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

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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

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2 GRAHAM ALLISON, ESSENCE OF DECISION 149 (1971).
Abstract

Compliance with international law is always dependent upon a domestic political decision to engage in the behavior that constitutes compliance. This article articulates the importance of the interdependence between home state domestic politics and foreign state domestic politics in determining compliance. International legal commitments allow the formation of domestic coalitions between those who will benefit by their own state’s compliance with the international legal rule in question, and those who will benefit from other states’ compliance with the international legal rule. The theory developed in this paper is based 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. The two extensions of these approaches made in this article, (i) from international relations more broadly to international law, and (ii) from adherence to compliance, raise some questions, and bear some important fruit. These extensions help to illuminate the problem of compliance. This article extends the rationalist approach to compliance with international law into the domestic politics of the target state. The model advanced in this article allows the formalization and contextualization of a variety of factors that have heretofore been viewed alone as explanatory variables in the decision to comply. Policy makers can use this model as an analytical template by which to assess whether their counterparties would comply with any undertakings they may make.
1. 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 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, domestic political, 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. This article is intended to contribute to the project of greater understanding of the effects of international law.

This article proposes a social scientific theory of compliance with international law that focuses attention on the domestic politics underlying a decision by a state to comply with an international legal rule. It builds on work in political science by Dai, Gourevitch, Moravcsik, Iida, Milner, Mo, Putnam, and others developing a two level game-based theory of cooperation. That political science literature focuses on cooperation in the form of adherence to a “rule,” but, except for work by Dai, does not examine the subsequent issue of compliance with the rule. The two extensions of this work made in this article, (i) from international relations more broadly to international law, and (ii) from adherence to compliance, raise some questions, and bear some important fruit. These extensions help to illuminate the problem of compliance, and provide a social scientific, positive, approach to compliance.

There is also what we might call (sacrificing some precision) a “constructivist” international law literature of two-level compliance, including work by Koh, the Chayes, and Goodman and Jinks. However, this literature does not focus on preferences, or as political scientists would put it, “power and interest,” but instead focuses on ideational, 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. The purpose of this article is to advance the project of developing a preference-based model of the internal mechanisms of state compliance with international law. Future empirical work will be required to evaluate which channel of causation has greater effects, and under which circumstances.

This article also builds on a preference-based literature of compliance with international law that declines to open the black box of the state in order to see the internal workings of the domestic political process. While this approach might be seen as an appropriate simplification,
allowing a more parsimonious theory which can still generate interesting hypotheses, that argument has not been made, and I hope that this article’s argument will show the important role of domestic politics in determining compliance—a role that cannot be ignored. Social science always requires simplification, and we may decide that a particular simplification allows us to develop a model that yields useful information. But in the international legal setting, it seems that this particular simplification may cause us to ignore information, and to fail to structure institutions accurately to attain the desired level of compliance.

After all, the decision to comply is essentially a domestic political decision, dependent on the existence of appropriate political support in the target state. 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 a reduced reputation or reduced opportunities for future cooperation, would provide incentives for compliance. These theories fail to examine how international legal rules, and how compliance with international legal rules, advance the interests of different constituencies within the target state. This article remedies that failure.

The basic premise of this article is that the immediate 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: first, there is a domestic decision to adhere to the international legal rule—to in effect enact the international legal rule as a national measure, and second, 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 the importance of the interdependence between domestic politics and foreign politics at the time of compliance.

The theory proposed here subsumes other social scientific theories of compliance and provides a highly plausible set of conditions under which we may expect states to comply with international law. These conditions seem so intuitively appealing that they may guide practice even without empirical testing. Indeed, empirical testing will be difficult.

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

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3 But see Eric A. Posner, The Perils of Global Legalism at 41 (Chicago 2009) (suggesting, without explanation, that this simplification is indeed appropriately parsimonious).

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.
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.

