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International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law

Joel P. Trachtman*

“[A] prudent ruler cannot keep his word, nor should he, where such fidelity would damage him, and when the reasons that made him promise are no longer relevant.”
Niccolo Machiavelli¹

“Applied to relations between nations, [the] bureaucratic politics model directs attention to intra-national games, the overlap of which constitutes international relations.”
Graham Allison²

Abstract

Compliance with international law is always dependent upon a contemporaneous domestic political decision to comply. This Article articulates the importance of the interdependence between home-state domestic politics and foreign-state domestic politics in

* Professor of International Law, The Fletcher School of Law and Diplomacy. This Article benefited from comments and suggestions from Anne van Aaken, William Alford, Douglas Arner, Gabriella Blum, Anu Bradford, Rachel Brewster, Howard Chang, Antonia Chayes, Lori Fisler Damrosch, Gene Grossman, Andrew Guzman, Robert Keohane, Matthias Kumm, Chin Leng Lim, and Kal Raustiala, and from participants in the American Society of International Law International Economic Law Interest Group Conference on New Scholarship in International Economic Law, the Harvard Law School International Law Workshop, the Hong Kong University Law Faculty Workshop, the Fletcher School Seminar on International Treaty Behavior, and the Panel on International Law of the 2010 Annual Meeting of the American Law and Economics Association. I am grateful for research assistance from Jeremy Leong and Filippo Ravalico.

¹ Niccolo Machiavelli, *The Prince* 61–62 (Cambridge 1988) (Quentin Skinner and Russell Price, eds).

² Graham Allison, *Essence of Decision* 149 (Little, Brown 1971).

determining compliance. International legal commitments allow the formation of domestic coalitions between those who will benefit from their own state's compliance with the international legal rule, and those who will benefit from other states' compliance with the international legal rule. This Article extends the rationalist approach to compliance with international law to the domestic politics of the target state. The theory developed in this Article builds on established approaches to international relations in the political science literature, in particular the "liberal" theory of international relations associated with Andrew Moravcsik, the two-level game theory approach associated with Robert Putnam, and the "second image reversed" approach associated with Peter Gourevitch. This Article extends these approaches (i) from broader international relations to international law and (ii) from adherence to compliance. The model advanced in this Article allows the formalization and contextualization of a variety of factors that up to now have been viewed in isolation as explanatory variables in the decision to comply. Policymakers can use this model as an analytical template by which to assess whether their counterparties would comply with any undertakings they may make.

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I. INTRODUCTION

If international law is to be a useful tool of international cooperation, we must know more about its social effects: its ability to cause states to take action that they would not have taken, or to refrain from taking action that they would have taken but for the existence of the international law rule. Greater

understanding of the effects of international law will allow more efficient allocation of diplomatic and analytical resources toward international law that will resolve international problems and will reduce uncertainty that may result in under-use of international law as a tool of cooperation. However, greater understanding will require greater particularity of analysis.

This Article proposes a social scientific theory of compliance with international law that focuses attention on the domestic politics underlying a state's decision to comply with a particular international legal rule. It develops further a preference-based model that describes the internal mechanisms of state compliance with international law, building on work in political science by Dai, Gourevitch, Moravcsik, Iida, Milner, Mo, Putnam, and others who have been instrumental in developing a two-level game-based theory of international cooperation. That political science literature focuses on cooperation in the form of *adherence* to a "rule." Except for the work by Dai, however, the literature does not examine the subsequent issue of *compliance* with the rule. The two extensions of this work made in this Article—from broader international relations to international law, and from adherence to compliance—help to illuminate the problem of compliance, and provide a social scientific, positive approach to compliance.

Most prior social scientific theories of compliance with international law take the structure of the state's aggregate utility function as a given and evaluate the circumstances under which the threat of retaliation, or perhaps the fear of reduced reputation or reduced opportunities for future cooperation, would provide incentives for compliance. These theories fail to examine how international legal rules, and how the compliance with international legal rules, advance the interests of different constituencies within the target state. This Article departs from this preference-based literature of compliance with international law in that the prior literature declined to open the black box of the state in order to see the internal workings of the domestic political process.³ It argues that domestic politics plays an important role in determining compliance—a role that cannot be ignored.

The basic premise of this Article is that the proximate *cause* of compliance is a domestic political decision to engage in the behavior that constitutes compliance. At the moment at which international law is made—at the moment of *adherence*—two politico-legal acts take place: (i) there is a domestic decision to

³ While an approach that ignores domestic politics might be seen as an appropriate simplification because it allows a more parsimonious theory which can still generate interesting hypotheses, this argument has not been sufficiently tested. See, for example, Eric A. Posner, *The Perils of Global Legalism* 41 (Chicago 2009) (suggesting, without explanation, that this simplification is indeed appropriately parsimonious).

adhere to the international legal rule—to, in effect, enact the international legal rule as a national measure,⁴ and (ii) there is ordinarily an international decision to reciprocate or engage in concerted enactment. These two acts are generally interdependent at the time of *adherence*. This Article explains that the interdependence between domestic politics and foreign politics is important at the time of *compliance* as well.

Where the international legal literature has approached internal political decisions to comply, its focus has been on narrow mechanisms of internal pressure, such as private rights to sue, networks, or NGOs, rather than on broader coalition politics.⁵ Alternatively, the international legal literature has focused on mechanisms to indoctrinate or modify the preferences of governments, often assuming that governments are autonomous vis-à-vis their constituencies, rather than on an approach that examines the domestic political mechanisms that result in the preferences of governments. This “constructivist” international law literature of two-level compliance includes work by Harold Koh, Abram and Antonia Chayes, and Ryan Goodman and Derek Jinks. However, this literature does not focus on preferences expressed within domestic politics, or as political scientists would put it, “power and interest,” but instead focuses on idea-based, bureaucratic, managerial, and cultural mechanisms that are thought to affect behavior, perhaps by changing preferences. This is certainly an alternative channel for causation of state behavior. Future empirical work will be required to evaluate which channel of causation has greater effects and under which circumstances.

The unitary model of the state—often associated with the realist approach to international relations—is ignorant of the domestic political dynamics that constitute the decision whether or not to comply. The realist model assumes an overwhelming drive toward security that eclipses other state preferences and is intentionally ignorant of political coalitions. However, as Milner has argued, “international negotiations to realize cooperation often fail because of domestic politics, and such negotiations are often initiated because of domestic politics.”⁶ Milner’s central claim in her 1997 book is that “states are *not* unitary actors; that is, they are not strictly hierarchical but are polyarchic, composed of actors with

⁴ This enactment may occur by virtue of a variety of methods, including according the international law domestic legal effect by virtue of either direct effect or a domestic measure that transposes it into the domestic legal system.

⁵ See, for example, Anne Van Aaken, *Effectuating Public International Law Through Market Mechanisms*, 165 J Institutional & Theoretical Econ 33, 44 (2009).

⁶ Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* 10 (Princeton 1997).

varying preferences who share power over decision making.”⁷ There is no unified, *ex ante* national interest. The national interest is the result of a domestic political process, taking into account opportunities and risks in the international “market.”

The unitary model of the state may have been a reasonable simplifying assumption in international relations theory when most governments ruled and determined policy independently of domestic constituents’ desires. It may have made sense when governments often acted independently of domestic political dynamics and when most international law was concerned with “beyond the border” rather than “inside the border” issues. The unitary model may still be reasonable in circumstances where there is great national unity, as in existential national security circumstances.

But in a post-realist world, where governments seek all types of gains and are increasingly accountable servants of their constituents, the structure of their accountability—the mechanism by which these agents are instructed and held to account with respect to their objectives—becomes a critical variable in international relations and international law. Therefore, in order to predict whether a state will or will not comply with an international legal rule and to construct international legal rules, remedies, and institutions that are relevant to the decision of the state to comply, it is necessary to examine the domestic coalitions that drive the decision whether or not to comply.

Domestic politics has long been understood to determine the decision of states to accept international legal obligations. This is clearest in connection with the decision of a state to enter a treaty, such as the Kyoto Protocol or the League of Nations Charter. But it has been insufficiently understood that the decision to enter into international legal obligations itself can transform domestic politics by enabling the formation of coalitions that otherwise could not be formed.⁸ Nor has it been understood that over time, the decision to comply with these obligations is dependent on the continuity and robustness of these coalitions. Compliance with international law can be analyzed by reference to the domestic political coalitions that exist in order to induce entry into the international legal rules, as well as those that will be precipitated by the establishment of the international legal rule.

