

HOW TO CREATE INTERNATIONAL LAW: THE CASE OF INTERNET FREEDOM IN CHINA

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INTRODUCTION

In early 2010, Google, Inc. (“Google”) announced that it was no longer willing to assist the People’s Republic of China (“China”) with censoring Google search engine results in mainland China. Google subsequently disabled Google.cn and redirected web users to Google.com.hk, an uncensored search portal based in Hong Kong. Google’s actions prompted spirited responses from both the United States and Chinese governments, and exposed a fundamental difference between the two countries’ ideologies regarding internet freedom. Like Google, the United States stressed the importance of internet freedom to human rights and trade. In contrast, China claimed that internet freedom was another variation of Western imperialism and would cause political instability. Unlike China, this Note begins from the premise that internet freedom is a desirable norm that can encourage government accountability, advance educational goals, and spur artistic and scientific innovation. Based on this premise, this Note examines how the United States, a state actor, and Google, a non-state actor, may achieve internet freedom in China through the creation of international law.

This Note constructs a variant of one scholar’s theory of international law to explore the ways in which state and non-state actors can induce internet freedom through international law. In *How International Law Works: A Rational Choice Theory*, Professor Andrew Guzman uses the concept of the “Three Rs of Compliance” or “reputation, reciprocity, and retaliation” to explain why state actors comply with *existing* hard and soft international law (“legal” and “quasi-legal” agreements, respectively).¹ This Note expands Guzman’s rational choice theory by applying it to state

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1. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 9 (2008).

actors and the *creation* of international rules. When applied to the creation of international law, the original definitions of Guzman's reputation, reciprocity, and retaliation evolve into a new concept that this Note terms the "Three Rs of Cooperation." The Three Rs of Cooperation—a variation of Guzman's rational choice theory—describe why a state actor might enter into a *new* international agreement. This Note applies the Three Rs of Cooperation to the circumstances of early 2010 to explain how China may one day enter an international agreement guaranteeing internet freedom to its citizens.

In developing the Three Rs of Cooperation, this Note broadens Guzman's rational choice theory to include non-state actors. Although Guzman's original theory only analyzes the role of state actors in international law, it is necessary to examine the role of non-state actors in this context because of their significant influence in shaping the international conversation concerning internet freedom. A "non-state actor" is used primarily in this Note to describe multinational companies such as Google or Microsoft Corp. ("Microsoft") that are capable of influencing state behavior.

Although the rhetoric employed by Google and the United States frames internet freedom as an essential human right,² this Note does not discuss how internet freedom may be achieved through human rights instruments. Human rights instruments that protect the freedom of expression, such as Article 19 of the Universal Declaration of Human Rights,³ Article 19 of the International Covenant on Civil and Political Rights,⁴ and customary international law are arguably not binding obligations upon China, even if freedom of expression may be said to encompass internet freedom.⁵ The question of whether existing legal

2. See, e.g., Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010) (transcript available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>); see also "Google and Internet Control in China: A Nexus Between Human Rights and Trade?" Hearing Before the Congressional-Exec. Commission on China, 111th Cong. 34-37 (2010) [hereinafter Davidson Testimony] (testimony of Alan Davidson, Director of Public Policy, Google Inc.), available at <http://www.scribd.com/doc/28866040/032410-Alan-Davidson-Testimony>.

3. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

4. Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 19, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

5. First, the Universal Declaration of Human Rights is a nonbinding agreement. Second, China has not ratified the International Covenant on Civil and Political Rights and technically has no obligation to uphold the substantive obligations of the treaty. See Status of the Int'l Covenant on Civil and Political Rights, U.N. T. Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb 10, 2011). Finally, it is arguable whether internet freedom has existed long enough under the banner of freedom of expression to

obligations require China to provide internet freedom to its citizens is outside the scope of this Note.

In summary, this Note fashions a theory that explains state cooperation with the creation of international law by building upon Guzman's theory of state compliance with existing international law, and applies this theory to the context of internet freedom in China. Part I discusses the events surrounding Google's withdrawal from China in early 2010. Part II summarizes Guzman's rational choice theory of international law. Part III redefines the role of reciprocity, retaliation, and reputation in the Three Rs of Cooperation, a variation of Guzman's rational choice theory. It uses the Three Rs of Cooperation to contemplate how the actions of both state and non-state actors can create international law. Part IV examines how state and non-state actors may use the Three Rs of Cooperation most effectively. It also considers how the choice between the hard and soft law forms may aggravate or mollify China's objections to a potential agreement that establishes internet freedom in China. Ultimately, this Note concludes that the United States and Google are most likely to achieve internet freedom in China through the concurrent use of the Three Rs of Cooperation, the collaboration of other state and non-state actors, and the soft law form.

I. FACTUAL BACKGROUND

On January 12, 2010, Google announced that sophisticated hackers in China had targeted several prominent U.S. companies and stolen valuable intellectual property from Google.⁶ Perhaps more seriously, these cyber

constitute customary international law. In particular, China has adamantly denied that it has violated the freedom of expression. Rather, China refers to Google's withdrawal and the United States' subsequent call to promote internet freedom as "information imperialism." Opinion, *The Real Stake in "Free Flow of Information,"* GLOBAL TIMES (Jan. 22, 2010), available at <http://opinion.globaltimes.cn/editorial/2010-01/500324.html>. This Note refers to English language editorials and articles from Chinese state-run newspapers—for instance, *Xinhua*, *China Daily*, and *Global Times*—as indicative of the Chinese government's public stance. These editorials and articles represent the message that the Chinese government desires to convey to its own people and the international community. See Wordpress.org, *World Newspapers and Magazines, China*, <http://www.worldpress.org/newspapers/asia/china.cfm> (listing affiliations of major newspapers in China); *China's State-Run Media Chastise Google*, CBS NEWS (Mar. 22, 2010), available at <http://www.cbsnews.com/stories/2010/03/22/business/main6322336.shtml> (arguing that the Chinese government reportedly told news editors to "get on message" criticizing Google); Tania Branigan, *China Defies Media Cuts and Closures with New Newspaper Launch*, THE GUARDIAN (U.K.) (Apr. 20, 2009), available at <http://www.guardian.co.uk/world/2009/apr/20/china-newspaper-launch> (describing the launch of *Global Times* as a "part of the Chinese government's drive to promote its views to an international audience and reshape the country's reputation").

6. David Drummond, *A New Approach to China*, THE OFFICIAL GOOGLE BLOG (Jan. 12, 2010), <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html>.

attackers had “routinely accessed” the Gmail accounts of Chinese, American, and European human rights supporters.⁷ Although Google never accused the Chinese government directly,⁸ Google declared that it was no longer willing to help the Chinese government censor search results on Google.cn, and that it was reviewing the feasibility of its continued operations in China.⁹ Google’s accusations were confirmed when diplomatic cables leaked to WikiLeaks revealed that the Chinese Politburo directed “computer sabotage . . . [of Google], American government computers, . . . Western allies, . . . and American businesses.”¹⁰

Less than a week following Google’s announcement, the U.S. government promoted internet freedom from “a piece of . . . foreign policy arcana” to the forefront of its foreign policy agenda.¹¹ Secretary of State Hillary Clinton stated that “new technologies do not take sides in the struggle for freedom and progress, but the United States does. We stand for a single internet where all of humanity has equal access to knowledge and ideas.”¹² Secretary of State Clinton directed her speech toward all repressive countries, but specifically named China as a state that threatens “the free flow of information.”¹³ She referred to the conflict involving Google and China, stating that she expected “Chinese authorities to conduct a thorough review of the cyber intrusions that led Google to make its announcement.”¹⁴

Chinese media swiftly denounced the U.S. government’s criticisms of China as a repressive country. For instance, *Xinhua*, a government-owned Chinese newspaper, requested that the United States “stop unreasonable accusations on China in the name of so-called Internet Freedom.”¹⁵ Government officials asserted that, far from restricting internet freedom, “[t]he Chinese constitution protects . . . citizens’ freedom of speech” and

7. *Id.* Gmail is a web-based email service provided by Google.

8. Davidson Testimony, *supra* note 2, at 35.

9. *Id.*

10. Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES (Nov. 28, 2010), available at <http://www.nytimes.com/2010/11/29/world/29cables.html>.

11. Alec Ross, Senior Advisor for Innovation, U.S. State Dep’t, State Dep’t Officials Brief Reporters on Internet Freedom (Jan. 22, 2010), available at <http://www.america.gov/st/texttrans-english/2010/January/20100123124856SBlebahC1.357234e-02.html>.

12. Clinton, *supra* note 2.

13. *Id.*

14. *Id.*

15. *China Urges U.S. to Stop Accusations on So-Called Internet Freedom*, XINHUA (Jan. 22, 2010), available at http://news.xinhuanet.com/english2010/china/2010-01/22/c_13147126.htm. For information on *Xinhua* as a government-owned Chinese newspaper, see Worldpress.org, *supra* note 5.