As Machiavelli suggests in the epigram at the beginning of this article, relevant circumstances may change between the date of entry into an international legal commitment, and the date of expected compliance. Change may take many forms, but the critical change is in the domestic political decision of the obligor state, which may not support the decision to comply with the commitment. Even worse, a strategic obligor state may accept a commitment at the date of entry with the intent to enjoy the benefits that flow from its adherence but with no intent ever to comply. How can states owed performance evaluate the likelihood of compliance, and ensure that compliance will take place at the critical moment? This article suggests that the key to predicting compliance is an evaluation of the domestic political constellation that may support compliance, with special attention to the continuing incentives of domestic political forces. This article suggests focusing not just on reciprocity between states, but also on the ways in which domestic political forces will be motivated to lobby for compliance.

a. Beyond Billiard Balls

We know very little about what makes individuals comply with law: to what extent they are motivated by penalties, by habit, by the idea of law, or by some moral code that is reflected in law.\(^6\) In any particular case of compliance, any or all of these may be at play. But we are able to observe more directly what makes states comply with international law. Sometimes, the decision to comply is at least to some extent within the authority of a single individual, or a group of individuals within the state, and then we operate under similar uncertainty as when we examine the compliance decisions of individuals. But under other circumstances, and over time, compliance by states with international law is dependent on the stability of political coalitions that successfully determine the decision of the state to comply.

For this reason, the problem of compliance with international law should not be addressed using a billiard ball model of the state, except perhaps where the state’s policy is dictated by a single person. The billiard ball 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, assuming an overwhelming drive toward security that eclipses other state preferences, 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.” 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 varying preferences who share power over decision-making.” 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 billiard ball 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, and often somewhat independently of domestic political dynamics, and when most international law was concerned with “beyond the border” issues rather than “inside the border” issues. The billiard ball 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, a world where governments are increasingly accountable servants of their constituents, the structure of their accountability—the mechanism by which they are *instructed* as to what they are to seek—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 in order 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 not been sufficiently recognized 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. 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.

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8 *Id.*, at 11.
b. Coalitions and International Law

International legal commitments allow the formation of coalitions between those who will benefit by their own state’s compliance with the international 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). This is well-understood in the field of international trade law, where 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 (1994, p. 849) 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.\(^\text{10}\)

In addition to specific coalitions for specific commitments, there are coalitions that support compliance with international law more generally. For example, in the U.S., one of the main roles of the American Society of International Law (ASIL) is to lobby generally, and engage in public education programs, in support of international law.\(^\text{11}\) In addition, the entry into international legal obligations triggers support for compliance with the obligations. Moreover, the ASIL’s general activities and orientation support both adherence to, and compliance with, international law. What motivates these lobbyists who generally advocate entry into, and compliance with, international law? There may be constructivist explanations, or explanations in terms of certain values. For example, Thomas Franck identifies legitimacy as a source of incentives for compliance.\(^\text{12}\) Many international lawyers would follow Franck in lobbying for compliance with legitimate international law. Alternatively, these lobbyists may be seeking to increase the importance of their own advice, in pursuit of respect, power, or money.

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\(^{11}\) See Frederic L. Kirgis, *The American Society of International Law’s First Century: 1906-2006* (ASIL/Nijhoff 2006). While the ASIL itself since 1966 has declined to take formal positions in most specific matters, many of its members, and other lobbyists, may advocate entry into international legal obligations.

Examples of the domestic coalition theory of compliance include the entry by Mexico into NAFTA, and the entry by China into the WTO. In each of those cases, commentators have suggested that 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 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 “billiard ball” 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. It is thus truly transnational.

On the other hand, it is clear that domestic politics about 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 value took place within the state.

To generalize, in order for welfare-enhancing international agreements to be entered into, they must engage the domestic politics of member states. They require 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 counterparties to engage in reciprocal concessions, they 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 remove 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, or a more managerial approach, along the lines advanced by Abram and Antonia Chayes, 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 domestic political actors operate under international constraints, including those that take the form of international law, but also including those that take the form of informal concern for the responsive actions of foreign states.

