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FRAMING IN AND THROUGH PUBLIC INTERNATIONAL LAW

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Abstract

Framing is pervasive in public international law. International legal norms (incl. soft law) and international politics both inevitably frame how international actors perceive a given problem. Although framing has been an object of study for a long time – be it in domestic or international politics – it has not been systematically explored in the context of social cognition and knowledge production processes in public international law. We aim to close this gap by examining the implications of framing effects for preference and belief formation in specific settings in public international law. By looking at issue framing in addition to equivalency framing (which includes most well-known gain-loss framing effects), we broaden the scope of framing effects as traditionally studied in behavioral law and economics by also including findings from research in political communication. In the first part of this chapter, we provide an overview of the experimental evidence of both types of framing, show how it has already been incorporated into neighboring disciplines to public international law, and untangle the difference between preference reversals and a change in beliefs. In the second part, we identify typical situations in public international law where framing effects play an important role in social cognition and knowledge production processes. Without claiming to be exhaustive, we focus on international negotiations, international adjudication, global performance indicators, and norm framing.

I. Introduction

The rational choice assumption, widely used in international relations and international legal scholarship, stipulates that rational actors should and do make the same decision independent of the way the decision problem is framed. Not doing so would be contrary to the independence and the invariance axioms of rational choice theory as a result of inconsistent decision making,³

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³ For an introduction into the von Neumann-Morgenstern utility theorem, see John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press 1944). Whereas the independence axiom holds that a choice is independent of irrelevant alternatives, the invariance axiom holds that the ranking of choice options is invariant to alternative but logically equivalent ways of eliciting the same preference.

and challenge the objectivity of public international law (PIL). In contrast, social psychology has a long tradition in acknowledging that ‘everyday human behavior, especially social behavior, becomes explainable and predictable only when we know, or can accurately guess, the subjective interpretations and beliefs of the people involved’.⁴ The recognition of the relativity of judgment has also found support in decision making theory because the relativist view in psychology – usually studied in decision making theory under the heading of ‘framing effects’ – has been shown to have objective (i.e., systematic) behavioral and motivational consequences.⁵ Frames function as psychological lenses through which people make sense of each other, the issues they face, and the choice options available to them.⁶ There are arguably no ‘correct’ or ‘wrong’ frames, but which frame bears an effect has important implications for how individuals ultimately behave.⁷ Some framing effects occur ‘when different ways of describing the same choice problem change the choices that people make, even though the underlying information and choice remain essentially the same’.⁸ This obviously plays a role when a decision maker faces an explicit choice. For example, experimental research shows that individuals make different choices depending on whether the very same choice options are framed in terms of either gains or losses.⁹ Yet framing also plays a more subtle role when a given problem description influences the decision maker’s – mostly unconscious – choice of how to address a broader problem, that is, by making certain aspects of an information set more salient to the detriment of others. For example, describing a problem of hate speech as an issue of free speech leads individuals to primarily base their opinions on free speech as opposed to public safety considerations (even though they are essentially not forced to do so).¹⁰ Whereas the former can be referred to as ‘equivalency’ framing, which includes gain-loss framing effects as widely studied in behavioral law and economics, the latter is dubbed ‘issue’ (or ‘emphasis’) framing and emerges from research in political communication.¹¹

⁴ Lee Ross and Richard E Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (McGraw-Hill 1991) 60.

⁵ *ibid* 63.

⁶ Deepak Malhotra, *Negotiating the Impossible: How to Break Deadlocks and Resolve Ugly Conflicts (Without Money or Muscle)* (Berrett-Koehler Publishers 2016) 11.

⁷ *ibid*.

⁸ Richard Cookson, ‘Framing Effects in Public Goods Experiments’ (2000) 3 EXP ECON 55.

⁹ See Daniel Kahneman and Amos Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’ (1979) 47 ECONOMETRICA 263.

¹⁰ See Thomas E Nelson, Rosalee A Clawson and Zoe M Oxley, ‘Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance’ (1997) 91 AM POLITICAL SCI REV 567.

¹¹ See James N Druckmann, ‘Political Preference Formation: Competition, Deliberation and the (Ir)relevance of Framing Effects’ (2004) 98 AM POLITICAL SCI REV 672.

Framing effects – both in terms of equivalency and issue framing – address the discrepancy between normative claims and positive observations in the study of judgment and choice: whereas normative analysis is concerned with the nature of rationality and the logic of decision making as it should be, positive analysis is concerned with individuals’ beliefs and preferences as they (really) are.¹² The standard model of rational choice theory proceeds from the simple requirement that observed choices ought to be consistent with each other. Framing effects, on the other hand, amount to a violation of the axioms of rational choice theory. Experimental evidence is supportive of the existence of framing effects.

The independence and invariance axioms – and with it the objectivity of PIL – has long been a mantra in international legal scholarship. Framing effects therefore shine a new light on the study of PIL. On the one hand, both equivalency and issue framing bear the potential of triggering preference reversals in individual choice, which has important implications for several areas in PIL, most notably international adjudication. On the other hand, framing effects may also change individuals’ beliefs about others’ beliefs in strategic interactions (such as international treaty-making), which is of high interest to international legal scholars. Given that framing effects cannot be captured by standard game theory as conventionally used in rationalist international scholarship,¹³ those who rely exclusively on rationalist approaches to PIL are missing important phenomena likely to influence outcomes. Challenges to the rational choice assumption such as framing effects have only recently entered the research agenda of a few international legal scholars.¹⁴ Yet at the same time framing effects have been greatly impactful in the study of political science (both at the domestic and international level) and appear to confirm long-held constructivist views in international relations theory.¹⁵ International legal scholars, policymakers, and practicing lawyers are therefore bound to benefit from studying framing effects as it refines our understanding of the mechanics underlying much of PIL.

¹² Daniel Kahneman and Amos Tversky, ‘Choices, Values, and Frames’ (1984) 39 AM PSYCHOL 341.

¹³ For a discussion on the use of standard game theory in public international law and international relations theory, see, e.g., Duncan Snidal, ‘The Game Theory of International Politics’ (1985) 38 WORLD POLITICS 25.

¹⁴ See, e.g., Anne van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 HARV INT’L LJ 421 (2014); Tomer Broude, ‘Behavioral International Law’ (2015) 163 U PA L REV 1099; Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (OUP 2018) 423–31 with further references; see also Emilie M Hafner-Burton, Stephan Haggard, David A Lake and David G Victor, ‘The Behavioral Revolution and International Relations’ (2017) 71 INT’L ORG 1. For a discussion on the unit of analysis problem, see Anne van Aaken and Tomer Broude, ‘Introduction to Special Issue ‘The Psychology of International Law’’ (2019) 30 EJIL 1225.

¹⁵ See Anne van Aaken, ‘An Experimental Approach to International Legal Theory’ (2019) 30 EJIL 1237.