“China’s internet is open.”¹⁶ *China Daily*, also a state-run newspaper, stressed that the internet in China promotes “social democracy and pluralism” because it is “one of the major channels for people to offer tips on abuse of power by officials and lodge complaints about wrongdoings by governments at all levels.”¹⁷ The newspaper also claimed that the United States has no cause to criticize China for repressing information on the internet, because the internet has evidently caused “economic and political reform” and improved freedom of speech in China.¹⁸

Chinese media argued that the U.S. government was attempting to impose “information[al] imperialism” upon China and other developing countries by demanding universal access to an open internet.¹⁹ Chinese media described Secretary of State Clinton’s call for “an unrestricted Internet . . . [as] a disguised attempt to impose its values on other cultures in the name of democracy.”²⁰ A Chinese editorial described the U.S. government’s appeal to internet freedom as “smart sanctions” meant to “export democracy” and thereby instigate a change in government regime.²¹ The *Global Times* criticized the concept of “freedom of speech” as “an aggressive political and diplomatic strategy, rather than a desire for moral values.”²² Because many countries cannot match the “informational control and dissemination” of Western countries, an unrestricted internet would be tantamount to further disadvantaging non-Western nations.²³ To support its accusations, Chinese media noted that the United States had

16. *Id.*

17. *Internet Safety, Order*, CHINA DAILY (Jan. 23, 2010), available at http://www.chinadaily.com.cn/cndy/2010-01/23/content_9365529.htm. For information on *China Daily* as a state-run newspaper, see Worldpress.org, *supra* note 5.

18. *Id.*

19. *The Real Stake in “Free Flow of Information,”* *supra* note 5.

20. *Id.*

21. *Googling Sanction Targets*, CHINA DAILY (Mar. 18, 2010), available at http://www.chinadaily.com.cn/opinion/2010-03/18/content_9606924.htm (quoting Adam Szubin, a director of the U.S. Department of Treasury’s Office of Foreign Assets).

22. *The Real Stake in “Free Flow of Information,”* *supra* note 5. See also Ian Buruma, *Battling the Information Barbarians*, WALL ST. J. (Jan. 29, 2010), available at <http://online.wsj.com/article/SB10001424052748704878904575031263063242900.html> (explaining that Chinese officials often view criticism of their human rights policy or politics “as an attack on Chinese culture” or “an attempt to ‘denigrate China’”). The *Global Times* is affiliated with *People’s Daily*, a newspaper run by the Chinese Communist Party. See Worldpress.org, *supra* note 5.

23. *The Real Stake in “Free Flow of Information,”* *supra* note 5. The Chinese argument appears to assert that because information production in the United States outpaces information production in China and non-Western nations, citizens of non-Western nations would be unfairly swayed to believe that democracy is the correct form of governance. Thus, restrictions on the internet are necessary to level the ideological playing field.

recently formed a cyber warfare division²⁴ and that shortly before Google's announcement on January 12, 2010, the Secretary of State dined with "the leaders of the powerful information enterprises such as . . . Microsoft, Twitter and Google."²⁵ Chinese media thereby implied that the United States government was conspiring with American information industry giants to topple China.

Although China claims that it censors only websites that encourage violence or terrorism or that disseminate illicit material such as child pornography,²⁶ several nonprofit and human rights organizations have reported that the Chinese government actively engages in censorship and repressive activities that extend far beyond its claims.²⁷ Besides actively censoring websites,²⁸ the Chinese government controls the rapid spread of "negative news reports" on the internet using an approach called "Control 2.0."²⁹ Under Control 2.0, the Chinese government nullifies the

24. Commentary, *Don't Impose Double Standards on "Internet Freedom,"* XINHUA (Jan. 24, 2010), available at http://news.xinhuanet.com/english2010/china/2010-01/24/c_13148512.htm.

25. *Google, Do Not Take Chinese Netizens Hostage*, XINHUA (Jan. 20, 2010), available at http://news.xinhuanet.com/english2010/indepth/2010-01/20/c_13143639.htm.

26. See, e.g., *Don't Impose Double Standards on "Internet Freedom,"* *supra* note 24 (defending China's restrictions on the internet by pointing out that the United States also regulates terrorist and pornographic activities on the internet); *China Says Internet Regulation Legitimate and Reasonable*, XINHUA (Jan. 25, 2010), available at http://news.xinhuanet.com/english2010/china/2010-01/25/c_13149272.htm (noting that Chinese internet regulations are based on, *inter alia*, the Law on the Protection of Minors).

27. See, e.g., Joanne Leedom-Ackerman, *The Intensifying Battle Over Internet Freedom*, THE CHRISTIAN SCIENCE MONITOR (Feb. 24, 2009), available at <http://www.csmonitor.com/Commentary/Opinion/2009/0224/p09s01-coop.html> (noting that China is "particularly adept at blocking Internet use" and "leads the list of countries with . . . the highest number of writers in prison"). See also *Global Internet Freedom: Corporate Responsibility and the Rule of Law: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Human Rights and the Law*, 110th Cong. (May 20, 2008) (testimony of Arvind Ganesan, Director, Business and Human Rights Program, Human Rights Watch), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3369&wit_id=7184 ("We also learned that US companies, including Google, Microsoft, and Yahoo!, censor their search engines in China, in anticipation of what Chinese censors expect and in addition to what the Chinese government's firewall prohibits.").

28. Andrew Jacobs, *Chinese Learn Limits of Online Freedom as the Filter Tightens*, N.Y. TIMES (Feb. 4, 2009), available at <http://www.nytimes.com/2009/02/05/world/asia/05beijing.html> (reporting that a Chinese Internet affairs bureau official admonished his peers "to check the channels one by one, the programs one by one, the pages one by one"). See generally HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM": CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 18:8 (C) (2006), available at <http://www.hrw.org/sites/default/files/reports/china0806webwcover.pdf> (describing the Chinese government's curtailment of freedom of expression on the Internet and the complicity of multinational companies including Yahoo!, Microsoft, Google, and Skype); OPENNET INITIATIVE, INTERNET FILTERING IN CHINA (2009), available at http://opennet.net/sites/opennet.net/files/ONI_China_2009.pdf (describing the Chinese government's posture toward Internet censorship).

29. OPENNET INITIATIVE, *supra* note 28, at 3.

dissemination of damaging information by issuing “‘authoritative’ facts” through “state news agencies such as Xinhua and the People’s Daily.”³⁰

After weeks of silence,³¹ Google finally announced in late March 2010 that it was automatically diverting mainland Chinese internet users from its censored Google.cn search engine to its uncensored Google.com.hk search engine based in Hong Kong.³² In the weeks preceding the announcement, the Chinese government refused to make any concessions regarding China’s internet policy during talks with Google.³³ In fact, far from relaxing its policies, China strengthened its censorship and surveillance practices in April 2010 by amending the Protection of State Secrets Law, so that the government could force foreign companies to release information on their customers relating to “leaks of state secrets.”³⁴ The amendment gives the Chinese government great power, due to the fact that “[a]lmost any information can be classified as a state secret in China . . . even information [that is] publicly circulated.”³⁵

Google maintained its stance against censorship through June 2010, but it backed down from its original threat to leave China.³⁶ On June 30, 2010, Google’s Internet Content Provider license was due to be renewed by the Chinese government.³⁷ Without a renewed license, Google would not be able to operate in China, and the Chinese government made it plain that it would not renew the company’s license if Google continued to redirect mainland Chinese users of Google.cn to Google.com.hk.³⁸ In order to comply with China’s demands and yet not abandon the moral high ground of its stance against censorship, Google stopped automatically redirecting mainland Chinese internet users in June 2010 from Google.cn to Google.com.hk,³⁹ but provided a link on Google.cn so that users could still

30. *Id.* at 3-4.

31. Kevin Voigt, *China Partners to Google: Decide Now*, CNN (Mar. 17, 2010), available at <http://www.cnn.com/2010/BUSINESS/03/17/china.google.letter/index.html>.

32. Miguel Helft & David Barboza, *Google Shuts China Site in Dispute Over Censorship*, N.Y. TIMES (Mar. 22, 2010), available at <http://www.nytimes.com/2010/03/23/technology/23google.html>.

33. Elinor Mills, *In Post-Google China, Censorship is Unfazed*, CNET NEWS (Mar. 26, 2010), http://news.cnet.com/8301-27080_3-20001212-245.html.

34. Sky Canaves, *Beijing Revises Law on State Secrets*, WALL ST. J. (Apr. 29, 2010), available at <http://online.wsj.com/article/SB10001424052748703572504575213944098022692.html>; see also Kathrin Hille, *China Includes Internet in Secrets Law Revision*, FIN. TIMES (Apr. 29, 2010), available at <http://www.ft.com/cms/s/2/d7944740-537d-11df-bfdf-00144feab49a.html>.