Therefore, we can understand international law as a tool for linking constituencies in different states in order to allow Pareto improving political transactions between constituencies in different states, in a way that is not possible under autarchy. 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

c. A Domestic Politics-Based Theory of Compliance with International Law

Compliance by any individual state with an international legal rule is, in the final analysis, dependent on a political decision within that state’s domestic political process to comply. 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 to comply or not to do so. 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 are benefited by compliance and target state constituencies that are harmed by compliance. The decision to comply will depend on the relative influence exercised by these constituencies. So, it

would be a simplification, and perhaps an over-simplification, to assume that we may predict compliance based solely on the costs and benefits to the target state as a whole of compliance versus violation.

d. The Structure of this Article

Part 2 of this article examines the prior literature of compliance with international law, focusing on rationalist and constructivist theories of compliance, and on two-level or second image reversed theories as they illuminate the issues of entry into and compliance with international law. Part 3 develops a social scientific model of the domestic politics of compliance with international law, and suggests its theoretical and empirical utility and limitations. Part 4 suggests the implications of this model and directions for future research, and concludes.

2. Antecedent Literature

a. Social Scientific International Law Compliance Theory: Billiard Balls

Rationalist approaches to compliance with international law have generally examined only the international level. These approaches focus on punishment of states, and on the reputation of states.

i. Punishment Theories

A number of scholars have examined reciprocity, or retaliation, as a means of inducing compliance with international law. 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.14

Most work in this area has arisen from a growing rationalist debate regarding compliance with customary international law.15 Norman and Trachtman,16 for example, developed a repeated multilateral prisoner’s dilemma model of formation of, and compliance with, customary international law. That analysis focuses on the parameters of the multilateral prisoner’s dilemma

16 Norman & Trachtman, supra note 15.
in the customary international law context. These parameters include (1) the relative value of cooperation versus defection, (2) the number of states effectively involved, (3) 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, (4) the information available to the states involved regarding compliance and defection, (5) the relative patience of states in valuing the benefits of long-term cooperation compared to short-term defection, (6) the expected duration of interaction, (7) the frequency of interaction, and (8) the existence of other bilateral or multilateral relationships among the states involved.

While Norman and Trachtman highlighted some of the characteristics of different states’ domestic politics that might affect their level of patience, and so their propensity to accept and comply with rules of customary international law, we did not analyze the decision-making process within states, or the lobbying game within states. Other rationalist approaches focusing on retaliation have suffered from the same limitation.

**ii. Reputation Theories: Do they Really Add to Punishment?**

A growing literature focuses on “reputation” as the critical concern of states, and the critical inducement of states, in connection with compliance with international law. Reputation can be viewed from a rationalist perspective in several ways. First, reputation may be understood as simply another word for retaliation, where the retaliation is broadened to include additional issues or action by third parties. Second, under models of incomplete information, reputation may be understood to help resolve uncertainty as to what “type” a counterparty is—whether the counterparty is cooperative or not. Third, it is possible that states would have a preference for a good international reputation (presumably for compliance), either for intrinsic reasons or perhaps because it assists the government in domestic politics.

If reputation is simply another word for retaliation, then the important issues will obviously be captured in a model of retaliation, as discussed above. While it may be that government officials, and thereby states, have a preference for a good international reputation, and that this preference would have some effect on compliance, I do not pursue this topic here. I revisit a similar topic in the discussion below of constructivism and the transnational legal process school. This leaves us with the possibility of reputation working through an informational mechanism, where reputation is useful to states in order to determine who to deal with in future.

