or induce another state to retaliate or withdraw cooperation. In this sense, the ICJ's informal enforcement capacity is no different, analytically, from that of a domestic court or a tribunal that has the characteristics of formal enforcement. (Of course, states can withdraw from the ICJ's jurisdiction, as Scott and Stephan note; but states can withdraw from the jurisdiction of any international tribunal, including that of the putatively formal ICC, and they can strip domestic courts of jurisdiction over international disputes.)

An alternative view is that states must comply with formal tribunals simply because they have a legal obligation to, and cannot ignore the rulings of the tribunals the way they can avoid or withstand more informal mechanisms for international dispute resolution. The U.S. government almost never refuses to obey an order from a domestic

court; if it were to do so, it might precipitate a constitutional crisis. Internal domestic norms in this way grant domestic courts power over governments that international norms do not. But the problem with this view is, as just noted, that the state can eliminate formal enforcement through the simple expedient of repealing the statute that authorized the courts to hear cases under the treaty. If a state wants to cheat against a treaty partner without fear of domestic enforcement, it can strip its courts of jurisdiction. The only thing that could prevent the state from doing this is fear of a negative international response—informal enforcement again. So it is hard to avoid the conclusion that the distinction between formal and informal enforcement is illusory.

#### Evidence

Theory, then, casts doubt on Scott and Stephan's hypothesis; what of the evidence? Scott and Stephan argue that the evidence is on their side. Among other institutions, they examine the arms control treaty regime, human rights treaties, international trade institutions, and international criminal law. In each case, they attempt to show that formal enforcement is correlated with verifiability. For example, arms control depends on non-verifiable information and so informal enforcement is used, whereas some types of protection of property rights involve verifiable information, so formal enforcement is used.

The empirical analysis is interesting and enlightening but overall, in my view, it is unpersuasive. There are two main problems. First, the main independent variable—verifiable versus nonverifiable information—is never adequately operationalized. Every type of international cooperation seems to involve both types of information. An arms control agreement might, for example, involve an agreement not to construct anti-ballistic



missiles near a population center (probably verifiable) and an agreement not to do research in ABM technology (probably nonverifiable). A law-of-war treaty might involve an obligation not to parade POWs in front of cameras (verifiable!) and an obligation to give them adequate medical treatment (maybe not verifiable). So why is formal enforcement never used for arms control agreements but sometimes used for war crimes? Perhaps one could argue that there are more problems of verifiability in the cases of arms control agreements than in the case of war crimes, but this seems highly doubtful, and in any event only indicates that until one can reliably measure the degree of verifiable information about states' actions in some area of international cooperation, one cannot test Scott and Stephen's thesis.

Second, as Scott and Stephan acknowledge, there are many areas of international relations involving identical problems where some states use formal enforcement and other states do not. The WTO system lacks formal enforcement but within Europe the rules governing trade between states is subject to formal enforcement. The major human rights treaties lack formal enforcement but again the European states have formal enforcement. At the same time, the U.S. civil liability system to some extent enforces human rights treaties where violations involve other states that do not enforce these treaties. Scott and Stephan try to explain away this variation, but they cannot. Indeed, consider the problem from the temporal perspective. Formal enforcement is more common today than it was in the recent past. What explains this trend? Scott and Stephan's argument implies, implausibly, that treaties today involve more verifiable information than treaties of the past, but there is just no reason to think that this might be true.

## Normative Arguments

Scott and Stephan think that the trend toward formal enforcement is welcome, but that international lawyers and policymakers should not support formal enforcement for its own sake. The question is always whether, in a particular realm of international cooperation, formal enforcement will enhance the ability of states to enter and keep to their agreements. Sometimes, often perhaps, it will not; then, states will need to rely on informal enforcement.

This is reasonable, and the authors are right to resist the prevailing instinct, among academics especially, to legalize whenever possible. But the reader is left with doubts about whether Scott and Stephan's model of formal enforcement provides much guidance to policymakers. The distinction between verifiable and nonverifiable information is certainly relevant for the design of international dispute resolution institutions, and for authorizing domestic courts to enforce international law, but it seems like a small part of the whole story.

## Conclusion

Scott and Stephan's main question is a good one—why do states sometimes but not always give direct effect to their international legal obligations by either permitting domestic courts to enforce them or handing over jurisdiction to international tribunals that have the power to bind domestic courts or have direct enforcement powers themselves? Their answer is that certain types of international cooperation involve verifiable information, and these types of cooperation are suitable for formal enforcement. As I have explained, I do not think that Scott and Stephan's answer is correct, as there are difficulties with the analysis and the evidence. Nonetheless, their

general approach is plausible and, like the best scholarship, suggests further hypotheses and ways of thinking about the evidence. Best of all, the book shows the advantages of cross-fertilization between international law and domestic law scholarship.

As for an alternative answer, much more research needs to be done but a few comments at this point are in order. First, there is really nothing new about states using domestic courts to enforce international legal obligations. In the United States, self-executing treaties, statutes that implement treaties, and statutes that incorporate customary international law go back to the founding. Domestic courts enforce extradition treaties, for example. I don't think there is any real puzzle here about why some treaties are enforced domestically and others are not. Domestic courts are given the authority to enforce international obligations when those obligations require the state in question to control its citizens in some domain that is traditionally subject to the jurisdiction of domestic courts. So if an extradition treaty is to be obeyed, there is little alternative to directing domestic courts to enforce it—otherwise, the domestic courts will maintain control over the foreign defendant and the treaty obligation will be violated. Similarly, if a treaty obliges a state to protect the property rights of aliens, then the natural implication is that courts, the guardians of property rights, would be instructed to do so. By contrast, domestic courts do not determine what types of weapons will be manufactured, so there is no point in giving them authority over arms control treaties. The nature of the information involved (verifiable or not) does not seem relevant to this choice.

Second, there is also not that much new about formal enforcement in Europe—an important source of evidence for Scott & Stephan's argument. European courts do not

(except in special cases) have the power to formally enforce international law; they have the power to formally enforce European law. In this way, they seem like American federal courts at the end of the eighteenth century, which were created to enforce American (federal) law against the wishes of the sovereign American states. This worked in the United States and it might work in Europe. The reason had to do with the willingness of the affected population to extend their loyalty to a higher government entity, and not the nature of the information (verifiable or not) involved.

What remains is the special case of the Alien Tort Statute, a handful of rarely used universal jurisdiction laws in some European countries, the International Criminal Court, the NAFTA review tribunals, and a few other marginal institutions. The ATS is unique to the United States, so impossible to fit in Scott and Stephan's framework: it can't be that violations under the ATS are verifiable when American courts are involved and not otherwise. Universal jurisdiction laws remain marginal. It is not clear to me why one would think that these and the other institutions have much in common, but if they do, it seems unlikely that what they have in common is related to the nature of information involved in the underlying cooperative relations that they are designed to promote.