35. Canaves, *supra* note 34.

36. Helft & Barboza, *supra* note 32.

37. David Drummond, *An Update on China*, THE OFFICIAL GOOGLE BLOG (June 28, 2010), <http://googleblog.blogspot.com/2010/06/update-on-china.html>.

38. *Id.*

39. *Id.*

click through to Google.com.hk.⁴⁰ By doing so, Google complied with China's regulations and successfully renewed its Internet Content Provider license.⁴¹

While Google could have remained silent regarding the cyber attacks like other victimized companies,⁴² it instead vocally campaigned against internet censorship. Google executives called for the U.S. government to prioritize internet freedom in U.S. foreign policy, arguing that internet censorship creates human rights violations and barriers to trade.⁴³ Google offered several methods to combat internet censorship; for instance, Google suggested that U.S. companies could disclose any requests by foreign governments for companies to censor information or to produce personal information concerning their clients.⁴⁴ To demonstrate its commitment to transparency and the freedom of expression, Google unveiled on April 20, 2010 a new online tool that discloses government requests received by Google for "user data or content removal."⁴⁵

Google's influence on state policy and its focus on human rights, transparency, and freedom of expression has prompted journalists and academics to describe Google as a quasi-state.⁴⁶ In February 2010, Sergey Brin, Co-Founder of Google and President of Google's Technology

40. *Id.*

41. *Id.* Many interpreted Google's actions to appease the Chinese government so that Google's license could be renewed to mean that Google had lost its battle against censorship in China. Surojit Chatterjee, *Google Seen Losing Censorship Battle Against China Govt, May Lose License*, INT'L BUS. TIMES (July 1, 2010), available at <http://www.ibtimes.com/articles/32005/20100701/google-seen-losing-censorship-battle-against-china-govt-may-lose-license.htm>.

42. John Markoff, *Cyberattack on Google Said to Hit Password System*, N.Y. TIMES (Apr. 19, 2010), available at <http://www.nytimes.com/2010/04/20/technology/20google.html>.

43. Davidson Testimony, *supra* note 2, at 36.

44. *Id.* at 36-37.

45. David Drummond, *Greater Transparency Around Government Requests*, THE OFFICIAL GOOGLE BLOG (Apr. 20, 2010), <http://googleblog.blogspot.com/2010/04/greater-transparency-around-government.html>; see also Google, *Transparency Report: Government Requests*, <http://www.google.com/governmentrequests/> (follow "China" hyperlink) (last visited May 22, 2010). Data regarding China is markedly absent from this tool, because "Chinese officials consider censorship demands as state secrets." *Id.*

46. The quasi-state nature of powerful multinational companies is not new; the British East India Company is a famous example. See Peter Marshall, *The British Presence in India in the 18th Century*, BBC (Nov. 5, 2009), http://www.bbc.co.uk/history/british/empire_seapower/east_india_01.shtml; see also Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES MAG. (Nov. 28, 2008), available at <http://www.nytimes.com/2008/11/30/magazine/30google-t.html> ("'To love Google, you have to be a little bit of a monarchist, you have to have faith in the way people traditionally felt about the king,' Tim Wu, a Columbia law professor and a former scholar in residence at Google, told me recently. 'One reason they're good at the moment is they live and die on trust, and as soon as you lose trust in Google, it's over for them.'").

division,⁴⁷ stated that Google chose to enter the Chinese market in 2006 not out of a desire to increase revenue streams, but rather to do “what’s best for the Chinese people.”⁴⁸ For Google to focus on “what’s best” for a people rather than solely on its profit margin is a remarkable “mixing and matching of the interests of what a nation-state is all about and what a corporation is all about.”⁴⁹ Google’s need to have a foreign policy regarding government censorship in foreign jurisdictions arises from the fact that what it is providing to other countries “isn’t a product or a service, it’s a freedom.”⁵⁰ Its role as a distributor of information forces Google to

absolutely need[] a foreign policy, and it needs a foreign policy about free speech, and about privacy, and about intellectual property, and about the whole range of issues that a society confronts [especially because Google] seem[s] to be more concerned about free speech than a lot of the countries that they are interacting with as a foreign power.⁵¹

Google’s ability to attract the attention of both the United States and Chinese governments simply by threatening to cease business operations in China not only points to Google’s quasi-state nature and its consequent need for a foreign policy, but also Google’s unique capacity to influence international law.

II. A RATIONAL CHOICE THEORY OF INTERNATIONAL LAW

This Part summarizes Guzman’s rational choice theory of state compliance with international law and describes the three mechanisms by which a state calculates the costs and benefits of compliance. This Part concludes with Guzman’s explanation of why hard and soft international law may be functionally equivalent in terms of affecting state behavior.

47. Google, Corporate Information: Google Management, <http://www.google.com/corporate/execs.html> (last visited Oct. 13, 2010).

48. Interview by Chris Anderson, TED Curator, with Sergey Brin, Co-founder and President, Technology, Google Inc., at TED2010 (Feb. 24, 2010), *available at* http://blog.ted.com/2010/02/our_focus_has_b.php.

49. Interview by John Hockenberry, host of The Takeaway, with Jeffrey Rosen, professor of law at George Washington Univ. (Apr. 22, 2010), *available at* <http://www.thetakeaway.org/2010/apr/22/what-googles-foreign-policy/transcript/>.

50. Mark Landler, *Google Searches for a Foreign Policy*, N.Y. TIMES (Mar. 27, 2010), *available at* <http://www.nytimes.com/2010/03/28/weekinreview/28landler.html> (quoting writer Clay Shirky).

51. Interview by John Hockenberry, *supra* note 49.

A. The Three Rs of Compliance

Guzman's *How International Law Works: A Rational Choice Theory* explains why states choose to comply with existing international agreements. Guzman begins from the assumption that a state will only comply with an international agreement if the benefits of complying with the agreement exceed the benefits of not complying.⁵² "Benefit" is defined loosely—it may be a present or future, reputational or nonreputational gain, and the state may value a benefit differently at different points in time.⁵³ According to Guzman, a state calculates the benefits of complying with international agreements by considering three mechanisms deemed "the Three Rs of Compliance"—reputation, reciprocity, and retaliation."⁵⁴

Guzman defines reciprocity as actions that are "taken without the intent to sanction the violator . . . [and are] not costly to the reciprocating state."⁵⁵ A typical reciprocal action may consist of one state's decision to withdraw from an international agreement because the other state has chosen to violate the obligation.⁵⁶ Thus, reciprocal actions are considered "adjustment[s] in a state's behavior motivated by a desire to maximize the state's payoffs in light of new circumstances or information."⁵⁷ Guzman does not explicitly discuss whether opportunity costs are considered "costs" for the purpose of defining reciprocal actions. Guzman raises the example of the Boundary Waters Treaty between the United States and Canada.⁵⁸ He posits that if Canada withdrew, then the United States might consider "that the expected payoff from termination is greater than the expected payoff from compliance."⁵⁹ The United States' termination of the Boundary Waters Treaty would be considered a reciprocal action taken in response to Canada's violation of the treaty.⁶⁰ Although the United States would be better off if both parties upheld the treaty, Guzman does not seem to consider this lost opportunity cost relevant in determining whether an action is "costless" and therefore whether it qualifies as a "reciprocal

52. See GUZMAN, *supra* note 1, at 17 (assuming states are rational and "able to identify and pursue their interests").

53. See *id.* at 56.

54. *Id.* at 9.

55. *Id.* at 33.

56. *Id.*

57. *Id.*

58. *Id.* at 44.

59. *Id.*

60. *Id.*

action.”⁶¹ Accordingly, this Note assumes that opportunity costs are not relevant when determining whether actions are “costless.”

Guzman defines retaliation as “actions that are costly to the retaliating state and [are] intended to punish the violating party.”⁶² Retaliatory actions may take the form of “economic, diplomatic, or even military sanctions.”⁶³ They are useful as a “signal to the violating state (and other states) that the sanctioning state will punish violations,” which in turn “encourage[s] the violating state” to comply with the existing obligation and deters the violating state from committing future violations.⁶⁴

Guzman defines reputation as a state’s “reputation for compliance with international law.”⁶⁵ A state may have a different reputation for compliance for any given area of the law.⁶⁶ For instance, a state may possess a positive (or strong) reputation for compliance in trade law but a negative (or weak) reputation for compliance in environmental law.⁶⁷ A positive reputation for compliance in the context of international law confers credibility upon a state.⁶⁸ States with positive reputations can more easily enter into future agreements and extract greater concessions from other states.⁶⁹ However, “a state’s reputation will be changed only to the extent that the state’s behavior differs from what observing states have expected.”⁷⁰ Because certain “states would behave consistently with treaty obligations even if the treaty were not in existence,”⁷¹ their compliance does not improve their reputations. For example, Trinidad and Tobago’s compliance with the Nuclear Non-Proliferation Treaty does not signal anything regarding its reputation for compliance because it lacks the infrastructure to develop nuclear weapons and therefore could not feasibly violate the treaty even if it desired.⁷²

61. *See id.* at 33, 42-44.