And yet, it is difficult to determine what motivates a particular state act: is the state retaliating, or is it determining to boycott another state in order to avoid losses due to updated information? Exclusion from beneficial opportunities in future periods can certainly be understood as a form of retaliation, as much as it can be understood as action on updated information. Without bringing interview data or other empirical means to bear, it will be

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difficult to be sure of the state’s motivation. It seems that under a reputational model, taking account of reputation is best understood as Bayesian updating in a multiple-play game. The players would still engage in cost-benefit analysis of the decision to comply or defect in subsequent periods.

However, it appears that reputation-based models would necessarily fail to address the two-level game aspect that appears neglected in other compliance literature. This is because these models are concerned with the reputation of a state, and the person who evaluates reputation is also a state. Of course, a reputation-based model, in accord with the approach advanced here, could recognize that the internal politics of the state is critical to its propensity to comply. However, reputation-based models based on information asymmetry are predicated on lack of direct information regarding the domestic political determinants of propensity to comply. The present article assumes that this type of information may be available, and calls for analysis of the domestic political determinants of each state’s propensity to comply.

We will see below that there may be some characteristics of the state that cross subject areas, such as the strength of the lobby for international law in general, or the state’s degree of patience. However, there will be other characteristics that are issue-specific, such as the strength of a particular lobby interested in a particular outcome. And so, reputation, in order to account for these issue-specific aspects, would also be required to be issue-specific. As reputation becomes more precise as a method of determining “type”, it converges with actual information about political structure and resultant propensity. That is, structural information may substitute for behavioral information.

However, more specific structural information would need to be obligation-specific. There is a significant question as to whether “reputation” is sectoral or general: whether a particular state has multiple reputations in different sectors, or has a single general reputation. The answer to this question must be that it depends on a number of factors relating to the specific sector, but that it is also possible that a state has a more general reputation for compliance with international law. Moreover, we cannot assume that a concern for reputation has overwhelming power to induce compliance. Therefore, we must know more about the domestic political context—the amount of work that reputation must do—in order to know whether reputation would cause compliance in a particular situation.

Thus, (a) reputation may be subsumed within a retaliation-based model, and (b) even if reputation is a separate concern, it must operate through domestic political mechanisms.

b. Constructivist International Law Compliance Theory: Ideas, Engagement, Management, and Acculturation

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Constructivist theories focus on the role of ideas, and on the social construction of meaning as an influence on behavior. Social practices and interaction may change ideas, and may therefore change behavior. To some degree, constructivism may be reconciled with a rationalist approach that would accept malleable preferences and the importance of non-material preferences.

i. Koh and the Transnational Legal Process School

One influential school of thought suggests that international law and institutions may play a role in inducing changes in state preferences through "norm internalization." An extension of this school utilizes sociological tools to examine the role of international law in an acculturation process.

Harold Koh has developed a constructivist approach to international law that focuses on the extent to which repeated interactions in legal process result in the internalization of international legal rules.

As governmental and non-governmental actors repeatedly interact within the transnational legal process, they generate and interpret international legal norms and then seek to internalize those norms domestically. To the extent that these norms are successfully internalized, they become future determinants of why nations obey. The international society theorists seem to recognize that this process occurs, but have given little close study to the 'transmission belt,' whereby norms created by international society infiltrate into domestic society.

For Koh, the key factor is repeated participation in the international legal process. This, however, is hardly theoretically satisfying, as repeated interaction with duplicity or hostility would not necessarily change anyone’s ideas, or their incentives to comply. Nor would it necessarily overcome strong incentives to defect.

However, one may agree with Koh that this type of internalization process could occur, and that it could have some effects. The interesting question, still unanswered, is the relative strength of this mechanism, compared to other mechanisms that induce compliance. A rationalist theory would be able to accept this constructivist insight as a model of one way in which preferences may be not static but malleable: individuals’ ideas about who they are, what

their roles are, and what they want may change. But as Koh recognizes, this is only one type of explanation of compliance with international law. The theory that I develop below is capacious enough to include changing preferences over time, but contextualizes this phenomenon within a broader model.

c. Chayes’ Managerial School

The managerial theory of compliance, developed by Abram and Antonia Chayes, 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 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’ . . . .” A focus on interests implies a focus on sanctions as a basis for enforcement:

Because these [sanctions] are costly, difficult to mobilize, and of doubtful efficacy, they are infrequently used in practice. Meanwhile, analytic attention is diverted from a wide range of institutional and political mechanisms that in practice bear the burden of efforts to enhance treaty compliance.