In this chapter, we examine the implications of framing effects for preference and belief formation shedding light on knowledge production processes and social cognition in specific settings in PIL.¹⁶ The first part of the chapter sketches out the experimental evidence of equivalency and issue framing, shows how it has already been incorporated both explicitly and implicitly in neighboring disciplines to PIL, and untangles the difference between preference reversals and a change in beliefs (II.). Without claiming to be exhaustive, the second part (III.) identifies four typical situations in PIL where framing effects play an important role in social cognition and knowledge production processes: (1) international negotiations ('how law comes into being'), (2) international adjudication ('how law is interpreted and shaped'), (3) global performance indicators ('how soft law shapes behavior'), and (4) norm framing ('how law shapes solutions to problems'). The last part concludes (IV.).

II. Evidence of Framing Effects

1. Equivalency framing

Gain-loss framing effects, arguably the best-known form of equivalency framing, originate from prospect theory.¹⁷ Experimental evidence shows that perceived differences based on a change in the framing of the very same available choice options – that is, from gains to losses – can trigger preference reversals in choices made by individuals in violation of rationalist assumptions. When facing a given decision problem, individuals categorize available choice options as potential gains and losses in relation to a salient reference point (e.g., the status quo or expectations) and systematically pick either the risk-averse option when the decision problem is framed in terms of gains and the risk-seeking option when the decision problem is framed in terms of losses.¹⁸ The underlying value function associated with prospect theory is sharply kinked at the reference point in the sense that it is concave in the domain of gains and convex in the domain of losses, while steeper for losses than for gains by factor of about two-to-one.¹⁹ Simply put, a loss looms larger than an equivalent gain.

Insights from prospect theory have been used in political science scholarship under the heading of 'political psychology'. It has been studied in the context of voting and public opinion,

¹⁶ See the introduction by Andrea Bianci and Moshe Hirsch in this book.

¹⁷ See Kahneman and Tversky (n 9).

¹⁸ *ibid.*

¹⁹ *ibid* 279.

political campaigning, policymaking, coalition bargaining, and a variety of other topics.²⁰ In the international realm, political psychologists have heavily drawn on prospect theory and associated gain-loss framing effects to formalize foreign policy makers' decision making.²¹ They have examined how risk preferences vary as a function of whether foreign policy makers face decision problems either framed in terms of gains or losses.²² With respect to loss frames, political psychology claims that foreign policy makers exhibit a tendency to adopt risk-seeking behavior (e.g., by resorting to preemptive action) to prevent the deterioration of their international positions.²³ Prominent examples include the failed rescue mission of the American hostages in Iran under President Carter in 1980.²⁴ In the domain of gains, on the other hand, foreign policy makers appear more likely to accept the status quo.²⁵ Examples include NATO's hesitation in the 1990s to expand into parts of Eastern Europe in view of Russia's weaknesses.²⁶

2. Issue framing

Issue framing refers to 'situations where, by emphasizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions'.²⁷ As compared to equivalency framing, issue framing does not involve logically equivalent ways of making the same statement and appears to occur via distinct psychological processes.²⁸ The latter is not a violation of the invariance axiom.²⁹ In contrast to earlier studies that explained issue framing in terms of either altering the content of beliefs or temporary priming,³⁰ it has been shown that issue framing influences opinion not primarily by targeting belief content, but rather by selectively enhancing the relative importance an individual assigns

²⁰ See, e.g., Jack S Levy, 'Applications of Prospect Theory to Political Science' (2003) 135 SYNTHÈSE 215.

²¹ James Davis (ed), *Psychology, Strategy and Conflict* (Routledge 2013).

²² See, e.g., Barbara Farnham, *Avoiding Losses, Taking Risks: Prospect Theory and International Conflict* (University of Michigan Press 1994); Rose McDermott, *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy* (University of Michigan 1998).

²³ See, e.g., Jack S Levy, 'Prospect Theory and International Relations: Theoretical Applications and Analytical Problems' (1992) 13 POL PSYCHOL 286.

²⁴ See Rose McDermott, 'Prospect Theory in International Relations: The Iranian Hostage Rescue Mission' (1992) 13 POL PSYCHOL 237; for further examples, see Audrey McInerney, 'Prospect Theory and Soviet Policy Towards Syria, 1966-1967' (1992) 13 POL PSYCHOL 265; Barbara Farnham, 'Roosevelt and the Munich Crisis, Insights from Prospect Theory' (1992) 13 POL PSYCHOL 205.

²⁵ James M Goldgeier and Philip E Tetlock, 'Psychology in International Relations Theory' (2001) 4 ANN REV POL SCI 71.

²⁶ *ibid.*

²⁷ See Druckmann (n 11) 672; see also James N Druckman, 'On the Limits of Framing Effects: Who Can Frame?' (2001) 63 J POLIT 1041, 1042.

²⁸ Druckman (n 11) 672.

²⁹ *ibid* 673.

³⁰ See, e.g., Shelly Chaiken, Wendy Wood and Alice H Eagly, 'Principles of Persuasion' in E Tory Higgins and Arie W Kruglanski (eds), *Social Psychology: Handbook of Basic Principles* (Guilford Press 1996); Benjamin I Page and Robert Y Shapiro, *The Rational Public* (University of Chicago Press 1992); Donald R Kinder and Lynn M Sanders, *Divided by Color: Racial Politics and Democratic Ideals* (University of Chicago Press 1996) 174.

to specific beliefs with respect to the issue at hand.³¹ Whether employed consciously or not, issue framing allows individuals to filter information to make some aspects of a broader problem more salient than others and therefore has the potential of changing the way individuals deliberate and what they believe to be important,³² particularly if promulgated by sources that individuals deem credible.³³ Furthermore, experimental research shows that the ‘lens’ through which subjects view a given question changes their attitudes on a broad range of related questions.³⁴ In international politics, for example, describing a protectionist trade policy as an issue of national security by a head of state may cause people to base their opinions primarily on security threats as opposed to adverse economic implications.³⁵ Also, foreign engagements by the United States may be framed as either tools for promoting American interests abroad, a waste of taxpayers’ money, or humanitarian gestures directed at the needy of the world.³⁶

Issue framing has also been demonstrated in strategic interactions by showing that describing a prisoner’s dilemma game in two different ways – either as a ‘Wall Street Game’ or ‘Community Game’ – had an influence on players’ choices to either cooperate or defect, leading to more cooperation in the latter case as compared to the former.³⁷ Intuitively, this does not seem surprising: whereas ‘Wall Street’ emphasizes one’s individual self-interest, ‘community’ is generally associated with the collective interest of a particular group. In other words, players’ beliefs about other players’ most probable choice to either defect or cooperate can be represented as a function of the label of the game.³⁸ Other examples that are relevant in PIL abound: it has been shown that reframing an ultimatum game as a product of resource scarcity generates higher offers and fewer rejections,³⁹ reframing negotiations as occurring in an international setting rather than a business context increases cooperation,⁴⁰ and reframing a

³¹ See Thomas E Nelson and Zoe M Oxley, ‘Issue Framing Effects on Belief Importance and Opinion’ (1999) 61 J POLIT 1040; Thomas E Nelson, Zoe M Oxley and Rosalee A Clawson, ‘Toward a Psychology of Framing Effects’ (1997) 19 POLITICAL BEHAV 221.