62. *Id.* at 34.

63. *Id.* Goldsmith and Posner recognize that promising cash in exchange for a concession may be functionally indistinguishable from threatening military sanctions against a nation. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 117-18 (2005).

64. GUZMAN, *supra* note 1, at 48.

65. *Id.* at 33.

66. *See id.* at 100-11.

67. *See id.* at 109.

68. *Id.* at 34-35.

69. *Id.*

70. *Id.* at 75.

71. *Id.* at 80.

72. *Id.* at 79-80.

B. The Costs and Benefits of Compliance

Because a legal obligation qua legal obligation “is just one of many factors that affect the incentives of states,”⁷³ a state’s decision to comply with international law also accounts for both the nonreputational and reputational payoffs of compliance.⁷⁴ Nonreputational payoffs include domestic gains and losses, such as those relating to the domestic economy or national security,⁷⁵ and international gains and losses, such as the potential reciprocal or retaliatory actions taken by other state actors.⁷⁶ Reputational payoffs include reputational gains and losses that affect the “many future opportunities for cooperation that require . . . [states] to make credible promises, or . . . an ongoing relationship with a partner that makes a good reputation especially valuable.”⁷⁷ If a state does not perceive the need to make credible promises in the international community, then reputational gains are less valuable to such a state.⁷⁸

C. Soft Law Versus Hard Law

Agreements between state actors may take the form of either hard law (binding treaties) or soft law (nonbinding agreements) and still influence state behavior.⁷⁹ As Guzman explains, the choice between hard and soft law is not binary, but rather “different points on a spectrum of commitment.”⁸⁰ Soft law is generally considered to be “international agreements that fall short of formal treaties but nevertheless seek to influence state conduct.”⁸¹ Because soft law is nonbinding, states may find the soft law form attractive because, among other reasons, the reputational cost of violating a nonbinding agreement is less than the cost of violating a binding treaty.⁸² However, the structure of a soft law agreement affects whether the agreement is functionally binding, if not technically so. For example, the inclusion of “some form of dispute resolution[,] . . . monitoring procedures[,] . . . reservations[,] . . . [or] exit and escape clauses” into the agreement increases or decreases “the seriousness of the

73. *Id.* at 15.

74. *Id.* at 74-75.

75. *Id.* at 78, 82.

76. *See id.* at 82.

77. *Id.* at 75.

78. *Id.* at 75-76.

79. *Id.* at 142.

80. *Id.* at 144.

81. *Id.* at 23, 220 n.27.

82. *Id.* at 141.

commitment.”⁸³ Design elements like these “maximize the credibility” of a state’s commitment to an international agreement.⁸⁴ Guzman emphasizes that the technical form of the international agreement is inconsequential because what matters to his rational choice theory is the ability of the agreement to change state behavior.⁸⁵ Therefore, a nonbinding agreement can be just as effective as a formal treaty in changing state behavior.

III. THE THREE RS OF COOPERATION

This Part builds upon Guzman’s “Three Rs of Compliance” to explain how internet freedom can be achieved through a new international agreement. Because of Google’s ability to advance internet freedom from an arcane U.S. foreign policy point to a hotly contested international issue, this Part examines the ability of both state and non-state actors to affect the payoffs for China of creating an agreement that establishes internet freedom. To do this, this Note employs a new explanatory mechanism called the “Three Rs of Cooperation.”

The Three Rs of Cooperation applies Guzman’s concepts of reputation, retaliation, and reciprocity to the creation of international law. The Three Rs of Cooperation are nominally identical to Guzman’s Three Rs of Compliance, but these Rs take on different significance when applied to the creation of, and not compliance with, international law. In particular, rather than examining a state’s reputation for compliance with international law, as Guzman does, this Note examines a state’s reputation for cooperation with respect to the creation of international law.

This Part first discusses the importance of China’s reputation for cooperation in the context of internet freedom. Next, it discusses the reciprocal and retaliatory actions that state and non-state actors could take to influence Chinese policy on internet freedom. Finally, it discusses China’s domestic concerns in deciding whether to adopt internet freedom.

A. Reputational Payoffs

The greatest difference between the “Three Rs of Compliance” and the “Three Rs of Cooperation” concerns reputation. In Guzman’s theory, a state’s decision to comply or not comply with an existing international agreement affects the state’s reputation for compliance.⁸⁶ In the context of *creating* international agreements, a state’s reputation for cooperation is

83. *Id.* at 134.

84. *Id.* at 135.

85. *See id.*

86. *Id.* at 73-82.

affected by its decision to work with other states to create an international agreement. Thus, a state's reputation for cooperation improves when it (1) actively contributes to diplomatic negotiations or talks; (2) participates in the writing and production of an international agreement; (3) signs an international agreement; and/or (4) ratifies an international agreement.⁸⁷ A state's compliance with an existing agreement also adds to its reputation for cooperation. When a state engages in any of the above actions, other states perceive that the state is striving to achieve a shared goal of creating and implementing new international law. Each of the above actions individually contributes to a state's reputation for cooperation,⁸⁸ but, when combined, these actions garner a larger increase in reputational capital for a state than a single action alone.

In the context of creating international agreements, a state is concerned about its reputation for cooperation.⁸⁹ A positive reputation for cooperation signals that a state is willing to solve mutual problems with other state actors through international law. State actors would perceive such a state as a "team player," and would approach the state with relatively more trust and candor.⁹⁰ If one temporarily disregards a state's economic or political might, a state with a positive reputation for cooperation will be more readily approached to create new agreements. State actors may hesitate before conferring with uncooperative states, if at all. Uncooperative states are less willing to work with other states to craft an agreement, and consequently state actors are more likely to work "around" uncooperative states, perhaps excluding such states from the process of crafting an international solution altogether.

A state's reputation for cooperation correlates with its reputation for compliance. State actors may be attracted to entering agreements with a state that possesses a positive cooperative reputation because it is more likely that such a state will comply with the resulting agreement. Granted, a state's positive reputation for cooperation will not guarantee its compliance with an agreement. Unforeseen events that occur between crafting the agreement and complying with the agreement may change the state's reputational and nonreputational payoffs.⁹¹ However, a state that sacrifices

87. A state's signing or ratification of a legal obligation does not necessarily signal a state's compliance with the treaty. *See id.* at 78, 177-79.

88. For instance, one can imagine a state that participates in treaty talks in good faith, but later ceases any further cooperation due to domestic disapproval.

89. *See* GUZMAN, *supra* note 1, at 33.

90. *See id.* at 34-35.

91. *See supra* notes 73-78 and accompanying text. Alternatively, the state may simply have entered the agreement negotiations in bad faith.

significant amounts of time and effort at the negotiating table correspondingly becomes more invested in the agreement's success. Cooperating with the creation of an agreement *now* means the state will likely comply with the agreement *later*. Furthermore, after agreement negotiations conclude, a state continues to build its positive reputation for cooperation if it complies by the agreement's terms. Because a state with a negative cooperative reputation may have been excluded from the negotiation process, it is less likely to comply with an agreement that it had no part in creating.

Strong reputations for cooperation are most important for state actors in multilateral, global situations where an agreement's success or failure is not contingent upon any one state.⁹² Examples of multilateral, global issues include environmental pollution, nuclear proliferation, and internet freedom. States known to be cooperative are more likely to be approached by other states for input and assistance; therefore, cultivating a reputation for cooperation is important for states that wish to have a continuous and active voice in global policymaking. Because parties can always be coerced into complying with international agreements even if they did not participate in the creation of such agreements,⁹³ a positive reputation for cooperation affords states an opportunity to create palatable legal regimes *ex ante*. A positive reputation for cooperation is less important when one state's consent is necessary for the potential agreement to succeed. In this instance, the state becomes a necessary participant and state actors will approach the state regardless of its reputation for cooperative behavior. For example, if an agreement concerns Canadian coastal waters, then interested state actors must ensure that Canada joins agreement negotiations and is satisfied with the resulting agreement. Otherwise, such an agreement will most certainly fail.

Since China is known for its strict censorship policies, China's reputation for cooperation with respect to internet freedom is probably negative.⁹⁴ Criticism of China's internet policy and monikers such as the "Great Firewall" indicate that the perception of China as a repressive state is entrenched.⁹⁵ Western countries understand that China views "the

92. Of course, an agreement relating to a multilateral, global issue would fail if the number of noncompliant states reached a critical mass.

93. See GUZMAN, *supra* note 1, at 60-63.

94. Cf. *id.* at 75. Many state actors agree that internet freedom is a desirable norm. See, e.g., Internet Governance Forum 2, Rio de Janeiro, Brazil, Transcript of Opening Session (Nov. 12, 2007), available at http://www.intgovforum.org/Rio_Meeting/IGF_opening_Session.txt.