First, from the fact that states have presumably consented to the relevant international legal rule in order to be bound, the managerial approach infers that states are disposed to comply with the rule. This factor arises from a concern for efficiency, and recognizes that the domestic cost-benefit analysis that gives rise to entry into an international legal commitment is costly and would not ordinarily be repeated continuously. This gives rise to a presumption of continued compliance. Of course, one response is that much depends on the degree of change of the domestic cost-benefit analysis. Another response is that the cost-benefit analysis that gives rise to entry into the treaty may not support compliance with the treaty. In a sense, this determinant suggests that the international legal rule was unnecessary: that the state would have complied without the added influence of international law.

Second, assuming that states erect a bureaucratic mechanism to comply with the relevant rule, it is bureaucratically difficult to reverse course and determine not to comply. The domestic bureaucracy created in order to manage compliance may itself “lobby” for compliance in order to preserve its role. Third, in a constructivist vein, states are disposed to comply out of a sense of obligation that is induced by virtue of the international legal rule.

Furthermore, Chayes and Chayes suggest that much of the non-compliance that we see can be explained by managerial factors, rather than by interest-based rationalist accounts:

(1) ambiguity and indeterminacy of treaty language,
(2) limitations on the capacity of parties to carry out their undertakings, and

23 Id. at 178.
24 Chayes and Chayes recognize this. Id., at 184.
the temporal dimension of the social and economic changes contemplated by regulatory treaties.\textsuperscript{25}

The “temporal dimension” is intended to refer to lags in compliance that Chayes and Chayes argue are anticipated when states enter treaties. However, many modern treaties contain transition periods that allow states to avoid this type of formal non-compliance.

While the factors adduced by the managerial school no doubt have some relevance, a theory such as the one developed in this article that ascribes non-compliance to purposive political decisions to defect would take account of the types of non-compliance that causes the greatest concern: cases where states intend to breach international law.

d. International Relations Theory: Liberal Theory, Two-Level Games, and the Second Image Reversed

Most of the pre-existing 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.\textsuperscript{26} Indeed, the question of compliance by its counter-party may determine the willingness of a state to adhere. So, the adherence decision by state A is affected by expectations about subsequent compliance by state B.

i. Gourevitch’s Second Image Reversed

In his seminal 1978 paper, “The Second Image Reversed: The International Sources of Domestic Politics,”\textsuperscript{27} Peter Gourevitch develops the implications of the fact that 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.\textsuperscript{28} Furthermore, he finds that much of the preceding literature examining the second image, the effects of domestic politics on foreign policy, had tended to examine the broad political structure of domestic politics, rather than focusing on the particular distributive interests involved. The present article develops the implications of Gourevitch’s perspective for international law, but focuses on the interrelation between the second image reversed, and the second image. While “third image” theory—

\textsuperscript{25} On Compliance, supra note 22, at 188.
\textsuperscript{27} 32 INT’L ORG. 781 (1978).
\textsuperscript{28} 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. KENNETH WALTZ, MAN, THE STATE, AND WAR (1959).
focusing on the structure of the international system and the relations between states—may be more parsimonious than this reversed and forward second image theory, it misses an important, and often a critical, set of details.