³² See Nelson and Oxley (n 31).

³³ See James N Druckman, ‘Using Credible Advice to Overcome Framing Effects’ (2001) 17 J L ECON & ORG 62.

³⁴ See Dennis Chong and James N Druckman, ‘Framing Theory’ (2007) 10 ANNU REV POLITICAL SCI 103.

³⁵ See Anne van Aaken and Jürgen Kurtz, ‘Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism’ (2019) 22 J INTL ECON L 601.

³⁶ Nelson and Oxley (n 31) 1041.

³⁷ See Varda Liberman, Steven M Samuels and Lee Ross, ‘The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner’s Dilemma Game Moves’ (2004) 30 PERS SOC PSYCHOL BULL 1175; see also Tore Ellingsen, Magnus Johannesson, Johanna Mollerstrom and Sara Munkhammar, ‘Social Framing Effects: Preferences or Beliefs?’ (2012) 76 GAMES ECON BEHAV 117.

³⁸ Liberman, Samuels and Ross (n 37) 1182.

³⁹ See Colin F Camerer, *Behavioral Game Theory: Experiments in Strategic Interaction* (Princeton University Press 2003) 75.

⁴⁰ See Richard J Eiser and Kum-Kum Bhavnani, ‘The Effect of Situational Meaning on the Behaviour of Subjects in the Prisoner’s Dilemma Game’ (1974) 4 EUR J OF SOC PSYCHOL 93.

prisoner's dilemma as a trust game has equally been reported to enhance cooperation.⁴¹ This is in stark contrast to what standard game theory would predict; that is, the Nash equilibrium in the prisoner's dilemma game is to defect. Both conditions in the experiments involved alternative wordings, but objectively equivalent material incentives. Experimental research thereby exposes the shortcomings associated with overemphasizing the role of material payoffs in human decision making.

Rationalist international relations theory has already incorporated, albeit not explicitly through the lens of framing effects, the issue of changes in beliefs and how this affects behavior. On the one hand, both realist and institutionalist scholars assume that international actors select the best option among available alternatives based on payoff structures that focus exclusively either on security concerns or material interests, respectively.⁴² On the other hand, constructivists claim that international institutions – conceptualized as interpretative frameworks – can be transformative as a result of defining identities and shaping action.⁴³ Unlike institutionalists, for example, constructivists depart from the overemphasis on material interests and focus on the causal effects of non-material aspects such as ideas, culture, and norms: 'what actors want is not fixed and predetermined, but a function of their culture, prevailing ideas, and identity, or the conception of who they are'.⁴⁴ Considering that constructivists treat belief formation as a function of external forces, elements such as learning effects, shared understanding, and social norms become important in determining the behavior of international actors.⁴⁵ In particular, the language and rhetoric used to construct social reality – that is, the framing of beliefs – are essential to predict outcomes in strategic settings.

3. Preference reversals versus a change in beliefs

Whereas preferences reflect what individuals want (to increase their utility), beliefs relate to what individuals think (about others' beliefs and actions). In the context of strategic interactions, beliefs center on players' beliefs about other players' choices, which then again depend on the latter players' beliefs about the former players' choices (and so forth). In standard game theory, the process of tracing back interdependent decision making up to the very first

⁴¹ See Brian Skyrms, *The Stag Hunt and the Evolution of Social Structure* (CUP 2004).

⁴² Jeffrey A Frieden, David A Lake and Kenneth A Schultz, *World Politics: Interests, Interactions, Institutions* (3rd edn W. W. Norton & Company 2016) xxviii.

⁴³ *ibid* xxxi, see also John G Ruggie, *Constructing the World Polity: Essays on International Politics* (Routledge 1998); Alexander Wendt, *Social Theory of International Politics* (CUP 1999).

⁴⁴ Frieden, Lake and Schultz (n 42) xxxi.

⁴⁵ See, e.g., Alexander Wendt, 'Constructing International Politics' (1995) 20 INTL SECUR 73.

choice to either cooperate or defect is commonly referred to as backward induction.⁴⁶ If players are assumed to be mere payoff maximizers, payoffs alone represent preferences. However, recent work in psychological game theory – supported by experimental evidence – shows that preferences also depend on features of beliefs about behavior, which are determined by strategic analysis (e.g., kindness-based reciprocity).⁴⁷ In other words, players’ beliefs about other players’ choices are endogenous variables of the underlying strategic setting.⁴⁸ As a result, backward induction alone cannot be used to figure out a player’s optimal choice independently of beliefs.⁴⁹ To make an expected-utility maximizing choice, a player thus must consult their beliefs about the probability of the other player to either cooperate or defect.⁵⁰ A given model of standard game theory (such as the prisoner’s dilemma game) can thereby be transformed into a psychological game by extending standard payoff-based utilities by belief-dependent utilities.⁵¹ As the independence and invariance axioms also applies to belief formation, a player’s beliefs about the probability of the other player to either cooperate or defect should not vary on how the underlying strategic setting is framed. Yet belief-based framing matters. As shown above, both equivalency framing and issue framing, which may reasonably be assumed to apply to strategic settings as much as to public opinion, bear the potential of triggering preference reversals and influencing individuals’ beliefs about others’ beliefs. The causal link between framing effects and resulting behavior thereby becomes clear: framing effects cause a change in beliefs, and as beliefs are factored into preferences, beliefs, in turn, shape resulting behavior.⁵²

To gain a better understanding of how framing effects shape PIL, it is important to distinguish between preference reversals and a change in beliefs, even if difficult in practice. Preference reversals (e.g., triggered by loss aversion) are more long-lasting and impact compliance with a given treaty, for example, to a larger extent. A change in beliefs, on the other hand, is a matter of interaction between international actors, such as whether other signatories to the treaty are expected to comply or not. In practice, both preference reversals and a change in beliefs may be intertwined.

⁴⁶ See, e.g., Andreu Mas-Colell, Michael D Whinston and Jerry R Green, *Microeconomic Theory* (OUP 1995) 277.

⁴⁷ See Pierpaolo Battigalli and Martin Dufwenberg, ‘Belief-Dependent Motivations and Psychological Game Theory’ (2020) CESIFO WORKING PAPERS NO 8285 <<https://www.cesifo.org/en/publikationen/2020/working-paper/belief-dependent-motivations-and-psychological-game-theory>> accessed 21 June 2020 1, 3.

⁴⁸ *ibid.*

⁴⁹ *ibid* 9.

⁵⁰ *ibid.*

⁵¹ *ibid* 4.