95. See, e.g., James Fallows, *The Connection Has Been Reset*, THE ATLANTIC (Mar. 2008), available at <http://www.theatlantic.com/magazine/archive/2008/03/-ldquo-the-connection-has-been-reset-rdquo/6650/>; Emily Parker, *Leaping the Great Firewall of China*, WALL ST. J. (Mar. 24, 2010),

Internet as a ‘core interest,’ an issue of sovereignty [on par with Taiwan and Tibet] on which Beijing will brook no intervention.”⁹⁶ The West also views China’s unyielding reaction to Google’s announcement and subsequent withdrawal “as a proxy for [China’s] broader confrontation with the West over rights, trade, climate change, and declining American hegemony.”⁹⁷ Based on China’s public refusal to compromise with Google,⁹⁸ state actors should expect that China will not easily cooperate with creating internet freedom through a new legal instrument.

Nevertheless, the United States could use the prospect of a positive gain in China’s reputation for cooperation as a bargaining chip. On the one hand, the United States must recognize that whether China values a positive reputation for cooperation depends on if China believes there is anything to gain by cooperating with the international community. China’s increasing dominance on the world stage means that it may be unwilling to compromise with other state actors through international law.⁹⁹ Furthermore, other state actors may invite China to participate in the creation of new legal instruments in spite of a poor reputation for cooperation¹⁰⁰ because of China’s economic, military, and political strength.¹⁰¹ On the other hand, China has been “seeking to expand its influence” in the international community by pursuing “a larger voice in international organizations . . . [such as] the International Monetary Fund . . . [and] has also begun to expand its international peacekeeping efforts.”¹⁰² The United States should strongly emphasize to China that its reputation for cooperation with respect to internet freedom is inextricably tied to its reputation for cooperation in other areas of the law.¹⁰³ Because a “state’s reputation will be changed only to the extent that the state’s

available at <http://online.wsj.com/article/SB10001424052748704896104575139742687410862.html>; Austin Ramzy, *The Great Firewall: China’s Web Users Battle Censorship*, TIME (Apr. 13, 2010), available at <http://www.time.com/time/world/article/0,8599,1981566,00.html>.

96. Michael Wines, *Stance by China to Limit Google is Risk by Beijing*, N.Y. TIMES (Mar. 23, 2010), available at <http://www.nytimes.com/2010/03/24/world/asia/24china.html> [hereinafter *Stance by China to Limit Google is Risk by Beijing*].

97. *Id.*

98. Mills, *supra* note 33.

99. Ian Bremmer, *China vs America: Fight of the Century*, PROSPECT (Mar. 22, 2010), available at <http://www.prospectmagazine.co.uk/2010/03/china-vs-america-fight-of-the-century/>.

100. *See id.* (“[A]t December’s climate change summit in Copenhagen, . . . China spearheaded resistance from developing states to western-proposed targets on carbon emissions.”).

101. *See* U.S.-CHINA ECON. AND SECURITY REV. COMMISSION, 2009 REPORT TO CONGRESS 15-17, available at http://www.uscc.gov/annual_report/2009/annual_report_full_09.pdf.

102. *Id.* at 15.

103. *Cf.* GUZMAN, *supra* note 1, at 100-06.

behavior differs from what observing states have expected,”¹⁰⁴ China’s refusal to create a new legal instrument on internet freedom will have no effect on its (negative) reputation for cooperation with respect to internet freedom. However, China’s reputation for cooperation will improve dramatically if it collaborates with the United States to create an agreement concerning internet freedom. China could thereby use internet freedom to increase its reputational capital in the international community, attract the goodwill of Western democracies, and thus leverage significantly greater influence in the creation of international law in the future.

Foreign non-state actors care about a state’s reputation for cooperation to the extent that it affects their business interests. Generally, a state’s reputation for cooperation is not an important concern. When determining whether to invest in a particular state, non-state actors are primarily interested in the suitability of domestic conditions, such as the applicable tax rate or the stability of a political environment.¹⁰⁵ Thus, the interests of a non-state actor typically do not require a state to make international commitments.¹⁰⁶

For certain non-state actors, however, a state’s willingness to engage in international obligations serves as an important proxy for its commitment toward a course of action that is valuable to the non-state actor’s business interests. For instance, a state that has made domestic and international commitments to internet freedom has more to lose than if it is only willing to make domestic commitments. If a state agrees to implement internet freedom through both domestic law and international law, then violating internet freedom would incur not only domestic but also international costs for that state. International law thereby signals to a non-state actor that a state’s pledge toward a course of action is relatively more certain.

Internet freedom is an important business interest for many non-state actors in China. Besides Google, other foreign non-state actors have ceased business operations in China due to China’s policies on internet freedom.¹⁰⁷ After China increased surveillance upon domestic domain name registrants,

104. *Id.* at 84.

105. *See* MULTILATERAL INVESTMENT GUARANTEE AGENCY & DELOITTE & TOUCH, LLP, FOREIGN DIRECT INVESTMENT SURVEY 19 tbl. 2 (2002).

106. *See id.*

107. *See, e.g.,* Tim Arango, *U.S. Media See a Path to India in China’s Snub*, N.Y. TIMES (May 3, 2009), available at <http://www.nytimes.com/2009/05/04/business/media/04media.html> (“[M]any companies have been pulling . . . [out from China because] of frustration over censorship, piracy, strict restrictions on foreign investment and the glacial pace of its bureaucracy.”).

GoDaddy.com (“GoDaddy”) ceased domain name registration in China.¹⁰⁸ If GoDaddy ever decides to resume operations in China, China’s reputation for cooperation will be important to the extent that it illustrates China’s decision to implement internet freedom. If China later believes that GoDaddy’s return to the Chinese market is desirable, China could woo GoDaddy and other like-minded foreign non-state actors back to its markets by making both domestic and international pledges to internet freedom.¹⁰⁹ China’s engagement with the international community would demonstrate China’s sincere commitment to internet freedom.

B. Reciprocity

In the framework of internet freedom, reciprocity entails a costless change in the behavior of state actors in response to China’s refusal to create an international agreement.¹¹⁰ A reciprocal action allows state actors such as the United States to maximize their own gains once they realize a state intends to act in a certain manner.¹¹¹ Previously, Guzman illustrated the concept of reciprocity by pointing to a state’s decision to withdraw from an existing international agreement when it discovers another state has violated the agreement.¹¹² Here, in the context of *creating* international law, the choice a state actor faces is not whether to comply with an existing agreement, but whether to join or devise new international law. For example, if China refuses to enter a new agreement on internet freedom, the United States may act reciprocally by also declining to enter the agreement. Although the United States firmly believes in the value of internet freedom, it may not wish to commit to the firm obligations of an agreement. Alternatively, the United States may cease to engage China in talks concerning the internet because it believes that China is unlikely to change its policies on censorship in the near future. If China is reluctant to diminish its participation in the formation of international law, this reciprocal action may lead China to relax its internet policies.¹¹³

The newly signed Daniel Pearl Freedom of the Press Act and the proposed Global Online Freedom Act are two examples of reciprocal

108. Ellen Nakashima & Cecilia Kang, *In Response to New Rules, GoDaddy to Stop Registering Domain Names in China*, WASH. POST (Mar. 25, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/24/AR2010032401543.html>.

109. Because China has many domestic companies that offer the same services as GoDaddy.com and Google, China may not believe it will ever be necessary to woo these non-state actors back into the Chinese market. See *infra* note 121 and accompanying text.

110. Cf. GUZMAN, *supra* note 1, at 33.

111. *Id.*

112. See *supra* note 56 and accompanying text.

113. See U.S.-CHINA ECON. AND SECURITY REV. COMMISSION, *supra* note 101, at 15.

actions taken by the U.S. government in response to repressive countries that restrict the flow of information. The Daniel Pearl Freedom of the Press Act “requires the State Department to expand its scrutiny of news media restrictions and intimidation as part of its annual review of human rights in each country.”¹¹⁴ The Act specifically acknowledges the negative effect of censorship on internet journalism.¹¹⁵ Although the annual reporting requirement does not directly affect repressive countries, the requirement signals to countries worldwide the importance of press freedom, including internet freedom, to the United States.¹¹⁶ Such a signal may encourage countries to relax their censorship policies and promote press freedom in order to curry favor with the U.S. government. The proposed Global Online Freedom Act would require non-state actors to take reciprocal actions against repressive countries.¹¹⁷ Under the Act, American businesses must disclose to the U.S. government any requests by repressive governments to produce personally identifiable information of customers, to filter search engine results, or to implement censorship.¹¹⁸ Presumably, the Global Online Freedom Act envisions that repressive governments will relax their censorship when faced with certain disclosure of their policies to the U.S. government.¹¹⁹

Non-state actors may also engage in costless reciprocal actions in order to adjust to—and influence—the behavior of a state. For instance, multinational companies like Google may choose to limit their services in response to state policies. When Google first entered the Chinese market, it refused to offer internet services such as Gmail and Blogger until Google could guarantee that its users’ information would remain private.¹²⁰ However, these reciprocal actions will not influence China’s behavior if China believes it can adequately rely on domestic companies to provide the same or similar services as Google or other multinational companies.¹²¹ As

114. *U.S. to Promote Press Freedom*, N.Y. TIMES (May 17, 2010), available at <http://www.nytimes.com/2010/05/18/world/18press.html>.