International legal commitments allow the formation of coalitions between those who will benefit from their own state’s compliance with the international

⁷ Id at 11.

⁸ For a recent effort to do so, focusing on the relationship between Congress and the Executive in the US, see Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 Va L Rev 251, 263–68 (2006). See also Beth Simmons, *Mobilizing For Human Rights* 23–56 (Cambridge 2009) (examining the role of human rights law in empowering domestic human rights advocates).

legal rule in question (“direct beneficiaries” of compliance) and those who will benefit from other states’ compliance with the international legal rule (“indirect beneficiaries” of compliance by virtue of reciprocity). For example, international trade treaties are supported by a coalition between consumers of imported goods—who are direct beneficiaries because they benefit from reduced domestic barriers to imports—and producers of goods for export—who are indirect beneficiaries because they benefit from reduced foreign barriers. The reduced foreign barriers may be jeopardized by non-compliance of the home state. As Grossman and Helpman put it at the conclusion of their leading work on the political economy of protectionism in trade:

A next step might be to assess the relative desirability of alternative international “rules of the game.” Such rules limit the policy choices open to national governments and change the nature of the strategic interactions between elected officials and their constituents. Our framework could be used to generate predictions about what domestic policies will emerge from the political process in different [international] institutional settings, and therefore to evaluate which rules give rise to preferred policy outcomes.⁹

In addition to specific coalitions for specific commitments, there are coalitions that support compliance with international law more generally. For example, in the US, one of the main roles of the American Society of International Law (ASIL) is to lobby and engage in public education programs in support of international law.¹⁰ In addition, the entry into international legal obligations triggers support for compliance with the obligations. Moreover, ASIL’s general activities and orientation support both adherence to, and compliance with, international law. What motivates these lobbyists? There may be constructivist explanations, or explanations in terms of certain values. Alternatively, these lobbyists may be seeking to increase the importance of their own advice, in pursuit of respect, power, or money.

One type of example of the domestic coalition theory of compliance involves a circumstance where a government seeks to perpetuate its policy by using the power of international law to restrict the actions of subsequent governments. The entry by Mexico into NAFTA, and the entry by China into the WTO, may illustrate this type of behavior. In these cases, the relevant government sought to use international law to maintain the strength of domestic forces in favor of liberalization. Indeed, it may be that the formation of international law, plus a degree of compliance, increases the welfare and thus

⁹ Gene M. Grossman and Elhanan Helpman, *Protection for Sale*, 84 Am Econ Rev 833, 849 (1994).

¹⁰ See Frederic L. Kirgis, *The American Society of International Law’s First Century: 1906–2006* 551–59 (Nijhoff 2006). While the ASIL itself has declined to take formal positions in most specific matters since 1966, many of its members, and other lobbyists, may advocate entry into international legal obligations.

strengthens the lobbying position of both direct beneficiaries and indirect beneficiaries, producing a circumstance under which adherence leads to greater support for compliance. Furthermore, systematic interests in compliance, either on the part of a public international law lobby, or on the part of the government itself, are likely to be anticipated to produce the “lock-in” effect that the Mexican and Chinese governments sought.

A theory of formation and compliance with international law that focuses on the role of domestic political coalitions achieves important theoretical advances. First, as suggested above, it allows for the possibility of greater explanatory and predictive power than “unitary state” theories of compliance. Second, it encompasses the role of individuals in domestic politics, and therefore moves toward a more liberal and cosmopolitan understanding of the role and dynamics of international law. A domestic coalition-based theory of international law transcends the state and examines individual preferences, but takes the state as the partial mediator of individual preferences.

On the other hand, it is clear that domestic politics about the formation of and compliance with international law is fundamentally different from most other domestic politics. This is because domestic politics about formation of and compliance with international law must concern itself with the responsive actions of other states. International law that involves commitments by other states by definition involves the contribution of value, or the taking of value, by other states. This difference contributes to a different political equilibrium from that which would be possible if the only exchanges of political value took place within the state.

To generalize, in order for international agreements to be entered into, negotiators must engage the domestic politics of member states. Entry into such agreements requires the assembly of domestic coalitions that have the political power to approve international agreements that will be acceptable to foreign counter-parties. In order to convince foreign counter-parties to engage in reciprocal concessions, it often will require the assembly or contingent assembly of domestic coalitions that have the political power to induce continued compliance with the relevant agreement. Compliance coalitions may be supported, in part or in whole, by international legal commitments that include the threat of specific or diffuse, formal or informal retaliation, or of other types of consequences. But the important point is that these *international* consequences operate through the medium of *domestic* politics to induce behavioral change in the relevant government policy.

Of course, it is true that not all decisions are made in an intensely contested political lobbying setting. Any approach focusing on domestic politics must be sensitive to comparative politics across states, and to different political structures established to address different issues within states.

Furthermore, some decisions are made by administrative agencies, and some decisions are made by courts, both at some distance from the full brunt of legislative lobbying. To the extent of this removal, a different model would be required, examining the objective functions of these decision-makers. For example, in an area in which international law is accorded direct effect, the courts themselves, and the supporters of the judicial system, would be more extensively engaged in seeking to influence political decisions regarding compliance. Similarly, if decisions are committed to administrative agencies, perhaps a network approach along the lines advanced by Anne-Marie Slaughter,¹¹ or a more managerial approach along the lines advanced by Abram and Antonia Chayes,¹² would have greater explanatory power. For some types of decisions, a hybrid model may be appropriate, in which administrative agencies or courts operate in the shadow of potential legislative action, or under legislative supervision. The model developed in this Article is open to different political structures in different states. The magnitude of the variables would change, but the model itself does not.

This approach might assist our understanding of the changing content of sovereignty: sovereignty in its classical sense means having a self-contained political system, in which political actors are responsible only domestically. In the modern sense, sovereignty is constrained or fractured precisely because there are growing circumstances in which the best way to deliver governmental goods and services is through arrangements with other states.

International law is a tool for linking constituencies in different states in order to facilitate political Pareto improving transactions between constituencies in different states, in a way that is not possible under autarchy. In this sense, international law is a selective instrument for structuring limited function-specific transnational political communities. Finally, the theory of compliance developed here can also serve as the basis for a theory of international organizations. International organizations that are delegated decision-making power may be understood simply as wholesale, or aggregate, means of linking domestic constituencies. Instead of doing so on a single transactional basis, like the market, international organizations may be analogized to long-term contracts or the firm.¹³

¹¹ Anne-Marie Slaughter, *A New World Order* 18–35 (Princeton 2004) (summarizing her theory of how governments are adjusting their operations to respond to an increasingly networked world).

¹² See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* 109–11 (Harvard 1995) (giving an overview of states' management strategies for improving compliance, such as implementing dispute resolution mechanisms or providing technical assistance through international bureaucracies).

¹³ Joel P. Trachtman, *The Economic Structure of International Law* 9–11 (Harvard 2008).

Compliance by any individual state with an international legal rule is, in the final analysis, dependent on a political decision to comply made within that state's domestic political process. This domestic decision is both necessary and sufficient to result in compliance. While this decision is purely a domestic political decision, it is importantly influenced by international dynamics. These international dynamics will include the likely response by other states to a decision by the target state whether to comply. But importantly, these international dynamics are neither necessary nor sufficient to cause compliance. Their causal effects are always mediated through domestic politics.

Any decision to comply with international law or to violate international law will have both short-term and long-term effects, and there will ordinarily be target state constituencies that benefit from compliance and target state constituencies that are harmed by compliance. The decision to comply will depend on the relative influence exercised by these constituencies.

Part II of this Article develops a social scientific model of the domestic politics of compliance with international law. Part III suggests the implications of this model for policy, suggests directions for future research, and describes how this model draws on, competes with, and complements prior constructivist and rationalist approaches. Part IV concludes.