⁵² Martin Dufwenberg, Simon Gächter and Heike Hennig-Schmidt, ‘The Framing of Games and the Psychology of Play’ (2011) 73 *GAMES ECON BEHAV* 459; Battigalli and Dufwenberg (n 47).

III. Applications in public international law

As compared to international legal scholarship, neighboring disciplines differ in their research focus. Perhaps most importantly, both political psychology and most international relations scholarship attribute minor importance to international legal norms, if any. Furthermore, political psychology predominantly concentrates on international security concerns, which form only a small part of PIL. Also, whereas PIL has focused for a long time on collective unitary actors (e.g., sovereign states), political psychology uses prospect theory predominantly to explain the behavior of single elite decision makers. However, in view of the Cuban Missile Crisis, for example, it becomes clear that elite decision makers (incl. former President Kennedy) do not make important decisions on their own.⁵³ A detailed overview of experimental research on group decision making would go beyond the scope of this chapter. The issue, however, is crucial as behavioral decision theories are most germane ‘to situations in which an individual makes choices among several alternatives presented by an external environment’.⁵⁴ In general, how findings from behavioral and experimental research – primarily tested in the context of individual decision making – unfold within groups greatly depends on a wide array of factors: group characteristics, decision-making procedures, the object of decision, and the decision task,⁵⁵ while furthermore taking into account that PIL offers many instances of advice taking, which differs from group decision making in subtle ways.⁵⁶ However, it has been shown that groups could be more vulnerable to framing effects than individuals.⁵⁷ Groups may amplify framing effects because of the high likelihood for initial framing effects at the individual level to interact, in potentially destructive ways, with processes of social influence.⁵⁸ Given the required fine-tuning of decision-making processes to counter framing effects, there is little reason to believe that governmental bodies form an exception.⁵⁹ Yet international courts may fare better

⁵³ See, e.g., Robert F Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (W.W. Norton & Company 1969).

⁵⁴ van Aaken (n 14) 439.

⁵⁵ Christoph Engel, ‘The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature?’ (2010) 6. J INSTITUTIONAL ECON 445; Steven R Elliot and Michael McKee, ‘Collective Risk Decision in the Presence of Many Risks’ (1995) 48 KYKLOS 541; Patrick R Laughlin and Alan L Ellis, ‘Demonstrability and Social Combination Processes on Mathematical Intellectual Tasks’ (1986) 22. J EXPERIMENTAL SOC PSYCHOL 177; see also Zamir and Teichman (n 14) 120-24; Eyal Zamir, *Law, Psychology, and Morality: The Role of Loss Aversion* (OUP 2015) 37.

⁵⁶ Zamir and Teichman (n 14) 123-24.

⁵⁷ Norbert L Kerr, Robert J MacCoun and Geoffrey P Kramer, ‘Bias in Judgment: Comparing Individuals and Groups’ (1996) 103 PSYCHOL REV 687; Timothy W McGuire, Sara Kiesler and Jane Siegel, ‘Group and Computer-Mediated Effects in Risk Decision Making’ (1987) 52 J PERS SOC PSYCHOL 917; Paul W Paese, Mary Bieser and Mark E Tubbs, ‘Framing Effects and Choice Shifts in Group Decision Making’ (1993) 56 ORGAN BEHAV HUM DECIS PROCESS 149.

⁵⁸ Cass R Sunstein and Reid Hastie, *Wiser: Getting Beyond Groupthink to Make Groups Smarter* (Harvard Business Review Press 2015) 52, 75.

⁵⁹ *ibid.*

on introducing counter-frames if they have diversity requirements, such as the International Court of Justice.⁶⁰ Diversity leverages counter-factual mindsets, which may foster deliberative efforts among international judges as well as arbitrators and thus reduce the influence of framing effects.⁶¹

In what follows, we identify four typical situations in PIL where framing effects play an important role in social cognition and knowledge production processes, which happen in those instances simultaneously: international negotiations, international adjudication, global performance indicators, and norm framing, pointing out whether it refers rather to equivalency or issue framing.

1. How law comes into being: international negotiations

Much of PIL comes into being through negotiations between sovereign states. International negotiations thereby primarily address legal processes that underlie the creation of substantive PIL. In so doing, international negotiations become critical for both social cognition and knowledge production processes at the international level. The influence of framing effects in international negotiations is therefore of utmost importance to understand the creation of PIL, in particular in the domain of treaty making. At the same time, the existence of framing effects also implies the need for a different kind of knowledge production: the development and dissemination of behaviorally informed negotiation practices.

It has been shown that actively manipulating the setting of the negotiation – that is, by framing each negotiator's problem description either in terms of gains or losses – resulted in different outcomes.⁶² Whereas negotiators whose problem description was framed in terms of losses showed little willingness to make concessions, negotiators in the positive frame condition

⁶⁰ See Statute of the International Court of Justice (26 June 1945) 33 UNTS 933 art. 9. More generally on diversity in international arbitration in comparison with courts: Susan Franck, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 COLUM J TRANSNAT'L L 429.

⁶¹ See Adam D Galinsky and Laura J Kray, 'From Thinking About What Might Have Been to Sharing What We Know: The Effects of Counterfactual Mind-Sets on Information Sharing Groups' (2004) 40 J EXP SOC PSYCHOL 606; Laura J Kray and Adam D Galinsky, 'The Debiasing Effect of Counterfactual Mind-Sets: Increasing the Search for Disconfirmatory Information in Group Decisions' (2003) 91 ORGAN BEHAV HUM DECISION PROCESSES 69; see also Jan-Philip Elm, 'Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators' (2016) 27 AM REV INT'L ARB 125-27.

⁶² Margaret A Neale and Max H Bazerman, 'The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes' (1985) 28 ACAD MANAG J 34; in the context of settlement negotiations, see Jeffrey J Rachlinski, 'Gains, Losses, and the Psychology of Litigation' (1996) 70 S CAL L REV 113; Russell Korobkin and Chris Guthrie, 'Psychological Barriers to Litigation Settlement: An Experimental Approach' (1994) 93 MICH L REV 107; Linda Babcock, Henry S Farber, Cynthia Fobian and Eldar Shafir, 'Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values' (1995) 15 INTL REV L & ECON 289.

reached more successful outcomes.⁶³ These findings suggest that negotiating parties tend to become risk-seeking if they enter the negotiation process considering what they have to lose while they could just as well reach a mutually beneficial compromise by primarily focusing on what they could gain. However, even though the previous set of findings is good news for integrative settings that aim at maximizing joint surplus, PIL is nevertheless also prone to distributive concerns. In these situations, negatively framed negotiators appear to outperform their positively framed peers.⁶⁴ As framing effects generally determine whether a negotiator tends to claim value rather than create value,⁶⁵ a risk-seeking negotiator should have a higher propensity to resort to threatening tactics. It follows that risk-averse negotiators – because of their reluctance to engage in risky tactics – might be susceptible to exploitation from those risk-seeking negotiators who are willing to employ them.⁶⁶ In an ideal scenario, different frames should therefore be used alternately throughout the negotiation process depending not only on whether a given issue is either integrative or distributive in nature but also to align negotiators' attitudes among themselves in order to achieve cooperative gains while at the same time assert their interests.