115. See Daniel Pearl Freedom of the Press Act, H.R. 1861, 111th Cong. § 2(a)(3) (2009).

116. See generally *id.*

117. See Global Online Freedom Act, H.R. 2271, 111th Cong. (2009). The Global Online Freedom Act has been introduced in Congress in every session since 2007. See *H.R. 2271: Global Online Freedom Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2271&tab=related>.

118. H.R. 2271 §§ 203-05.

119. See *id.* § 2(6).

120. Andrew McLaughlin, *Google in China*, THE OFFICIAL GOOGLE BLOGSPOT (Jan. 27, 2006), <http://googleblog.blogspot.com/2006/01/google-in-china.html>. As mentioned previously, Gmail is Google’s web-based email service. Blogger is Google’s weblog publishing tool.

121. See David Barboza, *China’s Internet Giants May Be Stuck There*, N.Y. TIMES (Mar. 23, 2010), available at <http://www.nytimes.com/2010/03/24/business/global/24internet.html>; Bremmer, *supra* note 99; Kathrin Hille, *The Internet: A Missing Link*, FIN. TIMES (London) (Jan. 19, 2010),

long as Google is unable to provide unique services to China, then Google's reciprocal actions will not affect China in the information technology market.

Joining the Global Network Initiative ("GNI") is a reciprocal action that non-state actors in the technology and telecommunications industry may take to influence the behavior of states. GNI is a non-profit alliance of "stakeholders in the global information and communications (ICT) technology industry."¹²² Members of GNI include non-state actors such as Google, Microsoft, and Yahoo! Inc. ("Yahoo!").¹²³ GNI aims to achieve a universal standard of behavior for private companies "to protect and advance the human rights of freedom of expression and privacy when faced with pressures from governments to take actions that infringe upon these rights."¹²⁴ For instance, GNI policy suggests that its participants "[r]equest that government demands to limit freedom of expression or privacy and the legal basis for such demands [be] made in writing" and "[c]onsider[] challenging governments in courts or other formal forums when faced with restrictions that appear inconsistent with domestic law or international human rights laws and standards on freedom of expression and privacy."¹²⁵ If governments know that attractive non-state actors will adhere to GNI policies in reaction to censorship and surveillance activities, then governments may be willing to relax their repressive information laws in order to avoid confrontation with GNI participants.

C. Retaliation

Encouraging states to enter or create new international legal regimes by retaliation can take various forms. For example, a retaliatory action could be as blunt as the United States using military force to coerce China into allowing internet freedom. In the nineteenth century, Britain forcibly took possession of Portuguese ships to compel Portugal into ceasing its slave trade.¹²⁶ Britain also burned Brazilian ships that it suspected were

available at <http://www.ft.com/cms/s/0/a7bdfbae-054b-11df-a85e-00144feabdc0.html> [hereinafter *The Internet: A Missing Link*].

122. Global Network Initiative, *Governance Charter*, 3, http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_Governance_Charter.pdf (last accessed Feb. 10, 2011).

123. Global Network Initiative, *Participants*, <http://www.globalnetworkinitiative.org/participants/index.php> (last accessed Feb. 10, 2011).

124. Global Network Initiative, *FAQ*, 1, http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_FAQ_PDF.pdf (last accessed Feb. 10, 2011).

125. *Id.* Some of the specific actions recommended by GNI, such as "challenging governments in courts" are retaliatory. However, merely joining the GNI is still a costless action that non-state actors may take before they begin activities in a particular state. Retaliation is discussed *infra* Part III.C.

126. GOLDSMITH & POSNER, *supra* note 63, at 116.

trafficking slaves, prompting the Brazilian foreign minister to state: “With the whole of the civilized world now opposed to the slave trade, and with a powerful state like Britain intent on ending it once and for all, can we resist the torrent? I think not.”¹²⁷ The Brazilian foreign minister’s comment suggests that a broad consensus in the international community and the presence of a forceful hegemon can pressure China into permitting internet freedom. However, the United States’ economic dependence upon China and the reputational backlash that the United States would incur if it used military force means that the United States is unlikely to elect this option.

State actors can also choose retaliatory actions subtler than outright economic or military sanction. “Subtle” retaliation takes advantage of a symbiotic relationship between China and the United States. The United States must condition an attractive benefit upon the implementation of internet freedom within Chinese borders. This method is desirable, because China has already expressed interest in maintaining cooperation with the United States.¹²⁸ Arvind Ganesan of Human Rights Watch has noted that the challenge of promoting internet freedom as a key human rights issue “will be to . . . incorporat[e] internet freedom into diplomacy, trade policy, and meaningful pressure on companies to act responsibly.”¹²⁹ In other words, if the United States can tie internet freedom to issues important to China, then the United States may convince China that internet freedom is crucial to the success of China’s other goals.¹³⁰

Framing internet freedom as a barrier to free trade may be a promising method to pressure China into implementing internet freedom through an international agreement. The European Centre for International Political Economy argues that censorship is a protectionist policy that violates the

127. *Id.* at 116-17.

128. A spokesperson for the Foreign Ministry of China stated that the United States and China should continue to develop “bilateral relations, strengthen dialogue, communication and cooperation, respect each other’s core interest and great concerns, handle disputes and sensitive issues appropriately, so as to maintain a healthy and stable development of the China-U.S. relations.” *China Urges U.S. to Stop Accusations on So-Called Internet Freedom*, *supra* note 15.

129. *US: Clinton to Press for Internet Freedom*, HUM. RTS. WATCH (Jan. 21, 2010), <http://www.hrw.org/en/news/2010/01/21/us-clinton-press-internet-freedom>.

130. The internet is an area that requires global coordination and therefore affords opportunity for subtle retaliation. For instance, China has recognized that “[i]nternet security . . . [is] a global concern which require[s] international coordinated efforts. China . . . [is] willing to deepen cooperation with other countries and learn from their experiences China has also taken part in the Internet safety emergency drill organized by the ASEAN countries . . . and signed cooperation pacts with member countries of regional organizations in Asia.” *Accusation of Chinese Government’s Participation in Cyber Attack “Groundless”: Ministry*, XINHUA (Jan. 25, 2010), http://news.xinhuanet.com/english2010/china/2010-01/25/c_13149276.htm.

General Agreement on Trade in Services.¹³¹ Google recognized this when it repeatedly called for the U.S. government to prioritize internet freedom in its foreign policy so as to reduce “the trade barriers of the new technology era.”¹³² The First Amendment Coalition has also pressured “the U.S. Trade Representative to file a case against China on the grounds that it has been violating its WTO obligations . . . [for example, by] discriminat[ing] against foreign suppliers of Internet services by blocking them at the border while allowing domestic suppliers to offer like services.”¹³³

The United States must consider that internet freedom is inextricably intertwined with its security and economic interests, which may therefore warrant some form of retaliatory action against China.¹³⁴ On a macro-level, relations between the United States and China suffer from significant information asymmetry. Whereas China benefits from the open internet in the United States and can exhaustively peruse American websites, the United States can only access limited amounts of information from Chinese websites. For instance, China’s censorship of political discourse on the internet allows the United States to obtain only a restricted glimpse of China’s political climate. In contrast, an open internet in the United States allows China access to any information regarding political unrest or criticism within the United States. As a result, China possesses a more informed understanding of the political climate in the United States. China has a clear advantage over the United States when the internet in China remains closed and the internet in the United States remains open. To

131. See generally Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* (Eur. Ctr. for Int’l Political Econ., Working Paper No. 12/2009).

132. Davidson Testimony, *supra* note 2, at 5. Google has also appealed to Congress “to bolster the global reach and impact of our Internet information industry by placing obstacles to its growth at the top of our trade agenda. At the risk of oversimplification, the U.S. should treat censorship as a barrier to trade, and raise that issue in appropriate fora.” Karen Wickre, *Testimony: The Internet in China*, THE OFFICIAL GOOGLE BLOG (Feb. 15, 2006), <http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html> (citing Elliot Schrage, Vice President, Global Communic’n & Pub. Affairs, Google Inc., Testimony of Google Inc. before the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations, Committee on International Relations, United States House of Representatives (Feb. 15, 2006)).

133. Ronald Bailey, *Battering Down the Great Firewall of China*, REASON (Feb. 2, 2010), available at <http://reason.com/archives/2010/02/02/battering-down-the-great-firew>. Accord FIRST AMENDMENT COAL., CFAC BRIEFING PAPER: CHINA’S INTERNET MEASURES VIOLATE ITS WTO OBLIGATIONS (2007).