Gourevitch’s work focuses on two types of domestic effects of international relations: (i) regime change, meaning the institutional structure of decision-making, and (ii) coalition pattern, meaning social forces and the relationship among them. Gourevitch criticizes a literature that focused too greatly on procedures, rather than on the constellation of domestic interest groups. Focus on procedures or on regimes is important, but fails to provide an account of how interests are developed. Perhaps most importantly, focus on procedure or type of regime often assumes that the constellation of domestic coalitions and interests is stable, and remains stable even after the introduction of the possibility for international transactions through international legal rules. As Gourevitch concludes, “the international system is not only a consequence of domestic policies and structures, but a cause of them.”30 “However compelling external pressures may be, they are unlikely to be fully determining, save for the case of outright occupation.”31

Of course, many international lawyers have been concerned with the effects of international law on regime change, and even on domestic political procedures. However, international law has failed to take up the second question: how international law modifies domestic coalitions. Again, this is the focus of the present article.

ii. Putnam’s Two Level Games

In his seminal article, Diplomacy and Domestic Politics: The Logic of Two-Level Games, Putnam focused 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.32

Putnam explains that the Bonn Summit Conference of 1978 relating to international financial management was characterized by circumstances in which, “within each country, one faction supported the policy shift being demanded of its country internationally, but that faction was

30 Id. at 911.
31 Id.
initially outnumbered.” Putnam observes that “international pressure was a necessary condition for policy shifts.”

We might ask, though, where the international pressure found resonance within the domestic political system? The next step, once we abandon the idea of the unitary, billiard ball, state, must be to identify a source of domestic political pressure: either fearing retaliation by the other states, or hoping for concessions by the other states.

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. 33

While this provides important insights, especially as to the position of government officials caught in between, 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. 34 The corporation must decide whether to make or to buy—whether to be satisfied 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. 35

The unstated assumption in Putnam’s theory is that the national negotiator has some measure of autonomy that allows the negotiator to make a 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 sees the national negotiator as maximizing national interests under international constraint, with the additional possibility of agency problems.

33 Id. at 434.
34 For a broader argument along these lines, see JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008).
35 Putnam, supra note 32, at 434.
But 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 that would not exist except for the existence of the international game (what Putnam refers to as a “synergistic linkage”). This is not the exception, however, but the rule in international cooperation, and in international law. As Mo points out, domestic bargaining is endogenous to international cooperation—it is affected by opportunities for international cooperation. 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 the entry into, and compliance with, new international law is always motivated by the prospect of change in domestic coalitions that the new international law causes. It focuses on the implications of these realignments for compliance. If there were no change in domestic coalitions, there would be no purpose for the international law—once it is accepted that compliance is always a domestic political decision, the international law would only be effective if it modifies domestic politics. Putnam discusses the possibility of what he calls “involuntary defection,” where the domestic political process fails to ratify an international agreement, despite the best efforts of its executive. From a formal legal standpoint, this is not defection, as generally no full obligation has yet been incurred. The present article is concerned with defection after ratification—after a formal legal obligation is incurred. It is concerned with compliance.

As Milner explains, societal and political preferences do not translate directly into policy. Rather, “policy is determined by the strategic interaction among the actors’ preferences, given the institutional context.”

iii. Liberal theory

The liberal theory of international relations, associated primarily with the work of Andrew Moravcsik, calls for attention to the domestic sources of international relations preferences. Thus, “the demands of individuals and societal groups are treated as analytically prior to politics.” Liberal theory focuses on stable preferences of states, resulting from the aggregation by the state’s political mechanisms, of individual preferences. Governments then act

36 *Id.*, at 448.
38 With the exception of the modest obligations that arise upon signing under Article 18 of the Vienna Convention on the Law of Treaties, or under the unusual circumstance where the treaty is not signed subject to ratification.
39 Milner, *supra* note 7, at 17.
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 defined in accordance with liberal theory, other theories, including realism and institutionalism, may generate hypotheses that explain behavior.

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, and in the current social structure, a 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,” the relationship between domestic politics and international relations has a particular directional structure, and is not commutative. Liberal theory envisions states entering the “market” of international relations to satisfy preferences. 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.