A comparison between the United Nations Framework Convention on Climate Change (UNFCCC) negotiations in Copenhagen and Paris shows that gain-loss framing effects play a role in international treaty-making. In contrast to Copenhagen, Paris triggered a collective shift in international climate action by framing UNFCCC negotiations not in terms of economic burdens associated with coordinated climate action but in terms of opportunities with respect to economic growth and development.⁶⁷ The negotiations in Copenhagen, in contrast, reinforced the developed-developing world framing divide and long-lasting disputes over who ought to take responsibility for mitigating the adverse consequences of climate change, how to share the burden associated with respective policies, and the amount and type of financing on

⁶³ Neale and Bazerman (n 62) 44; *see also* Max H Bazerman, Thomas Magliozzi and Margaret A Neale, 'Integrative Bargaining in a Competitive Market' (1985) 35 ORGAN BEHAV HUM DECIS PROCESS 294.

⁶⁴ *See* Linda Chang, Mandy M Cheng and Ken T Trotman, 'The Effect of Framing and Negotiation Partner's Objective on Judgments About Negotiated Transfer Prices' (2008) 33 ACCOUNT ORGAN SOC 704.

⁶⁵ *See generally*, David A Lax and James K Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (The Free Press 1986).

⁶⁶ Andrea Caputo, 'A Literature Review of Cognitive Biases in Negotiation Processes' (2012) 24 INT J CONFL MANAG 385.

⁶⁷ Jean A Garrison, 'Overcoming Obstacles in Global Climate Action from Copenhagen to Paris: Issue Framing as a Tool to Understand Opportunities for Policy Change' (2017) KFG WORKING PAPER NO. 81 <https://www.polsoz.fu-berlin.de/en/v/transformeuropa/publications/working_paper/wp/wp81/WP_81_Garrison_WEB.pdf> accessed 21 June 2020.

behalf of developed states.⁶⁸ At the same time, the manipulability of a given (loss) frame is not unlimited: some situations display particularly resilient frames,⁶⁹ which appears likely to apply to the immense costs associated with climate action. Perceived reference points outside the laboratory are determined by a wide array of psychological, historical, social, and legal factors.⁷⁰ Even though preference reversals caused by gain-loss framing effects undeniably play a role in the comparison of UNFCCC negotiations, the magnitude of their impact thus remains debatable. A meta-analysis shows that although framing effects exist, their size may be nonetheless small to moderate.⁷¹ However, prior to the negotiations in Paris, 185 States submitted nationally endorsed climate action plans (referred to as Intended Nationally Determined Contributions, INDCs), thereby circumventing long-lasting disputes over how to share the costs of climate action. In comparison to the negotiations in Copenhagen, INDCs thus provided an additional signal. Both theoretical and experimental studies show that using expectations as the reference point (as opposed to the status quo) may offer better explanations and predictions about behavior.⁷² Although debatable, one may argue that the introduction of INDCs not only solved disputes over how to split the costs of climate action but as a result also succeeded in changing the reference expectation in that states expected that the negotiations in Paris would successfully pave the way to an agreement rather than not, thereby highlighting the reputational ‘losses’ associated with the prospect of not belonging to the ‘green club’ of signatories of the agreement.⁷³

International negotiations, aside from competing (distributional) views with respect to the selection of a particular set of Pareto-efficient solutions, are also characterized by competing narratives.⁷⁴ These narratives – that is, alternative issue frames – determine the definition of the negotiation problem, the choice options to be considered, and influence the set of choices ultimately made.⁷⁵ Different frames thereby compete for the attention of the targeted audience, and relative salience of the messages conveyed decides upon which frame dominates the

⁶⁸ *ibid* 7.

⁶⁹ Zamir (n 55) 7.

⁷⁰ *ibid* 211.

⁷¹ See Anton Kühberger, ‘The Influence of Framing in Risky Decisions: A Meta-Analysis’ (1998) 75 *ORGAN BEHAV HUM DECIS PROCESS* 23.

⁷² Zamir (n 55) 8; *see also* Botond Köszegi and Matthew Rabin, ‘A Model of Reference-Dependent Preferences’ (2006) 121 *Q J ECON* 1133; Botond Köszegi and Matthew Rabin, ‘Reference-Dependent Risk Attitude’ (2007) 97 *AM ECON REV* 1047.

⁷³ Regarding INDCs and associated expectations, *see also* Lavanya Rajamani and Jutta Brunnée, ‘The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement’ (2017) 29 *J ENVTL L* 537.

⁷⁴ *See* Garrison (n 67).

⁷⁵ *ibid*; *see also* text accompanying n 36 et seqq.

other.⁷⁶ Put differently, the most effective frames focus on specific attributes and are based on salient issues and experiences that link the negotiation problem to vivid instances of everyday life.⁷⁷

The UNFCCC negotiations in Paris provide evidence for issue framing in action. The presence of 140 world leaders at the launch of the conference, each giving compelling speeches, provided an opportunity for framing the negotiations in terms of need for immediate collective action given the salience of recent natural disasters,⁷⁸ that is, an issue of resource scarcity. In fact, experimental evidence suggests that the salience of ‘dangerous’ thresholds – such as the adverse effects of climate change as per the 2 degrees Celsius limit of global warming – can turn climate negotiations into a cooperative game.⁷⁹ Threshold uncertainty, in contrast, can be detrimental to cooperation.⁸⁰

2. How law is interpreted and shaped: international adjudication

Adjudication is knowledge production in two aspects: facts and law. Whereas the facts are usually case-specific, the law is not but frames future decisions by precedent or argument, usually by making one issue salient while underemphasizing other, equally important aspects. That is, it is an application of issue framing.⁸¹ Whereas law itself is a frame, we are more concerned with how legal interpretation creates frames that ultimately justify adjudicatory decision making as well as future reasoning in international adjudication. We pick two examples of high salience that relate to PIL: the recent Advisory Opinion by the International Court of Justice (ICJ) relating to the separation of the Chagos Archipelago from Mauritius in 1965 (Chagos) and the decision of the European Court of Human Rights (ECtHR) in *James and Others v. The United Kingdom* (James and others),⁸² which either possibly turn out (Chagos)

⁷⁶ *ibid*, for an introduction into salience theory in behavioral economics, see Pedro Bordalo, Nicola Gennaioli and Andrei Shleifer, ‘Salience Theory of Choice Under Risk’ (2012) 127 Q J ECON 1243.

⁷⁷ *ibid*.

⁷⁸ See Garrison (n 67).