II. DEVELOPING A SOCIAL SCIENTIFIC MODEL OF THE DOMESTIC POLITICS OF COMPLIANCE WITH INTERNATIONAL LAW

In this subsection, I begin to develop this Article's model, based, in part, on the Grossman-Helpman political support model designed for use in connection with international trade negotiations.¹⁴ In that model, incumbent governments are assumed to seek to maximize a political support function. This political support function is assumed to have two components. First, organized interest groups are assumed to make political contributions that can assist in reelection, providing an incentive for governments to implement policies that enhance organized interest group welfare. Second, voters are assumed to respond in their voting behavior to their own welfare, and so one can expect some incentive to implement policies that enhance voter welfare.¹⁵ The government then sets its policy to aggregate a weighted sum of total

¹⁴ See Gene M. Grossman and Elhanan Helpman, *Trade Wars and Trade Talks*, 103 J Pol Econ 675, 678 (1995).

¹⁵ It may also be that politicians are civic-minded, resulting in precisely the same motivation, assuming that the voter's utility is actually congruent with the politician's civic vision.

contributions and aggregate social welfare. Politicians thus seek to please the “winning” lobbies and the electorate as a whole.

I adapt the Grossman-Helpman model of the lobbying process as follows: Each lobby, representing a particular policy decision in connection with international law (whether for or against the adherence or compliance decision), confronts the government with a contribution schedule. The contribution schedule arrays contributions against policy decisions. The government then sets a policy and collects from each lobby the appropriate contribution. “An equilibrium is a set of contribution schedules such that each lobby’s schedule maximizes the aggregate utility of the lobby’s members, taking as given the schedules of the other lobby groups.”¹⁶ This model has the structure of a common agency problem: a situation where several principals seek to influence the behavior of a single agent. “The government here serves as an agent for the various (and conflicting) special interest groups, while bearing a cost for implementing an inefficient policy that stems from its accountability to the general electorate.”¹⁷

Here, for simplicity, I do not examine the distinction or the strategic relationship between legislatures and executives: I aggregate these components of government. I am interested here in focusing attention not on the governmental processes or the type of government, but on the constellation of political support. The lobbies make implicit offers relating prospective contributions to the policies of the government.

The Grossman-Helpman model is designed to explain the effectiveness of lobbying in regard to trade policy, and specifically, tariffs and subsidies.¹⁸ Individual preferences over protectionism are assumed to arise from their sector-specific endowments. Following Mancur Olson, there are some owners of factors of production who are able to organize, and some who are unable to do so.¹⁹ The unorganized owners of factors of production do not make contributions, and so lack this type of influence over policy. I assume that each lobby structures its contribution schedule to maximize the total welfare of its members. Like Grossman and Helpman, I am first “interested in the political equilibrium of a two-stage noncooperative game, in which the lobbies

¹⁶ Grossman and Helpman, 84 *Am Econ Rev* at 836 (cited in note 9).

¹⁷ *Id.*

¹⁸ *Id.* at 834 (“This paper seeks to explain the equilibrium structure of trade protection. We are interested in understanding which special interest groups will be especially successful in capturing private benefits from the political process.”).

¹⁹ See Mancur Olson Jr, *The Logic of Collective Action: Public Goods and the Theory of Groups* 53–65 (Harvard 1965) (providing a model predicting under what conditions organized political groups are likely to emerge).

simultaneously choose their political contribution schedules in the first stage and the government sets policy in the second.”²⁰

An equilibrium will be a set of contribution schedules, one set for each lobby, such that each one maximizes the joint welfare of its lobby’s members given the schedules set by the other lobbies and the anticipated political optimization by the government. The structure of this menu-auction problem is such that the policy vector chosen by the government is assumed to maximize the joint welfare of the lobby and the government, given the contribution schedules offered by the other lobbies.

The Grossman-Helpman model relates a lobby’s equilibrium success in obtaining protection to: (i) the state of its political organization, (ii) the ratio of domestic output in the relevant industry to net trade, (iii) the elasticity of import demand, (iv) the relative importance to the government of campaign contributions versus voter welfare, and (v) the fraction of voters that belong to the lobby group. Items (ii) and (iii) are specific to the trade context, but one would expect to find other measures of lobby welfare in other international legal contexts.

In their 1995 work, *The Politics of Free Trade Agreements*,²¹ Grossman and Helpman extend their 1994 model to examine the conditions under which two states might agree to a free trade agreement. This model uses assumptions about the welfare effects of trade liberalization and addresses adherence rather than compliance. Therefore, this extended model is not directly adaptable to a general international law model of compliance. However, it provides a good basis with which to begin.

We begin with adherence. Where it is clear that one state wants an agreement, the analysis can be limited to the unilateral determination by the other state. However, this simplification may be useful only in a limited range of circumstances. States will normally contend over the distribution of the surplus from agreement, and therefore, even a state that initially wants an agreement may be requested to accept a level of surplus below its BATNA or reservation price.

Grossman and Helpman assume that the status quo prior to an international agreement is itself a domestic political equilibrium in each state.²² This assumption seems appropriate. Thus, the opportunity for an international agreement can be understood as an exogenous shock to the existing domestic equilibrium. The opportunity for an international agreement changes the relative

²⁰ Grossman and Helpman, 84 Am Econ Rev at 838 (cited in note 9).

²¹ Gene M. Grossman and Elhanan Helpman, *The Politics of Free-Trade Agreements*, 85 Am Econ Rev 667 (1995).

²² Id at 668–70.

prices. In the trade context, the possibility for foreign compliance with a commitment to liberalize makes the price of domestic protectionism higher by engaging the concerns of domestic producers for export.

Grossman and Helpman, in the context of establishment of a free trade agreement, find that in order for an agreement to be entered into, there must be a sufficient number of exporters in each country prepared to lobby for the agreement, on the basis of the welfare gains these lobbies would achieve by virtue of the performance by the other state of its obligations under the agreement.²³ They use the concept of a politically Pareto efficient agreement, meaning an agreement with the property that no party could gain politically except at the expense of the other.²⁴ After they establish the Pareto frontier, they develop a bargaining model that shows first that two states negotiating by making alternating proposals would reach an equilibrium somewhere along the Pareto frontier.²⁵ The specific equilibrium selected would depend, under perfect information, on the relative positions of the two states, including their discount factors or degree of patience, and each state's relative aggregate welfare under the status quo.

In the trade context where Grossman and Helpman develop their model, it is possible to assume that specific industry groups, or lobbies, have specific types of interests in trade policy. In the broader international law context, lobby interests will be more diverse, and preferences cannot be assumed to be confined to narrow wealth gains. However, there may be industry groups, ethnic groups, or other groups that have narrower interests.

While in the Grossman-Helpman model, lobbies make their contributions contingent on trade policy, we may generalize to assume that lobbies make their contributions contingent on international legal policy. For example, within domestic societies there will be a lobby group that is interested in increased human rights in other states. While this interest may be explained in terms of preferences, the types of preferences involved will depend on the particular legal rule involved, and this type of interest cannot be compared directly with other types of interests that may be measured in monetary terms. Nor are we able to make any assumptions about the utility function of any particular group. Rather, the only assumption that seems defensible is that each international law rule will harm some groups and help some other groups. However, there is one type of

²³ Grossman and Helpman, 84 Am Econ Rev at 847-49 (cited in note 9) (describing under what conditions that the interests of various lobbying groups may align to make trade agreements across coalitions and countries possible).

²⁴ See Gene M. Grossman and Elhanan Helpman, *Interest Groups and Trade Policy* 27 (Princeton 2002) (describing the concept of a Pareto efficient agreement).

²⁵ Consider Grossman and Helpman, 85 Am Econ Rev 667 (cited in note 21).

lobby that generally appears to be in favor of international legal adherence and compliance.²⁶ That type of lobby is exemplified, in the US, by the members of ASIL. I will discuss this type of lobby in greater detail below.

It is important to recognize that, in this political Pareto efficiency-based model, “compliance can be rational even if the country as a whole pays for it more than benefits from it.”²⁷ And the converse is true: compliance may be irrational, in the sense that it is not supported by sufficient political force, even if the country as a whole benefits from it more than it pays. However, if public welfare is included in the government’s utility function, as in the Grossman-Helpman model, through the mechanism of voting, then international legal rules that increase public welfare are more likely to meet with both adherence and compliance. Interestingly, different governments will have different approaches to public welfare, and their approaches may be expected to vary over time. Their approaches will depend on their relative accountability to the public, including the timing of elections.

A. Depth and the Adherence-Compliance Lag

The core question is, conditional upon entry into an international legal rule at an initial time (t_1), what are the circumstances under which a particular country will comply with that legal rule at a later time (t_2)? I also assume that domestic politics change, in an “obsolescing bargains”²⁸ sense.²⁹ Thus, the coalition that supports adherence at t_1 may not have the same structure or magnitude, and may not even support compliance, at t_2 .