134. Coercive action in the human rights context “usually dovetails with a powerful security or economic interest of the coercing state. . . . and the costs of enforcement.” GOLDSMITH & POSNER, *supra* note 63, at 117. Coercive action may also occur because of a “major international political issue[.]” LOUIS HENKIN, *HOW NATIONS BEHAVE* 236 (2d ed. 1979) (“Some human rights, e.g., freedom from racial discrimination, have become major international political issues, and many governments will be quick to react to and to seek international sanctions against violations.”).

address this information asymmetry, the United States could consider blocking American websites from China as long as China refuses to open its internet. Blocking American websites from China would incur costs upon the United States while punishing China. However, doing so would be ideologically self-defeating, because it would undermine the United States' commitment to a universally open internet.¹³⁵

Non-state actors may similarly retaliate against states unwilling to engage in cooperative behavior. For example, a non-state actor could withdraw its existing business from the state. This is retaliatory insofar as it incurs costs on the non-state actor and punishes the state. Google retaliated against China's unwillingness to cease internet censorship by closing Google.cn, re-directing mainland Chinese users to Google.com.hk, and shutting down the majority of its mainland Chinese operations.¹³⁶ Google also began publishing online the availability of its other services (including Gmail and Blogger) in mainland China.¹³⁷ This disclosure was a retaliatory maneuver that invited scrutiny from foreign audiences interested in tracking Google's services in China and, relatedly, the extent of China's internet censorship. By doing so, Google probably intended to deter China from blocking Google's services in China altogether. However, the actions of one non-state actor alone are insufficient to achieve internet freedom. Google's retaliatory actions have had no short-term effect in pressuring China to allow internet freedom. In fact, China condemned Google for its arrogance: "China won't let its regulations or laws bend to any companies' [sic] threats. It is ridiculous and arrogant for an American company to attempt to change China's laws."¹³⁸

In the long-term, Google's criticism may foment enough nonreputational losses that China could consider entering an international agreement concerning internet freedom. Google's withdrawal "has been pretty bad publicity for the [Chinese] government" especially because

135. See Clinton, *supra* note 2.

136. See Davidson Testimony, *supra* note 2, at 2-3.

137. Mainland China Service Availability, GOOGLE, <http://www.google.com/prc/report.html> (last accessed May 23, 2010). Google's Mainland Service Availability page has since been replaced by an online Transparency Report dedicated to show "where governments are demanding that . . . [Google] remove content and where Google services are being blocked . . . [because] this kind of transparency can be a deterrent to censorship." David Drummond, *Tools to Visualize Access to Information*, THE OFFICIAL GOOGLE BLOG (Sept. 20, 2010), <http://googleblog.blogspot.com/2010/09/tools-to-visualize-access-to.html>. For more information on the original Mainland China Service Availability page, see David Drummond, *A New Approach to China: an Update*, THE OFFICIAL GOOGLE BLOG (Mar. 22, 2010), <http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html>.

138. *China Doesn't Need a Politicized Google*, XINHUA (Mar. 21, 2010), http://news.xinhuanet.com/english2010/indepth/2010-03/21/c_13219104.htm.

Google still has a substantial presence in China, including “tens of millions of [Chinese] users.”¹³⁹ Analysts consider Google to be “the biggest foreign player in the market . . . [that has] raised the bar for the Internet industry . . . [and] really helped other Chinese companies develop.”¹⁴⁰ Many Chinese citizens appeared sympathetic to Google’s stance on internet freedom and “laid flowers at Google offices in Beijing, Shanghai, and Guangzhou.”¹⁴¹ Yet, thus far, Google appears to be the only GNI participant that has publicly objected to censorship in China.¹⁴² Presumably, because Microsoft and Yahoo!—two other major GNI participants¹⁴³—have not joined Google in its outcry, China does not feel sufficient pressure to amend its internet policy.¹⁴⁴ If other influential, non-state actors support Google and also threaten to withdraw from China, the cost of continued internet censorship for China would be significantly greater, and could lead to a change in Chinese internet policies.

D. Domestic Concerns

China perceives a strong domestic interest in preventing internet freedom. Based on articles published after the Google incident, the Chinese government believes that internet freedom creates dangerous unrest in society, encourages separatist movements, and threatens its system of governance.¹⁴⁵ Indeed, China seems to fear that under a free internet regime, the United States will outpace China’s information production capacity and produce so much democratic propaganda that Chinese citizens

139. *Google Still Threatening to Leave China* (NPR radio broadcast Mar. 18, 2010) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=124807740>).

140. *Id.*

141. Buruma, *supra* note 22.

142. See Alexei Oreskovic & Paul Eckert, *Google Finds Few Allies in China Battle*, REUTERS (Mar. 25, 2010), available at <http://www.reuters.com/article/idUSTRE62O5FS20100325>.

143. See Global Network Initiative, *supra* note 123.

144. See Oreskovic & Eckert, *supra* note 142 (“Google’s difficulty in enlisting allies could hint at the challenges ahead for the world’s largest search engine in China, where organizing broad support has in the past proven to be an effective tool for negotiating with the government.”).

145. E.g., Han Dongping, *From Democracy and Human Rights to Internet Freedom*, CHINA DAILY (Jan. 26, 2010), available at http://www.chinadaily.com.cn/thinktank/2010-01/26/content_9377250.htm (“China is composed of 56 nationalities. Since the founding of the People’s Republic of China, Chinese people of different nationalities have been able to live mostly in harmony except [for] a couple of riots in Xinjiang by Ughurs and a couple of riots by Tibetan Monks in Tibets [*sic*], both groups with extensive foreign connections and financial support . . . For countries like China, internet freedom is not simply internet freedom. It is ultimately the survival of the nation as a whole at the stake. There are people in this world who wish that China should be fragmented into several countries. . . . What should be the right kind of response to people who are taking advantage of internet freedom to instigate violence?”).

will be swayed to believe that democracy is the best form of governance.¹⁴⁶ Thus, abstract claims in favor of internet freedom, such as “the more information flows, the stronger the society becomes,”¹⁴⁷ are unlikely to persuade China because China has different baseline assumptions concerning the value of internet freedom.

On the other hand, China could benefit domestically from permitting internet freedom. Internet freedom could strengthen its government by providing greater transparency to its citizens and thereby increasing standards of government accountability.¹⁴⁸ A policy of internet freedom could encourage media companies such as Google and Time Warner to expand their operations in China,¹⁴⁹ thereby creating jobs for Chinese citizens. The increased presence of foreign companies could develop the skill and knowledge base of Chinese employees, and consequently foster greater innovation and entrepreneurship in China.¹⁵⁰ By allowing internet freedom, China would signal to its domestic constituents and to the international community that it is committed to technological innovation and a legal environment that welcomes foreign technology and telecommunications companies.

IV. HOW TO ACHIEVE INTERNET FREEDOM

By using the case of China and internet freedom as an example, this Part describes how state and non-state actors could effectively deploy the Three Rs of Cooperation to cause a state actor to join an international agreement. Because the form of the agreement is inconsequential as long as it has the ability to affect state behavior,¹⁵¹ achieving internet freedom in China through international law is possible regardless of the binding or nonbinding form of an agreement. This analysis includes an examination of the hard and soft law forms that such an agreement could assume and still be acceptable to China.

146. See *The Real Stake in “Free Flow of Information,” supra* note 5.

147. Barack Obama, U.S. President, Remarks at Town Hall Meeting with Future Chinese Leaders (Nov. 16, 2009) (transcript available at <http://www.america.gov/st/texttrans-english/2009/November/20091116095135eafas0.900326.html>).

148. E.g., *Internet Safety, Order, supra* note 17. For an opinion arguing that the internet does not encourage freedom, see Evgeny Morozov, *Think Again: The Internet*, FOREIGN POLICY (May-June 2010), available at http://www.foreignpolicy.com/articles/2010/04/26/think_again_the_internet.

149. See, e.g., Arango, *supra* note 107.

150. See *Stance by China to Limit Google is Risk by Beijing, supra* note 96 (“[Without Google spurring innovation in China,] the vast majority of Chinese Internet companies [will] invest[] little in research and ‘simply copy each other’s technology.’”).

151. See *supra* notes 79-85 and accompanying text.

The United States and Google can most effectively persuade China to create a new international agreement using subtle retaliation in the short-term. Retaliation by Google alone is insufficient to convince China. Given China's desire to encourage "indigenous innovation," China probably does not find the continued presence of many foreign internet companies particularly necessary.¹⁵² Observers have noted that the internet in China is tailored for Chinese consumers and is therefore diverging from the internet used in the rest of the world.¹⁵³ Thus, successful retaliation may proceed in two ways. First, state and non-state actors may threaten to withhold some inimitable, invaluable business or benefit for which China does not have a ready substitute. Second, state or non-state actors should act together. If these actors together threatened to withhold benefits such as trade opportunities, biotechnological expertise, or other unique services or products, then China may be persuaded to allow internet freedom within its borders. The concerted efforts of many state and non-state actors would be a nonreputational cost that China could not easily dismiss.