⁷⁹ See Scott Barret and Astrid Dannenberg, ‘Climate Negotiations Under Uncertainty’ (2012) 109 PROC NATL ACAD SCI USA 17372.

⁸⁰ *ibid*, see also Astrid Dannenberg, Andreas Löschel, Gabriele Paolacci, Christiane Reif and Alessandro Tavoni, ‘On the Provision of Public Goods with Probabilistic and Ambiguous Thresholds’ (2015) 61 ENVIRON RESOUR ECON 365.

⁸¹ The existence of cognitive biases and heuristics in adjudication is now well documented, see, e.g., Chris Guthrie, Jeffrey Rachlinski and Andrew J Wistrich, ‘Inside the Judicial Mind’ (2001) 86 CORNELL L REV 777; Susan Franck, Anne van Aaken, James Freda, Chris Guthrie and Jeffrey J Rachlinski, ‘Inside the Arbitrator’s Mind’ (2017) 66 EMORY LJ 1115.

⁸² *James and Others v The United Kingdom* App no 8793/79 (ECtHR, 21 Feb 1986) [hereafter James and others]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> accessed 21 June 2020 [hereafter Chagos Advisory Opinion].

or already were (James and others) very influential in subsequent case law of international adjudication.

The 2019 Advisory Opinion of the ICJ in *Chagos* is framing the debate about treaties concluded during colonial times.⁸³ The United Kingdom (U.K.) excised the Chagos Islands from the British colony of Mauritius in 1965, after reaching an agreement with the representatives of the Mauritian colonial government. The U.K. paid Mauritius £3 million in recognition of the detachment of the Chagos Islands and committed to cede the islands back to Mauritius when ‘no longer needed for defence purposes’.⁸⁴ The ICJ held that the separation of the Chagos Islands was contrary to Mauritius’s right to self-determination and that, accordingly, the decolonization of Mauritius was not completed in accordance with PIL.

One key problem was the exercise of discretion to give an opinion, namely whether, in answering the questions posed by the UN General Assembly, the ICJ would in essence decide on a bilateral dispute between states over territorial sovereignty, which one of them (the U.K.) did not consent to. The ICJ acknowledged that there would be a compelling reason to decline if an advisory opinion ‘would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent’.⁸⁵ It got around that problem by framing the issue as one of decolonization and self-determination,⁸⁶ issues in which the UN General Assembly has a longstanding interest – thereby allowing it to proceed – instead of one of sovereignty where it would have needed to decline to give an opinion.⁸⁷ Dissenting Judge Donoghue viewed the issue as a ‘quintessentially bilateral. . . dispute over territorial sovereignty’⁸⁸ since ‘[t]he questions of decolonization and sovereignty cannot be separated’.⁸⁹ The Advisory Opinion of the ICJ may have implications for further

⁸³ Chagos Advisory Opinion (n 82); for a discussion of the Advisory Opinion, see Diane Marie Amann, ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965’ (2019) 113 AJIL 784.

⁸⁴ Chagos Advisory Opinion (n 82) [50].

⁸⁵ Chagos Advisory Opinion (n 82) [85], quoting *Western Sahara* (Advisory Opinion) 1975 <<https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>> accessed 21 June 2020 [33].

⁸⁶ Chagos Advisory Opinion (n 82) [88]. This follows other Advisory Opinions using the ‘compelling reason’ argument to establish jurisdiction, such as *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <<https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>> accessed 21 June 2020 [30]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 21 June 2020 [44].

⁸⁷ Similarly, see Marko Milanovic, ‘ICJ Delivers Chagos Advisory Opinion, UK Loses Badly’ (EJIL:Talk!, 25 February 2019) <<https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>> accessed 21 June 2020.

⁸⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Dissenting Opinion of Judge Donoghue) 2019 <<https://www.icj-cij.org/files/case-related/169/169-20190225-ADV-01-06-EN.pdf>> accessed 21 June 2020 [1], [5]–[8], [21].

⁸⁹ *ibid* [16].

cases, such as military bases in Cyprus (U.K.)⁹⁰ and the Comorian island of Mayotte (France).⁹¹ It can be expected that the Advisory Opinion in *Chagos* will continue to frame future debates and cases.

Another prominent example of influential framing in PIL has been the use of democratic theory by investment tribunals. Several tribunals have claimed that the interests of foreign investors ordinarily will not be represented within the political processes of the host state and investors therefore deserve heightened protection from policy decisions that adversely affect their investment.⁹² In several cases, this has served as an argument to decide in favor of foreign investors. How has this inequality frame – and as a result: special protection in favor of foreign investors – come about?

In *James and others*, the ECtHR had to decide on protection of a foreign investor in an expropriation case. It argued that ‘[e]specially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption.’⁹³ For this result, it also relied on the *travaux préparatoires*, which show that in cases of social reform there was a consensus that foreigners had to be compensated whereas nationals not in all circumstances, and there was good reason for this given the historical context. ECtHR case law indeed shows that in the context of social reform or land reform, full compensation was not owed to nationals.⁹⁴

The first investment tribunal to refer to *James and others* was the *Tecmed* Tribunal. When the tribunal took up this citation in the context of proportionality analysis, it skipped the first part of the sentence, namely ‘as regards a taking of property effected *in the context of a social reform*’ (emphasis added), thus depriving the citation of its context of wide-scale social reform

⁹⁰ Constantinios Yiallourides, ‘Islands, Sovereignty and the Right to Return: An Analysis of the Chagos Islands ICJ Advisory Opinion Request’ (2018) JTMS 1.

⁹¹ UNGA Res 31/4 (21 October 1976) UN Doc A/RES/31/4 and subsequent resolutions up to and including UNGA Res 49/19 (6 December 1994) UN Doc A/RES/49/19 on the ‘Comorian island of Mayotte’, subsequently integrated into France as an overseas *département* in 2011 following a referendum in 2009.

⁹² For an excellent critique, see David Schneiderman, ‘Investing in Democracy? Political Process and International Investment Law’ (2010) 60 UNIV TOR LJ 909.

⁹³ *James and others* (n 82) [63].

⁹⁴ Anne van Aaken, ‘Direct Expropriation: The Legal Landscape in Europe’ in Hojun Lee, Ilya Somin and Iljoong Kim (eds), *Shifting the Paradigm for Sustainable Development: Eminent Domain and Property Rights* (CUP 2017) 67–92.

expropriation.⁹⁵ Weighing into the tribunal's proportionality analysis was 'that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because investors are not entitle[d] to exercise political rights reserved to the nationals of the state, such as voting for the authorities that will issue the decisions that affect such investors'.⁹⁶ It thus engaged in a general theory of the disadvantage of foreign investors who are subject to regulation in host states, framing the situation as one of disenfranchisement, that is, inequality of (democratic) influence of foreign investors as compared to national property owners, and suggested investment protection as an inequality-reducing device. Such issue framing made the participatory element of political rights salient to the detriment of other means of influence of foreign investors.