I assume an international legal rule with some “depth” in the sense described in the “legalization” literature:³⁰ the rule requires behavior that would not occur without the added inducement that arises from operation of the rule. In our context, the domestic political process by itself and without any effect of international law would not decide to conform national behavior to the rule. This is a slightly different issue from the question, addressed for example by Grossman and Helpman, of whether the domestic political process would decide to adhere to an international agreement. It is possible that *adherence* to an

²⁶ Of course, there will be exceptions. For example, some rules of international law may be found to be objectionable by some portion of the membership of the ASIL.

²⁷ Xinyuan Dai, *International Institutions and National Policies* 6 (Cambridge 2007).

²⁸ See Raymond Vernon, *Sovereignty at Bay* 46–53 (Basic Books 1971).

²⁹ See Giovanni Maggi and Andrés Rodríguez-Clare, *The Value of Trade Agreements in the Presence of Political Pressures*, 106 J Pol Econ 574, 574–601 (1998) (examining the utility of trade agreements to assist governments in opposing changing political pressure).

³⁰ Consider Judith Goldstein, Miles Kahler, Robert Keohane, and Anne-Marie Slaughter, eds, *Legalization and World Politics* (MIT 2001).

international agreement would be supported purely by domestic political forces, while *compliance* with the same agreement would require the additional effect of international law. Indeed, domestic *adherence* under “depth” for the adhering state would presumably be conditioned on an expectation of foreign *compliance*, depending on the magnitude of other, non-reciprocal, incentives for compliance.

I further assume that in order for any state to decide to comply with an international legal rule, there must be a coalition of domestic lobbies that is strong enough to determine national behavior. This assumption can survive the diversity of national politics: it is not necessary to have a dominant interest-group based politics such as that of the US for this type of model to apply. Even autocracies involve sensitivity to political support. For simplicity’s sake, I assume that a successful coalition will encompass a majority of some function of political support, but the actual decision rule in a particular state for a particular matter could be less or more. I focus on lobbies more broadly, recognizing that other mechanisms, such as courts, may play the critical role in compliance.³¹ For example, once a state has a general rule of direct effect of international law, the courts themselves become a critical, and often determinative, “lobby” in causing compliance.

B. Information Problems with Adherence and Compliance

Xinyuan Dai has developed a model of compliance with international law, incorporating both electoral leverage and informational advantage as sources of influence for a domestic lobby.³² Dai models a government’s compliance decision in the context of competing domestic lobbies. Dai emphasizes the information problem whereby lobbies cannot observe the government’s action directly. The accuracy of the lobbies’ inference about the government’s action “depends on how much information they have about the policy process and how much resources they invest in monitoring the governmental action.”³³ Dai thus develops a model in which a government’s compliance decision is determined by both the electoral leverage of the domestic lobby and the domestic lobby’s informational position.

In Dai’s model, interest groups differ in (i) their preferences regarding compliance—for example, one group may prefer a low compliance level, while the other prefers a high compliance level—and (ii) their informational endowments. Dai models informational endowments as a separate variable, even though it might be that information endowments vary with the magnitude of

³¹ See Aaken, 165 J Institutional & Theoretical Econ at 40–42 (cited in note 5).

³² Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 Intl Org 363, 363 (2005).

³³ Id at 365.

preferences. Her main concern is that interest groups do not perfectly observe compliance *efforts*.³⁴ However, we might speculate that in many international law areas, interest groups would perfectly observe *compliance itself*.

On the other hand, as in the Grossman-Helpman model, the government official's objective function includes both private interest in re-election and aggregate social welfare based on altruism. The expected value to the government official of being re-elected is discounted by the probability of re-election, and by a discount factor. The inclusion of aggregate social welfare is intended to separate this factor from concern for re-election, but is not necessary for the central result of Dai's model.³⁵ The government official's interest in re-election makes the government official's welfare dependent on how lobbies perceive its compliance policy.

As might be expected, because it is built into Dai's model, Dai finds that where the group that favors compliance has greater electoral leverage and monitoring ability, compliance increases.³⁶ Conversely, where the group that favors violation has greater leverage and monitoring ability, compliance decreases. Of course, if aggregate social welfare is included in the equation, these differences in leverage and monitoring ability are not necessarily by themselves determinative, and the model does not tell us how to commensurate among these different factors. Furthermore, as Dai points out, the value to the incumbent of reelection, and her discount factor, will affect the incumbent's susceptibility to influence by lobbies.³⁷

While recognizing the importance of Dai's reference to each lobby's informational advantage as a source of influence, I make the simplifying assumption that the informational advantage is either included in the measure of political strength, or is co-variable with the magnitude of political strength or preferences, and therefore I do not account separately for informational advantage. Furthermore, while Dai's approach assumes that lobbies have difficulty in assessing the degree of effort expended by government to comply, I focus on actual measures of compliance rather than efforts towards compliance, and assume that actual compliance is easier to measure than efforts. This will not always be true, but it seems to be a reasonable simplification. In appropriate circumstances, separate accounting for information would be important.

³⁴ See *id.* at 368, 384 (explaining that domestic interest group politics affects democratic governments' decisions to comply and how international organizations should use this observation to increase compliance).

³⁵ *Id.* at 369.

³⁶ Dai, 59 *Intl Org.* at 364.

³⁷ *Id.* at 374.

C. Reciprocity

A number of scholars have examined reciprocity, or retaliation, as a means of inducing compliance with international law.³⁸ This theoretical approach is elegant and compelling: states comply with international law in order to induce other states to comply, or in order to induce other states to continue to refrain from retaliation. In Keohane's "specific reciprocity" (as opposed to diffuse reciprocity) sense, there is little difference between reciprocity and retaliation.³⁹

Most work in this area has arisen from a growing rationalist debate regarding compliance with customary international law.⁴⁰ Norman and Trachtman,⁴¹ for example, developed a repeated multilateral prisoner's dilemma model of formation of, and compliance with, customary international law. This model is based on the potential for retaliatory defection. It focuses on the parameters of the multilateral prisoner's dilemma in the customary international law context. These parameters include: (i) the relative value of cooperation versus defection, (ii) the number of states effectively involved, (iii) the extent to which increasing the number of states involved increases the value of cooperation or the detriments of defection, including whether the particular issue has characteristics of a commons problem, a public good, or a network good, (iv) the information available to the states involved regarding compliance and defection, (v) the relative patience of states in valuing the benefits of long-term cooperation compared to short-term defection, (vi) the expected duration of interaction, (vii) the frequency of interaction, and (viii) the existence of other bilateral or multilateral relationships among the states involved.⁴²

Norman and Trachtman highlighted some of the characteristics of different states' domestic politics that might affect their level of patience and their resulting propensity to accept and comply with rules of customary international law. However, they did not analyze the *decision-making* process

³⁸ See, for example, Robert O. Keohane, *After Hegemony* 104–05, 128–31 (Princeton 2005); Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 211–12 (Oxford 2008) (listing reputation, reciprocity, and retaliation as costs that deter states from noncompliance).

³⁹ Robert O. Keohane, *Reciprocity in International Relations*, 40 *Intl Org* 1, 4 (1986).

⁴⁰ Consider Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford 2005); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal L Rev* 1823 (2002); Edward T. Swaine, *Rational Custom*, 52 *Duke L J* 559 (2002); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 *Va J Ind L* 839 (2002). The Goldsmith and Posner book has spawned a rich responsive literature. See, for example, George Norman and Joel P. Trachtman, *The Customary International Law Game*, 99 *Am J Intl L* 541, 541 (2005).

⁴¹ Norman and Trachtman, *The Customary International Law Game*, 99 *Am J Intl L* at 548 (cited in note 40).

⁴² *Id* at 542.

within states or the lobbying game within states. Other rationalist approaches focusing on retaliation are characterized by the same limitation.

The theory developed here assumes that a state complies with international law where its domestic politics supports compliance sufficiently. The theory is eclectic with respect to the types of interests various lobbies may have. It recognizes that certain domestic lobbies are motivated by the possibility of direct foreign reciprocity and other domestic lobbies are motivated by respect for international law. As discussed in more detail below, it is possible that respect for international law may also be understood as a special kind of diffuse reciprocity.