Of course, China may denounce attempts to promote internet freedom as ideologically driven, but this should not prevent the creation of a legal instrument on internet freedom. China's history of information control and the underlying ideological conflict between the East and West may cause China to view any state or non-state retaliatory action as inherently suspicious.¹⁵⁴ However, even bitter ideological conflict between democratic and communist states is no obstacle to the creation of international law. For instance, during the Cold War "there were particular interests common to the Soviet Union and the West—in avoiding war, in limiting the spread of nuclear weapons, in trade"—that cemented the necessity of international law.¹⁵⁵ Thus, while state and non-state actors should carefully address China's claims of informational imperialism, these claims should not be an impediment to the development of internet freedom through a new international agreement.

State and non-state actors may most effectively influence China's decision to enter an agreement using reputation in the long-term. State actors should appeal to China's desire to increase its influence in the international community. They should emphasize that a positive gain in China's reputation for cooperative behavior with respect to internet freedom will give China more power to craft future international law. Non-

152. Bremmer, *supra* note 99.

153. E.g., *The Internet: A Missing Link*, *supra* note 121. Accord Barboza, *supra* note 121 ("Post-Google, China's Internet market could increasingly resemble a lucrative, walled-off bazaar.").

154. See Buruma, *supra* note 22; *The Real Stake in "Free Flow of Information," supra* note 5.

155. HENKIN, *supra* note 134.

state actors should stress that a positive reputation for cooperation will signify China's willingness to engage in global issues that are important to the foreign telecommunications and technology industry. Non-state actors should remind China that a positive reputation could consequently attract valuable and innovative companies to the Chinese market. Because China is known for its censorship, permitting internet freedom will dramatically improve China's reputation for international cooperation.

Reciprocal actions by state and non-state actors are less effective than retaliation or reputation in the context of legally implementing internet freedom in China. China will most likely be the subject of a State Department report pursuant to the Daniel Pearl Freedom of the Press Act.¹⁵⁶ The United States could also decide not to engage China in any negotiations concerning internet freedom. Other non-state actors could refuse to enter the Chinese market because their business models are better served in countries that value internet freedom.¹⁵⁷ However, China's dominance on the world stage and the growth of its domestic internet and technology companies means that the reciprocal actions of the United States and other non-state actors are not particularly costly to China.

Both state and non-state actors interested in achieving internet freedom should consider employing reciprocity, retaliation, and reputation concurrently. Just as the actions of one state or non-state actor are insufficient to reduce the perceived rewards of China's online censorship, the use of only one mechanism of cooperation will also be insufficient. The U.S. government should emphasize the reputational capital that China could gain with cooperation: uncooperative behavior may prompt China's exclusion from participation in future international law. Concurrently, the U.S. government should make clear that it will be conducting surveys on the status of print and online press freedom in China pursuant to the Daniel Pearl Freedom of Press Act.¹⁵⁸ The United States could link this reciprocal action to a subtle retaliatory action, for example, by refusing to provide benefits to China as long as the State Department believes the state of press freedom in China is unsatisfactory. Other non-state actors should publicize their refusal to begin or expand activities in the Chinese market due to the government's censorship and surveillance practices, while concurrently highlighting the innovations and technologies that China could have attracted with a positive reputation for cooperation with respect to internet freedom.

156. *See U.S. to Promote Press Freedom*, *supra* note 114.

157. *See Arango*, *supra* note 107.

158. *See U.S. to Promote Press Freedom*, *supra* note 114.

Regardless of the method or methods that state and non-state actors choose, they will encounter the most difficulty minimizing the nonreputational concerns discouraging China from allowing internet freedom. China's fears that internet freedom will destabilize its government appear legitimate. If the full anger of Chinese citizens were ever directed toward the government, then China might face civil unrest of a sobering magnitude. Online phenomena such as the "Human Flesh Search Engine"—where ordinary Netizens "hunt down and punish people who have attracted their wrath . . . [getting] targets of a search fired from their jobs, shamed in front of their neighbors, run out of town"¹⁵⁹—embody the forceful potential of populist rage and vigilantism that simmers on anonymous Chinese web forums.

Given China's domestic concerns, state and non-state actors may better persuade China to join a new international agreement on internet freedom if they choose a soft law form. China's fear of civil instability may deter it from entering a formal, binding multilateral treaty on internet freedom. Even so, a hard law agreement that allows China the flexibility to introduce increasing degrees of internet freedom may be more palatable to China than an inflexible treaty that is effective immediately. A flexible, non-binding soft law agreement may be more attractive to China.¹⁶⁰ Although soft law "represent[s] a weaker form of commitment,"¹⁶¹ different design elements within a soft law agreement could increase the ways in which the agreement could attract state compliance.¹⁶² Thus, in negotiating the agreement, state and non-state actors could advocate for the inclusion of monitoring procedures and dispute resolutions, and the exclusion of exit or escape clauses and reservations.¹⁶³ Additionally, a soft law agreement that inextricably ties internet freedom to other concerns such as cybersecurity or the internet's technical infrastructure could also increase the agreement's compliance pull.¹⁶⁴ Finally, even if China entered a soft agreement with no intention of compliance, state and non-state actors could use Guzman's Three Rs of Compliance to encourage China's compliance with the agreement over time.¹⁶⁵ A soft law agreement that articulates the end goal of internet freedom but allows China discretion to

159. Tom Downey, *China's Cyberposse*, N.Y. TIMES MAG. (Mar. 3, 2010), available at <http://www.nytimes.com/2010/03/07/magazine/07Human-t.html>.

160. GUZMAN, *supra* note 1, at 143-44.

161. *Id.* at 143.

162. *Id.* at 144.

163. *See id.* at 134.

164. *See id.* at 129.

165. *See id.* at 144.

implement internet freedom on its own terms may thereby be more successful than a binding treaty.

CONCLUSION

This Note introduced the Three Rs of Cooperation as an extension of Guzman's rational choice theory to explain how China might enter an international agreement on internet freedom. This Note examined how Guzman's concepts of reputation, reciprocity, and retaliation evolve when they are applied in the context of creating international law. A state's reputation for cooperation is built from the numerous actions that it may take to ensure the creation and success of new international law. State and non-state actors may engage in a variety of reciprocal or retaliatory actions to cajole a state into cooperating with the creation of international law. While either subtle retaliation or reputation alone is more effective than reciprocity in convincing China to cooperate, these three mechanisms are most effective if used together. Similarly, state and non-state actors will be more successful if they combine their efforts to induce China's cooperation.

Given that China fears negative domestic payoffs from allowing internet freedom, it will be easier to persuade China to enter an agreement if there is some procedural flexibility built into the agreement's terms. For instance, state and non-state actors could propose a hard law treaty which introduces internet freedom to China by piecemeal, thereby allowing the Chinese government the space to resolve its fears of political instability. It is likely easiest to convince China to enter a "non-binding" soft law agreement. If a soft law form is used, state actors should strengthen the agreement's compliance pull by including design elements such as monitoring procedures into the agreement.

Of course, the United States and Google could do nothing and simply wait. China may one day be technologically unable to censor the internet. The "Great Firewall" is already said to be "far from impenetrable" for "web-savvy citizens."¹⁶⁶ Over time, internet censorship may become a Danaidian task that China will be unable to sustain. Technology grows by leaps and bounds. Although China has made tremendous efforts to censor the internet,¹⁶⁷ China will probably always struggle against new technology circumventing its restrictions.

166. John Prandato, *Searching for Cracks in the Great Firewall of China*, PARTNERSHIP FOR A SECURE AMERICA (Apr. 30, 2010), <http://blog.psaonline.org/2010/04/30/searching-for-cracks-in-the-great-firewall-of-china/>.

167. See, e.g., HUMAN RIGHTS WATCH, *supra* note 28.

Finally, in order to establish internet freedom in China, state and non-state actors must define internet freedom unambiguously. In response to Google and the United States' claims that it was restricting the internet, China countered that its citizens freely enjoyed the benefits of an open internet.¹⁶⁸ While the truth may lie in a gray area between these two assertions, a clear definition is necessary so that no state may claim to be upholding internet freedom when it is in fact not. The Chinese constitution already protects the freedom of expression;¹⁶⁹ it is up to Google and the United States to translate this protection into reality. If state and non-state actors define internet freedom carefully, internet freedom as an international obligation also has fruitful implications for the softening of digital rights management regimes. Internet freedom may thereby prove to be a potent weapon with which to defend the freedom of expression and the public domain.

168. See, e.g., *China Urges U.S. to Stop Accusations on So-Called Internet Freedom*, *supra* note 15.

169. XIAN FA [Constitution] art. 35 (1982) (P.R.C.), available at <http://www.oceanalaw.com> ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."); *id.* art. 41 ("Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary.").