The *Tecmed* Tribunal's perception of inequality is factually unfounded because foreign investors often have even more influence than national ones, surely more than regular national private property owners unless in the context of social reform. The literature on corporate political activity and business risk suggests that foreign corporate actors can and do shape host state domestic policy.⁹⁷ It even goes further and shows that foreign business may contribute to regime change, where the common underlying motive is 'to establish, promote, and defend the right of Americans to do business around the world'.⁹⁸ This is not meant to say that foreign influence is necessarily bad in single instances, indeed it can be efficiency enhancing,⁹⁹ yet it is to say that foreign investors' political influence is clearly not negligible, which means that inequality in political influence as compared to regular nationals is not a factual pattern to be relied on in legal interpretation. Furthermore, if 'exit' or 'entry' are complements to 'voice',¹⁰⁰ then foreign investors clearly voted with their feet to step into the host country. Regular national citizens cannot do that. This living myth has yet framed the scholarly discussion for a long

⁹⁵ *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States* (2003) ICSID Case No. ARB (AF)/00/2 [122].

⁹⁶ *ibid.*

⁹⁷ Kathleen A Rehbein, 'Foreign-Owned Firms Campaign Contributions in the United States: An Exploratory Study' (1995) 23 *POLICY STUD J* 41; Schneiderman (n 92) 931.

⁹⁸ Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (John Wiley & Sons 2003) 3; this view receives econometric support by Arindrajit Dube, Ethan Kaplan and Suresh Naidu, 'Coups, Corporations and Classified Information' (2008) 126 *Q J ECON* 1375.

⁹⁹ Toke S Aidt and Facundo Albornoz, 'Political Regimes and Foreign Intervention' (2011) 94 *J DEV ECON* 192.

¹⁰⁰ See Albert Hirschman, *Exit, Voice and Loyalty* (CUP 1970).

time¹⁰¹ and several tribunals have taken up the argument.¹⁰² Framing the problem as an inequality issue has thus worked very well (even though it was based on misinformed facts). As the *Lemire* Tribunal held: ‘this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere*. *Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State* and may thus, as a matter of legitimate policy, be granted a wider scope of protection’ (emphasis added).¹⁰³ There are several other examples in investment law in which the original, and ‘wrong’ (i.e., annulled or heavily criticized) decision keep on influencing subsequent jurisprudence.¹⁰⁴

3. How soft law shapes behavior: global performance indicators

Global Performance Indicators (GPI)¹⁰⁵ are not strictly PIL but may exhibit more behavioral force than classical international hard law via issue and equivalency framing. Starting from the 1990s, there has been a global trend in the use of indicators as a governance technique.¹⁰⁶ Intergovernmental organizations (IGOs), nongovernmental organizations (NGOs), private firms, and even states (mainly the United States) have begun to regularly package and distribute information on the relative performance of states, ranging from the World Bank’s Ease of Doing Business Index, to the Financial Action Task Force Blacklist, the Sustainable Development Goals, to the Transparency Perception Index by Transparency International. Such GPIs are ever more analyzed by PIL and international relations scholars¹⁰⁷ given that they are powerful

¹⁰¹ See, e.g., August Reinisch and Ursula Kriebaum, ‘Property, Right to, International Protection’, *Max Planck Encyclopedia of Public International Law* <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/Propertyright_int_protect.pdf> accessed 19 October 2019 [48]; Pasquale de Sena, ‘Economic and Non-Economic Values in the Case Law of the European Court of Human Rights’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 211.

¹⁰² *Pac Rim Cayman LLC v The Republic of El Salvador* (2016) ICSID Case No. ARB/09/12; *Pac Rim Cayman LLC v The Republic of El Salvador* (The Republic of El Salvador’s Counter-Memorial on the Merits) 10 January 2014 <<https://www.italaw.com/sites/default/files/case-documents/italaw3040.pdf>> [270] (fn 406); *International Thunderbird Gaming Corporation v The United Mexican States* (Separate Opinion Thomas Wälde) 1 December 2005 <<https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>> accessed 21 June 2020 [4] (fn 3).

¹⁰³ *Joseph Charles Lemire v Ukraine* (2011) ICSID Case No. ARB/06/18 [57].

¹⁰⁴ Wolfgang Alschner, ‘Correctness of Investment Awards: Why Wrong Decisions Don’t Die’ (2019) 18 LPICT 345.

¹⁰⁵ For a definition (there are several), see Kevin E Davis, Benedict Kingsbury and Sally E Merry, ‘Introduction: Global Governance by Indicators’, in Kevin E Davis, Angelina Fisher, Benedict Kingsbury and Sally E Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012) 3, 6; OECD, *Handbook on Constructing Composite Indicator: Methodology and User Guide* (OECD 2008) <www.oecd.org/std/42495745.pdf> accessed 21 June 2020 13.

¹⁰⁶ Morag Goodwin, ‘The Poverty of Numbers: Reflections on the Legitimacy of Global Development Indicators’ (2017) 13 INTL JLC 487; Marta Infantino, ‘Global Indicators’, in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 349.

¹⁰⁷ Judith G Kelley, *Scorecard Diplomacy: Grading States to Influence Their Reputation and Behavior* (CUP 2017); Judith G Kelley and Beth A Simmons, ‘Politics by Number: Indicators as Social Pressure in International Relations’ (2015) 59 AM J POLITICAL SCI 1146; Judith G Kelley and Beth A Simmons, ‘Introduction: The Power of Global Performance Indicators’ (2019) 73 INT’L ORG 491.

governance tools for shaping the behavior of states and framing issues in the national as well as the international realm. However, the legitimacy of GPIs is sometimes questioned given the risk of abuse.¹⁰⁸

GPIs are intended to generate easily digestible knowledge on the performance of states in selected issue areas. GPIs use comparative information to influence policy and governance through the pressure of comparison.¹⁰⁹ There is evidence that GPIs influence discourse, standards, and measurement, and that they also change actions. They may alter policy priorities, also with unintended consequences, for example by shifting resources to measurable proxies used to compute indicators. For example, it was found that countries substitute toward primary education enrollment rates (which is targeted by the Millennium Development Goals) and away from secondary (which is not), but that these effects are mitigated as accountability rises.¹¹⁰ Next to material interests and reputation creation via GPIs, Kelley and Simmons argue that ‘the social process of GPI influence begins with their ability to frame issues’: ‘naming an issue, coining a vocabulary for describing it, and creating categories for its assessment, promulgators hope to affect discourse and ultimately policy’.¹¹¹ Whereas in some cases, the promulgators collect new data, in others existing data are presented in ways that prioritize new objectives; yet in all cases they draw attention to some issues by making them salient and not others. Only by naming an issue and coining a vocabulary for describing it, as well as by creating categories for its assessment, they affect discourse and ultimately policymaking. GPIs can be well fought over and criticized, a sign for their importance not least because of framing the issue and performance at hand. Furthermore, it may well be that GPIs also rely on gain-loss framing effects since they often are issued annually and a decline in the ranking would activate loss aversion, potentially leading to risky policy choices on behalf of governments.¹¹²

4. How law shapes solutions to problems: norm framing

Norm framing has been analyzed (and welcomed) in many instances at the national and international level but mostly without drawing on psychological insights such as equivalency

¹⁰⁸ David Nelken and Mathias Siems, ‘Introduction: Global Social Indicators: Constructing Transnational Legitimacy’ (2017) 13 INTL JLC 438.