A good example of the type of specific reciprocity and engagement of domestic interests that benefit from reciprocity comes from the trade context. As discussed by Grossman and Helpman,⁴³ exporters are a domestic constituency interested in foreign liberalization. Therefore, exporters are concerned with domestic compliance with liberalization commitments in order to ensure against reciprocal punishment in the form of protectionism abroad.

It is important to note that reciprocity may be complex: it is not necessarily tit-for-tat where each state promises the same performance.⁴⁴ Indeed, the possibility for complex barter or package deals increases the set of possible transactions. For example, while State A may be concerned with human rights in State B, for any number of reasons, State B may be unconcerned with human rights in State A. But State B may be concerned with trade liberalization in State A. In fact, international law increases the opportunities for complex barter by allowing diverse performances to be linked and supported by broad fidelity to international law.

On the other hand, uncertainty as to which commitments the counterparty will suspend in response to a violation would limit the likelihood that the domestic lobby concerned with those commitments will lobby for compliance. There may be a collective action problem among possible lobbies. One way to reduce the effects of this collective action problem would be to designate in advance, and specifically, the type of retaliatory action that the counter-party will take.⁴⁵

⁴³ Grossman and Helpman, 85 Am Econ Rev at 687 (cited in note 21).

⁴⁴ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Intl Org 427, 446–47 (1988).

⁴⁵ This would be one benefit of the type of “contingent liberalization commitments” suggested by Robert Lawrence as a structure for remedies in the trade context. Robert Z. Lawrence, *Crimes and Punishments? Retaliation under the WTO* 79–89 (Peterson Institute for International Economics 2003).

D. Role of the Pro-International Law Lobby

The PILL can be included in a model of the domestic politics of international law in the same way that other lobbies are included. The PILL may be motivated by altruism. It may be motivated in addition or instead by an expectation that more international law will bring more power and income to international lawyers. This could not only cause the PILL to argue for more international law, but also cause it to argue for more compliance, as more compliance would be expected to evidence the importance of international law. Evidence for the importance of international law, in turn, would add to the prestige and income of international lawyers. Furthermore, more compliance with international law might result in more international law, further benefiting the PILL. It is in connection with the PILL, and with the government as a “lobby” itself as described below, that the constructivist model may have the greatest power: ideas and engagement may support compliance through the PILL and the government.

For example, the mission of the ASIL “is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice.”⁴⁶ So, yet another group has incentives to lobby for adherence and compliance with international law: professors who form a core leadership group within ASIL stand to gain from inducing greater study of international law. Furthermore, “establishment and maintenance of international relations on the basis of law” can and should be understood as promoting adherence to and compliance with international law.

The PILL would thus be expected to support compliance with international law under most circumstances. I say “most,” rather than “all” because there is an occasional debate regarding whether “legitimacy” may trump legality, especially in connection with humanitarian intervention.⁴⁷ Putting those exceptional circumstances aside, we might consider the PILL effect as fairly constant across international law rules.

Furthermore, while the PILL might advocate *adherence* to international legal rules in many cases, it would not advocate adherence in all cases. For example, it would not necessarily take a position with respect to a particular state’s entry into further preferential trade agreements, into stronger intellectual property protection treaties, or into further bilateral investment treaties. On the other hand, the PILL might more broadly advocate adherence to more international

⁴⁶ American Society of International Law, Overview (2010), online at <http://www.asil.org/mission.cfm> (visited May 3, 2010).

⁴⁷ Consider Simon Chesterman, *Legality versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law*, 33 Security Dialog 293 (2002).

law restraining the use of force or promoting human rights. However, one would expect the PILL to advocate *compliance* with international law in all but the exceptional circumstances mentioned above.

In addition to the public choice explanation of the PILL influence described above, the PILL, and government officials, may have an altruistic or civic-minded position, related to the fact that compliance with international law in general may be broadly beneficial due to network effects among international legal rules. While adherence to international law might have some network effects also, these would appear to be weaker. Importantly, this public welfare position may be held both by the PILL and by government officials. The PILL may seek to educate government officials as to the public welfare effects of compliance with international law. The altruistic position might be based on facts or based on beliefs.

Indeed, it may be that a broad group of citizens holds the view that compliance with international law is important, affecting their voting behavior and therefore the behavior of government officials. A 2002 Chicago Council on Foreign Relations survey showed that 43 percent of Americans considered strengthening international law a “very important” foreign policy goal, while another 43 percent rated it as “somewhat” important.⁴⁸ In a more recent World Public Opinion survey, respondents in 17 of 21 countries placed compliance with international law above national interest.⁴⁹

It is important to note that there may also be an anti-international law lobby.⁵⁰ To the extent that such a lobby exists, its effects can be netted against the PILL, and to the extent that the anti-international law lobby is stronger than the PILL, then the PILL variable would simply be negative.

E. Toward a Model

The following discussion is intended to outline a model of how domestic coalitions would be affected by, and would affect, international law.

⁴⁸ Chicago Council on Foreign Relations, *American Public Opinion and Foreign Policy* 33 (2002), online at http://www.thechicagocouncil.org/UserFiles/File/POS_Topline%20Reports/POS%202002/2002_US_Report.pdf (visited Mar 30, 2010). See also Michael Tomz, *Reputation and the Effect of International Law on Preferences and Beliefs* 3 (Feb 2008), online at <http://www.stanford.edu/~tomz/working/Tomz-IntlLaw-2008-02-11a.pdf> (visited Mar 30, 2010) (finding, based on an experimental empirical technique, that “individuals are far more likely to oppose policies that would violate international law than to oppose *otherwise identical* policies that would not trammel upon the law”).

⁴⁹ World Public Opinion, *World Public Opinion on International Law and the World Court* 1 (Nov 2009), online at http://www.worldpublicopinion.org/pipa/pdf/nov09/WPO_IntlLaw_Nov09_quaire.pdf (visited Mar 30, 2010).

⁵⁰ Consider Peter Spiro, *The New Sovereignists*, 79 Foreign Aff 6 (Nov/Dec 2000).

Assume two states, H and F. Assume H and F each has exactly four lobbies, and that the respective governments of H and F represent a fifth “interest group,” each with the policy goal profiles set forth below. Assume perfect knowledge by each player of the policy preferences and magnitudes of each lobby. Magnitude is a measure of the political valence of each lobby, although as noted above it could include knowledge endowment as to compliance. The model would involve four stages. In the first stage, the lobbies in each country set contribution schedules to influence their government. In the second stage, the governments negotiate an agreement. In the third stage, lobbies (perhaps including new or different ones, and perhaps with different magnitudes) lobby about compliance. In the last stage, governments simultaneously and non-cooperatively choose whether or not to comply. In the following discussion, I focus on two stages: t_1 when the governments negotiate an agreement, and t_2 when the governments choose whether or not to comply. But it is important to note that lobbies at the first and second stages would be expected to anticipate the situation at the third and fourth stages, and respond accordingly.

H lobbies:

J: policy goal is x (for example, *either* consumers seeking free trade in bananas imported to H,⁵¹ *or* environmentalists seeking carbon reduction).

K: policy goal is not x (for example, *either* import competing producers seeking protection in bananas in H, *or* oil companies seeking to avoid carbon reduction).

L: policy goal is y (for example, *either* orange producer seeking free trade in oranges exported to F, *or* separate group of environmentalists seeking protection of the rain forest in F)

P_h : policy goal is adherence to international law at t_1 (P_{h1}) and compliance with international law at t_2 (P_{h2}). Assume that $P_{h2} > P_{h1}$ (international law lobbies are harmed more by non-compliance than by non-adherence).

G_h : government of H (excluding the effects already reflected by J,K,L and P_h), as a separate “interest group” that seeks to maximize its voting support by maximizing general public welfare in connection, *inter alia*, with adherence and compliance and concern for reciprocity and

⁵¹ These policies in parentheses are merely provided as examples. Any policy where reciprocity is valuable and the magnitudes are appropriate could be substituted. For example, y could be protection of the ozone layer, while x is avoidance of terrorist attacks. The point is that within each domestic system, there is (i) a lobby on each side of the contention regarding the domestic measure, (ii) a lobby that cares about foreign measures, (iii) a public international law lobby that cares about the growth of and compliance with international law, and (iv) the government which, aside from its interest in lobbies’ support, is also interested in public welfare as a way to increase voting support.

retaliation in connection with non-adherence at t_1 (G_{h1}) and non-compliance at t_2 (G_{h2}). Assume that $G_{h2} > G_{h1}$ (there is greater concern for retaliation against non-compliance than against non-adherence).

If domestic equilibrium at t_1 were x (the preferred policy of J), that is $J > K$, then no international law would be needed to induce x . However, assume that at t_1 , $K > J$. (We are assuming international law with “depth.”) Therefore, the domestic equilibrium at t_1 is not x : H would not enter into an international agreement. However, assume that $J + L + P_{h1} + G_{h1} > K$. Therefore, international law that engages the lobbying power of L could cause a shift from not x to x at the adherence stage (t_1), inducing adherence to a rule of international law. Alternatively, or in addition, it is possible that P_{h1} or G_{h1} could be sufficient to overcome K . Once the rule of international law is established, there is a shift from P_{h1} to P_{h2} , and from G_{h1} to G_{h2} . According to our assumptions, these shifts would be expected to increase the tendency to comply. In order to determine actual compliance, we would need to examine whether at any given time $J + L + P_{h2} + G_{h2} > K$. P_{h2} and G_{h2} would be expected to vary over time.

It is important to note that in this model, international law only affects state behavior pursuant to the above assumptions regarding relative magnitudes of lobbies. This model does not utilize “compliance pull” or other effect of international law, separate from the force of the national lobbies that care about compliance with international law. But in assuming that $P_{h1} < P_{h2}$, and $G_{h1} < G_{h2}$, we are assuming a tendency to comply, conditional on adherence. The magnitudes of these differences tell us something about the level of vulnerability of continued compliance to changes in other factors.

Also, recall that the lobbies are not the only determinants of public policy. Under the assumptions of the Grossman-Helpman model, public welfare enters the equation through G by virtue of voting.⁵² Therefore, an international legal rule that increases public welfare is more likely to achieve both adherence and compliance.

As outlined above, H 's decision to adhere and comply is partially dependent on the decision of F to reciprocate, inducing L to lobby for adherence and compliance. The situation in F is a mirror image of H , with adherence and compliance by both increasing their joint welfare, according to the assumptions of this model. The F lobbies are described below.

F lobbies:

M : policy goal is y (for example, *either* consumers seeking free trade in oranges imported to F , *or* protection of rain forest).

⁵² Grossman and Helpman, 84 Am Econ Rev at 847–49 (cited in note 9).

N: policy goal is not y (for example, *either* import competing producers seeking protection in oranges in F, *or* seeking to develop the rain forest).

Q: policy goal is x (for example, *either* banana producer seeking free trade in bananas exported to H, *or* oil companies seeking to avoid carbon reduction).

P_F: policy goal is adherence to international law at t₁ (P_{F1}) and compliance with international law at t₂ (P_{F2}). Assume that P_{F2} > P_{F1} (international law lobbies are harmed more by non-compliance than by non-adherence).

G_F: government of F (excluding the effects already reflected by M, N, Q, and P_F), as a separate "lobby" that seeks to maximize its voting support by maximizing general public welfare in connection, *inter alia*, with adherence, compliance, and concern for reciprocity and retaliation in connection with non-adherence at t₁ (G_{F1}) and non-compliance at t₂ (G_{F2}). Assume that G_{F2} > G_{F1} (there is greater concern for retaliation against non-compliance than against non-adherence).

Assume that at t₁, $N > M + P_{F1} + G_{F1}$, therefore domestic equilibrium is not y. However, assume that, $M + Q + P_{F1} + G_{F1} > N$. The situation of F then parallels that of H.

Therefore, if H and F are considered separately, they have separate equilibria of not x and not y. But at t₁, if H and F are considered together—their ability to interact is an exogenous shock to each of their separate equilibria—they are able to reach an international exchange of policy. This international exchange of policy is politically Pareto superior, as it results in greater support for each government.⁵³ We have assumed that L and Q (the parties in each of H and F concerned about the measures taken by the other state), when their respective influence is added to J and L, respectively, is able to overcome K and N, respectively. So, at t₁, under interaction, a new equilibrium arises, of x and y, inducing adherence to an international agreement.

However, at t₂, the compliance phase, this structure may take on the characteristics of a prisoner's dilemma game. That is, if H can defect and move to not x, while F plays y, it might be that H can garner the most political support.⁵⁴ However, assuming all positions remain the same as at t₁, if H defects, then F can defect in response, resulting in a non-cooperative equilibrium. But, assuming that P₂ > P₁, and G₂ > G₁, the differences in these factors may be sufficient in magnitude, especially when aggregated over time or

⁵³ It is not necessarily superior from a public welfare standpoint.

⁵⁴ Putnam suggests that policymakers generally have an incentive to cheat. Putnam, 42 *Intl Org* at 438 (cited in note 44) (citing Matthew E. Canzoneri and Jo Anna Gray, *Two Essays on Monetary Policy in an Interdependent World*, International Finance Discussion Paper 219 (Board of Governors of the Federal Reserve System Feb 1983)).

over multiple cooperation contexts, to exceed the value of defection, avoiding the prisoner's dilemma.⁵⁵

Note that at t_1 , the forces in H and F supporting not x and not y, respectively, will be expected to oppose the creation of the international linkage that changes the equilibrium to their detriment. In addition, these forces will be expected to oppose the creation of international legal rules that will result in the shift from P_1 to P_2 and from G_1 to G_2 , which these forces anticipate will entrench their disfavored policy. However, the fact that they anticipate these effects does not mean that they have the lobbying power to avoid these effects. Nevertheless, they may seek to engage sovereigntist or other generally opposing forces in order to supplement their policy position.

III. IMPLICATIONS FOR POLICY AND SCHOLARSHIP

A. Implications

Further development and use of this model will depend on policymakers' ability to identify proxies for power and interest of lobbies. In international economic law areas, wealth and amount at stake may serve as a proxy. In other areas, such as human rights or international environmental law, size of membership in relevant groups, such as ethnic groups, and survey data regarding the magnitude of individual concern, may be helpful. However, as a guide to negotiators and policymakers, this approach may be useful without further formalization. If it is helpful to know about compliance, there is no more complete or precise approach. The test of a model is not whether it answers every question perfectly, but whether it answers questions that need to be answered in a useful way and better than the other tools available.

What systematic features does this model exhibit?

1. First, because we assume that $P_2 > P_1$, and $G_2 > G_1$, this model exhibits a systematic bias towards compliance, conditional on adherence. However, while this is a systematic bias, it cannot be expected to overcome changes in other parameters in all cases. Moreover, the magnitude of this systematic bias depends on the individual magnitude of P_2 and G_2 in each state. This focus on P_2 and G_2 may either supplement or supplant the "liberal states" theory, depending on the cause of P_2 and G_2 . These differentials between P_2 and G_2 may also be understood within a reputation or reciprocity model, as determinants of the importance to the particular state of its

⁵⁵ For a full discussion of the prisoner's dilemma dynamic in compliance with international law, and the circumstances under which it may be escaped, consider Norman and Trachtman, 99 Am J Intl L 541 (cited in note 40).

“reputation” or of diffuse reciprocity in determining whether to comply. In a prisoner’s dilemma model, these differentials can be seen as a measure of the extent to which the shadow of the future, including compliance in connection with other rules, affects the behavior of the subject state.

2. Second, this model accepts that domestic lobbies may vary in intensity from t_1 to t_2 . This variation may be for exogenous reasons, or it may systematically be that lobbies that achieve their preferences at t_1 become wealthier or otherwise stronger at t_2 as a result. If this is the case, we would again see a systematic bias towards compliance, conditional on adherence.

How can policy preferences change in ways that might give rise to non-compliance?