¹⁰⁹ Kelley and Simmons (2019) (n 107).

¹¹⁰ James H Bisbee, James R Hollyer, B Peter Rosendorff and James R Vreeland, ‘The Millennium Development Goals and Education: Accountability and Substitution in Global Assessment’ (2019) 73 INT’L ORG 547.

¹¹¹ Kelley and Simmons (2019) (n 107) 495.

¹¹² For different reactions of governments in order to avoid reputational and material losses due to a downgrading in ranking, see Alexander Cooley and Jack Snyder, *Ranking the World* (Cambridge University Press 2015), 3.

or issue framing.¹¹³ It works particularly well under conditions of uncertainty and fluidity, that is, in situations where opinions can easily be influenced through framing. It is also utilized in instances where an area of PIL is weak in the sense that it lacks international courts to strengthen its effectivity or to mobilize more actors. It is often used to advance a (normative) agenda.

One well researched example is the problem of human trafficking¹¹⁴ where issue frames have changed over time. Historically, the victim protection frame linked trafficking to prostitution, as illustrated by international treaties of the first half of the 20th century¹¹⁵ and was seen as a matter of protecting the vulnerable from exploitation and immoral life, typically of sexual nature, often de-emphasizing the autonomy and rights-bearing nature of the trafficked individual. This frame predominated through at least until the 1950s, but by the late 1990s, the victim protection frame was weakened by differences in opinion over the acceptability of ‘sex work’. It has been shown that framing the issue as a ‘crime issue’ was crucial to reach a consensus, given that human trafficking sits somewhat in between the combat against transnational crime and international human rights (if analyzed through the lens of UN General Assembly Resolutions). The ‘crime-fighting’ frame generates more support than a ‘human rights’ frame, especially in the crucial period leading up to the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons in 2000.¹¹⁶ This may be attributed to both issue framing and equivalency framing because crime – more specifically, the prospect of criminal sanctions – is likely to induce loss aversion.

Another example where human rights frames elevate a problem beyond its legal scope *strictu sensu* is corruption.¹¹⁷ For a long time, international and regional organizations had stressed the negative impacts of corruption on human rights without identifying corruption itself as a violation of human rights. It had mainly been framed as an issue of economic criminal law and although it was stressed that it was not a victimless crime, the victims were not made salient. Lately, however, this tendency has begun to shift in favor of human rights both in the academic discourse as well as in international human rights courts.¹¹⁸

¹¹³ Gwendolyn Leachman, ‘Legal Framing’ (2013) 61 SLPS 25.

¹¹⁴ Mojca Pajnik, ‘Media Framing of Trafficking’ (2019) 12 INTL FEM J POLITICS (2019) 45.

¹¹⁵ International Agreement for the Suppression of the ‘White Slave Traffic’ (adopted 18 July 1904, entered into force 18 July 1905) 1 LNTS 83; International Convention for the Suppression of the Traffic in Women and Children (as amended by the 1947 Protocol) (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415.

¹¹⁶ Volha Charnysh, Paulette Lloyd and Beth A Simmons, ‘Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons’ (2015) 21 EUR J INTL RELAT 323.

¹¹⁷ Jimena Reyes, ‘State Capture Through Corruption: Can Human Rights Help?’ (2019) 113 AJIL Unbound 331.

¹¹⁸ *Ramírez Escobar y otros v Guatemala*, Inter-American Court of Human Rights Series C No 351 (9 March 2018).

Anne Peters has proposed to use international human rights law as a lens for analyzing corrupt acts or omissions, arguing that this would close the ‘implementation gap’ of anti-corruption law.¹¹⁹ While she sets out the legal ways of doing so, Kevin Davis starts earlier and analyzes the value added of doing so by stressing that human rights analysis plays a valuable role in anti-corruption efforts to the extent that it helps produce information about the incidence in the first place.¹²⁰ It does so because international human rights regimes have considerably more capacity for fact-finding by various actors, not least international human rights activists. Moreover, human rights frames highlight the moral significance of corruption since international human rights can be interpreted as statements about moral priorities, thereby inducing states to give higher priority to combating corruption that result in human rights violations rather than to combating other forms of corruption.¹²¹ He thus alludes to classical framing mechanisms, albeit not mentioning the underlying psychological phenomena.

IV. Conclusion

The objectivity of public international law has long been a mantra in international legal scholarship. As such, it was assumed that subjects of PIL make the same decision independent of the way a given decision problem is framed. However, experimental evidence supports the existence of framing effects, both in terms of equivalency and issue framing. Framing effects therefore shine a new light on the study of PIL by providing a more finely grained understanding of how different actors in PIL make sense of international legal regimes and what this implies for resulting behavior.

In particular, framing impacts social cognition as well as knowledge production processes in PIL through various channels: in the context of international negotiations, state representatives and other actors involved (such as NGOs) bring to the negotiation table not only a ‘way of looking’ at the issues at stake but also produce knowledge and information, which influence both their beliefs (e.g., about others’ beliefs) and ultimately their behavior. When judicial bodies issue decisions, they produce knowledge about legal interpretation and facts but also frame the issues at hand in a decisive way for the general public and subsequent judicial decisions. GPIs also impact both social cognition and knowledge production. They frame issues

¹¹⁹ Anne Peters, ‘Corruption as a Violation of International Human Rights’ (2018) 29 EJIL 1251.

¹²⁰ Kevin Davis, ‘Corruption as a Violation of International Human Rights. A Reply to Anne Peters’ (2018) 29 EJIL 1289.

¹²¹ *ibid.*

by providing salience and may give rise to equivalency framing and induce loss aversion, both of which bearing the potential of shaping policymaking. Issue framing also plays a role in the generation of international legal norms, which had already long been discussed in constructivist thought.¹²² However, this debate also raises important follow-up questions, namely with respect to the actors who provide and use frames and those exposed to those frames and thus to the broader question of authority and authority-wielding bodies in PIL and their legitimacy.

Hitherto, those insights have not been studied through the lens of psychological research and have been entirely neglected by rationalist approaches. By illuminating the differences between equivalency framing and issue framing as well as preference reversals and a change in beliefs, international scholars, policymakers, and practicing lawyers can better understand what is going on – be it at the negotiation table, in courtrooms, or governmental bodies – and become aware of their own frames and those of others.

¹²² See n 43 et seqq.