1. First, the timing of performance by one state may differ from the timing of performance by another, and this may give rise to asset specificity after t_1 adherence. In this context, by “asset specificity,” I mean that the investment in compliance by one party would be less valuable to that party if the other party does not carry out its side of the bargain. This is no different from any other asset specificity in contracting. But under asset specificity, a greater role for a PILL, or for governmental preferences for compliance, may be required to induce compliance with international law, as the H lobbies that benefit from the asset specific investment by F would have little reason to lobby in support of compliance after performance by F. Obviously, to the extent that performance is expected to take place symmetrically at multiple moments over an extended period of time, this type of asset specificity may be reduced. If the period of time is finite, it is still possible for cooperation to unravel in anticipation of the last period.
2. Second, either state may have acted strategically or opportunistically at the adherence stage, developing a coalition to adhere in order to reap benefits that may arise from adherence, with no intent or political power to actually comply. This is a sub-case of the first type of change, as it assumes that the non-defecting state gives some performance after t_1 adherence, while the defecting state fails to comply at t_2 .
3. Third, the political magnitude of various lobbies may change over time. A prediction made at t_1 regarding the lobbying valence of various lobbies may have a high probability of being accurate at t_1 , but would be expected to become less likely to be accurate over time. Consider, for example, circumstances of sudden great political change, such as a revolution.
4. Fourth, this model suggests that uncertainty regarding domestic coalitions to support compliance would increase over time. It thus

might suggest that governments may assess the value of reciprocal commitments over a delimited period of time, rather than over an indefinite period of time. This would reduce the magnitude of the shadow of the future in inducing compliance at any stage.

5. Fifth, we can show that international retaliation, reputation, and reciprocity cannot ensure compliance. Compliance will always depend on the constellation of domestic political forces in the relevant state.
6. Sixth, we may be able to suggest reasons for bilateralism versus multilateralism, *mutatis mutandis*: bilateralism might allow for the construction of more nuanced political coalitions to induce compliance, individualized to the particular international legal transaction.
7. Seventh, we might be able to explain the use by domestic governments of international legal commitments at t_1 to lock in a policy that is supported by a domestic equilibrium at t_1 , where there is a preference over future policy. Government at t_1 may do so by increasing the effect of P and G through adherence, and inducing support from a separate domestic lobby through reciprocity.
8. Eighth, we may be able to assist in determining whether entry into a particular international legal commitment is done insincerely, without intent to comply. Counterparties would wish to evaluate whether there is sufficient domestic support for compliance with the commitments on which they rely.

B. Relation to Existing Literature and Directions for Future Research

1. Relation to existing literature.

This Article suggests a rationalist model of compliance that focuses on domestic politics. It provides no proof, however, that rational interest-based politics determines compliance. So it does not present an empirical challenge to constructivist theories that focus on other drivers of domestic politics. Constructivist theories focus on the role of ideas and on the social construction of meaning as an influence on behavior.⁵⁶ Social practices and interaction may

⁵⁶ See Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 *Intl Security* 171, 172–80 (1998) (explaining that even the seemingly anarchic behavior in international relations is in fact governed by social context); Alexander Wendt, *Social Theory of International Politics* 96 (Cambridge 1999) (explaining the central thesis that “the meaning of power and the content of interests are largely a function of ideas”).

change ideas and may therefore change behavior.⁵⁷ To some degree, constructivism may be reconciled with a rationalist approach that would accept malleable preferences and the importance of non-material preferences.

One influential constructivist school of thought—the transnational legal process school—suggests that international law and institutions may play a role in inducing changes in state preferences through “norm internalization.”⁵⁸ An extension of this school utilizes sociological tools to examine the role of international law in an acculturation process.⁵⁹ The managerial theory of compliance, developed by Abram and Antonia Chayes,⁶⁰ focuses on a specific set of domestic determinants of compliance. However, the one domestic determinant of compliance that this Article highlights—the possibility of gain by particular domestic coalitions—is excluded from the determinants that form the core of their theory. The managerial approach explicitly rejects a focus on “a narrow set of externally defined ‘interests’”⁶¹ Only further empirical work will help us to determine the relative power of interests versus the factors highlighted by constructivist theories.

Much of the pre-existing rationalist literature developing the relationship between domestic politics and international relations focuses on international relations writ large, rather than international law in particular. While some of this literature makes a turn toward international law, where it does so, its focus is often on “cooperation” in the form of adherence to rules, rather than the later, and more critical, moment of compliance with rules that is the subject of this Article.⁶² Indeed, whether a counterparty is expected to comply will often determine the willingness of a state to adhere.

In his seminal 1978 article, *The Second Image Reversed: The International Sources of Domestic Politics*,⁶³ Peter Gourevitch develops the implications of the fact that

⁵⁷ Hopf, 23 *Intl Security* at 178–79 (explaining the power of social practices in establishing the outer bounds of what kinds of interpretations of reality are possible between actors) (cited in note 56).

⁵⁸ Consider Harold Hongju Koh, *Internalization Through Socialization*, 54 *Duke L J* 975, 981 (2005); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L J* 2599, 2656 (1997).

⁵⁹ See, for example, Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L J* 621, 667–774 (2004). Consider Ryan Goodman and Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 *Duke L J* 983 (2005).

⁶⁰ Consider Abram Chayes and Antonia Handler Chayes, *On Compliance*, 47 *Intl Org* 175 (1993); Chayes and Chayes, *The New Sovereignty* (cited in note 12).

⁶¹ Chayes and Chayes, 47 *Intl Org* at 178 (cited in note 60).

⁶² But see Dai, 59 *Intl Org* at 366–74 (cited in note 32) (developing a model of compliance, discussed below); Dai, *International Institutions and National Policies* at 69–99 (cited in note 27).

⁶³ Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 *Intl Org* 881 (1978).

the international system can affect the structure of domestic politics. This is the second image (an image of the impact of domestic politics on international relations) reversed.⁶⁴ The present Article extends Gourevitch's point further, but focuses on the interrelation between the second image reversed and the second image.

In his leading article, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*,⁶⁵ Putnam focuses attention on the role of international pressure—foreign demands—in inducing domestic political change. Putnam saw that the “second image” approach—focusing on domestic causes of international relations, and the “second image reversed” approach—focusing on international causes of domestic political phenomena, were inadequate by themselves. He claims that:

A more adequate account of the domestic determinants of foreign policy and international relations must stress *politics*: parties, social classes, interest groups (both economic and noneconomic), legislators, and even public opinion and elections, not simply executive officials and institutional arrangements.⁶⁶

Putnam's two-level game theory suggests that the role of the national government in international relations is to mediate between two separate “games,” the international game and the domestic game: “The unusual complexity of this two-level game is that moves that are rational for a player at one board (such as raising energy prices, conceding territory, or limiting auto imports) may be impolitic for that same player at the other board.”⁶⁷

While this provides important insights, especially as to the position of government officials caught in between, the model introduced in this Article suggests that there is no real conflict between these games. Rather, opportunities in the international game shape the strategy for maximizing an aggregate basket of preferences in the domestic game. The state is always maximizing its preferences under constraint. It is as erroneous to say that there is an inconsistency between the international and the domestic as it is to say that a corporation, entering the market, is in conflict with the market. It seeks the benefits of the market, in terms of the ability to purchase and to sell.⁶⁸ The corporation must decide whether to make or to buy—whether to be satisfied

⁶⁴ The first image examines the role of individuals in international relations. Kenneth Waltz developed the idea of three images. The second focuses on the effects of domestic politics on international relations, while the third focuses on the effects of the international system on international relations. Consider Kenneth Waltz, *Man, The State, and War* (Columbia 1959).

⁶⁵ Consider Putnam, 42 *Int'l Org* 427 (cited in note 44).

⁶⁶ *Id* at 432.

⁶⁷ *Id* at 434.

⁶⁸ For a broader argument along these lines, consider Trachtman, *The Economic Structure of International Law* (cited in note 13).

with internal production—or whether to contract with others. It only contracts to buy where this is superior to making. Similarly, in Coasean terms, where outsiders impose an externality on the corporation, the corporation only contracts with the outsider where it achieves a better outcome than acting on its own. Putnam sees the opportunity for national gain in the market of international relations as the exception, rather than the rule: “On occasion, however, clever players will spot a move on one board that will trigger realignments on other boards, enabling them to achieve otherwise unattainable objectives.”⁶⁹

The unstated assumption in Putnam’s theory is that the national negotiator has some measure of autonomy that allows the negotiator to compromise between domestic and foreign interests, and that the national negotiator is not concerned with maximizing the national interests outcome. But there is no need to assume an agency problem. A more elegant model, as developed in this Article, sees the national negotiator as maximizing national interests under *international* constraint, with the additional possibility of agency problems.

Putnam is right in his core insight that if we examine the domestic game, we may find that there is an opportunity for a domestic equilibrium which would not exist except for the existence of the international game (what Putnam refers to as a “synergistic linkage”).⁷⁰ This is not the exception, however, but the rule in international cooperation and international law. As Jongryn Mo points out, domestic bargaining is endogenous to international cooperation—it is affected by opportunities for international cooperation.⁷¹ Domestic bargaining is constrained by the range of international opportunities, wherever the international opportunities allow a superior outcome compared to a purely domestic equilibrium. We must assume that international cooperation will only be efficient, and will only ensue, where it allows a superior aggregate outcome, either from a public choice or from a public interest standpoint.

This Article focuses on the role of realignments on the domestic board: on the possibility that entry into, and compliance with, international law is *always* motivated by either the prospect of change in domestic coalitions that the new international law causes, or by the prospect of avoiding unattractive change from an existing beneficial coalition. It focuses on the implications of these realignments for compliance. If there were no modification of domestic coalitions, there would be no purpose for the international law—once it is

⁶⁹ Putnam, 42 Intl Org at 434 (cited in note 44).

⁷⁰ Id at 447–48.

⁷¹ Jongryn Mo, *The Logic of Two-Level Games with Endogenous Domestic Coalitions*, 38 J Confl Res 402, 402 (1994).

accepted that compliance is always a domestic political decision, the international law will only be effective if it modifies domestic politics.

Mo formalizes and extends Putnam's conjecture that greater domestic constraints can be a bargaining advantage in international negotiations.⁷² As discussed above, this conjecture seems dependent on a particular definition of the state's preferences, and on a particular definition of advantage. That is, constraint can only be seen as an advantage if constraint is separated, and understood to be independent, from the state's actual preferences. However, it is difficult to understand how this type of artificial constraint could arise.

Putnam seems to assume that the state's true preferences are distinct from those expressed in domestic politics, and so it can be an advantage in achieving the true preferences if the constraint, which is visible and credible to counterparties in international negotiations, causes them to give up more of the surplus from agreement than they otherwise would. This concept of constraint as advantage would be more logical if the constraint were a *false* constraint, or a false negotiating signal.

Otherwise, domestic constraint can be understood more simply in terms of domestic preferences, and the *power* that domestic constraint confers is simply the power of the negotiation concept of BATNA: the "best alternative to a negotiated agreement." This "power" is actually the simple fact that where the surplus generated by a negotiated agreement is less than that generated by an alternative unilateral action, we can expect the actor to choose the alternative unilateral action.

The liberal theory of international relations, associated with the work of Andrew Moravcsik, calls attention to the domestic sources of international relations preferences.⁷³ Thus, "the demands of individuals and societal groups are treated as analytically prior to politics."⁷⁴ Liberal theory focuses on stable preferences of states, resulting from the aggregation of individual preferences by the state's political mechanisms. Governments then act purposively in world politics on the basis of these preferences. Thus, preferences are the cause of state behavior within a world system that provides constraints based on other states' preferences. Liberal theory accepts that while the state's preferences are

⁷² Id at 414.

⁷³ See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *Intl Org* 513, 516–21 (1997) (giving an overview of the assumptions underlying the liberal theory and explaining how domestic politics exerts an influence in world politics).

⁷⁴ Id at 517.

defined in accordance with liberal theory, other theories, including realism and institutionalism, may generate hypotheses that explain behavior.⁷⁵

States are dynamic systems, with individuals and groups of individuals vying with one another for influence. To the extent that these systems are assumed to be closed, it may be appropriate to expect a fairly stable equilibrium among these individuals and groups. Coalition politics may be relatively stable, with change occurring based on demographic, technological, ideational, or other factors that disrupt the equilibrium. The market of international relations provides an additional, dynamic source of stimuli that may disrupt existing national political equilibria. On the other hand, as the market of international relations becomes deeper and more efficient, it will increasingly be a part of a normal national equilibrium.

Thus, while as Putnam explains, “it is fruitless to debate whether domestic politics really determine international relations, or the reverse,”⁷⁶ the relationship between domestic politics and international relations has a particular directional structure. Liberal theory envisions states entering the “market” of international relations to satisfy preferences.⁷⁷ The “market” is a constraint: all preferences cannot be satisfied. Similarly, a non-monopolist/monopsonist corporation entering the market cannot determine alone the price at which it sells and buys. And, as this Article argues, the state is a dynamic aggregator of individual, group, and coalition preferences. As it turns out, the state may be theorized as an aggregator of a variable basket of preferences. We always begin with individual preferences and move up the vertical ladder of hierarchy according to the principle of subsidiarity in order to better satisfy those preferences.

2. Directions for future research.

Future research will be needed to provide empirical support for the model proposed in this Article. Models of this type encounter difficulty in measuring the magnitudes of various factors, and must estimate or use proxies for these factors. Future extensions of this model would follow some of the work done in connection with models of domestic-law compliance. Important extensions might include factoring in uncertainty regarding enforcement and factoring in the role and choice of enforcement resources and institutions.

⁷⁵ Id at 541–42 (suggesting that the theories of liberalism, realism, and institutionalism could be thought of as complements rather than substitutes).

⁷⁶ Putnam, 42 Intl Org at 427 (cited in note 44).

⁷⁷ See, for example, Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J Intl L 1, 13–14 (1999) (analogizing the “market of international relations” to the market of goods, except that states trade in units of power).

If it were possible to estimate the general magnitudes of P_2 and G_2 for each state, we could determine the relative propensity of those states to comply. Perhaps these magnitudes are what is meant by “reputation” in theories that consider reputation as a type of information, as opposed to a reference to collective punishment of a transgressor. One strategy for empirical testing might compare compliance measures to the relative number of members of the International Law Association (an international organization comprised of national branches in forty-four countries around the world), in order to examine whether a greater concentration of international lawyers is correlated with greater propensity to comply. However, it could be that causation runs in both directions, requiring more nuanced empirical strategies. It might also be useful to compare compliance measures to the number of other international legal rights that a particular state has. Here, the correlation might be positive if additional rights provide greater opportunities for engagement of domestic lobbies that benefit from these rights. On the other hand, it might be negative if additional rights exacerbate a collective action problem in lobbying for compliance.

If it were possible to estimate the magnitudes of P_1 and G_1 for each state, we could determine the relative propensity of those states to adhere. This would allow a social scientific approach to claims of exceptionalism in connection with adherence to international law.

IV. CONCLUSION

This Article theorizes that international law is made by strategic states willing to reduce their autonomy along certain dimensions in order to increase the satisfaction of their preferences along other dimensions, where after the commensuration of these two dimensions, each state’s government counts itself better off. The mechanism of the state’s decision-making regarding this tradeoff and commensuration is domestic politics. In this theory, when domestic coalition A stands to achieve a benefit greater than the loss that is expected by domestic coalition B, coalition A is able to enter the political arena and overcome coalition B, all other things being equal. Where an international transaction—one type of which is international law—could result in a political surplus, that surplus may induce a coalition to act to achieve it.

The Article has also developed a rationalist theory of compliance with international law that takes account of the internal decision-making process of states. It has always been true that the domestic public policy process has formed coalitions in order to make public policy, and that there have always been dissenters. The international relations context can be understood as an expansion of the possibilities for tradeoffs and agreement—for formation of coalitions. The set of possible coalitions that may be formed is effectively increased by the ability to engage in international legal agreements.

Formation and compliance with international law is dependent on the identification and negotiation of efficient transnational political linkages. In an important sense, the scope of domestic politics is extended by the capability of entering into international agreements. While we do not have a continuous transnational political system, international law forms a transmission belt that can link domestic lobbies transnationally. Indeed, by virtue of the expansion of the scope of the possibilities for Pareto improving political transactions, the international extension of the scope of domestic politics, where it occurs, would generally be expected to increase *domestic* welfare. Of course, the move from domestic *political* welfare to actual welfare depends on the extent to which domestic politics reflects actual welfare. In any event, a government that wishes to deliver the most to its people, or at least to get the most political support, will be required to enter the international law market for some transactions.

The rationalist theory of compliance developed here provides a novel way of analyzing the possibilities for compliance with international law. It suggests a number of empirical research strategies that may be followed in order to evaluate and possibly revise or extend the theory developed here. Perhaps more importantly, it provides a useful template by which states may evaluate the possibility that their counterparties will comply with their international legal obligations. As states approach important international public policy issues such as global warming, terrorism, and international financial crisis, this evaluative tool will allow them to be realistic regarding the utility of proposed international legal rules.