Liberal theory draws our attention to the quality of the aggregation: the degree to which the state accurately, or faithfully, reflects the preferences of its citizens. Democratic, or liberal, states are understood to be better partners for international relations, and more peaceful, than less democratic states. The coalition-based theory advanced in this article is intended to draw our attention back to the fact that the maximization of the state’s preferences is dynamic, and the basket sought will change depending on what is available in the market of international relations. There may even be an analog to cross-price elasticity of demand, in which states seek alternative arrangements where their otherwise preferred arrangements become more costly.

So, this article theorizes that international law is made by strategic states willing to reduce their demands 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.

iv. Extensions of Two-Level Game Theory

A number of authors have elaborated and commented on Putnam’s two-level game theory. For example, Mo formalizes and extends Putnam’s conjecture that greater domestic constraints can be a bargaining advantage in international negotiations. 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.

Mo develops a formal bargaining model of the interplay between domestic and international bargaining. He examines the context in which the negotiator has preferences different from those of her domestic constituents: the case of conflicting domestic interests. While Mo’s model, like Putnam’s, focuses on adherence rather than compliance, his model could be extended by adding a compliance phase.

Indeed, Mo’s model already has two stages: (i) proposal, and (ii) ratification. Mo represents domestic politics as the process of forming a viable coalition.

The model presented is also an example of a nested game. We can think of international bargaining as consisting of domestic and international games that are played simultaneously. In the domestic game, the incentives of groups trying to form a domestic coalition are structured by the international game. Because groups need to make a proposal attractive to the foreign country, their incentives in choosing domestic coalition partners thus do not depend exclusively on domestic considerations.

Mo, supra note 37, at 414.
Id. at 406.
Mo’s model also provides that each group prefers to receive the benefits of an agreement earlier, rather than later, making it costly to cause delay by proposing unacceptable terms. However, the higher the discount factor, meaning the more that the group values future benefits, the more willing it is to adopt a strategy of waiting for a better offer. Mo accounts for this with the concept of a “continuation value,” which is the discounted value of the expected outcome in continuing play after rejection of the current proposal.\(^{43}\) Players are expected to compare the continuation value to the value of the proposal, and choose the greater.

Mo’s model depicts a bargaining game of alternating offers between two countries. Each country has three lobbies, including as one “lobby” the government, and each country can only make an international agreement if two of the three lobbies agree. The foreign country will seek to provide concessions that will be marginally sufficient to induce a marginally sufficient number of the domestic country’s lobbies to accept its proposal. Domestic lobbies left out of the coalition are assumed to receive no benefits.

Note, however, that the assumed foreign country strategy may be counter-productive at a compliance stage. If the foreign country offers concessions marginally sufficient to induce marginally sufficient political support, then small shifts in lobby preferences may result in insufficient political support for compliance. So, depending on the incremental force of lobbies whose support increases upon adherence, which may include the government, international lawyers, and even other domestic players whose lobbying power is increased by the benefits they obtain from entry into the agreement, a foreign country strategy to ensure compliance would focus on concessions marginally sufficient to induce marginally sufficient support for future compliance, not adherence.

v. Milner and Rosendorff’s Polyarchy

Milner and Rosendorff develop a model of a two-level game.\(^ {44}\) Their model emphasizes the effects of government structure. The factors on which they focus are (i) degree of divided government (i.e., between legislature and executive), and (ii) asymmetric distribution of information within the domestic system (Evans, Jacobson and Putnam, 1993). These factors are not concerned, as the present article is, with the constellation of lobbying interests, and their relative power. Milner and Rosendorff assume a polyarchic state—a non-hierarchical state in which aggregate preferences arise from a political process. The actors that they examine are (a) the domestic executive, (b) the domestic legislature, (c) domestic interest groups, and (d) a unitary foreign government.

Interestingly, Milner and Rosendorff’s separation between the domestic executive and the domestic legislature requires an assumption of differential interest group influence on the executive compared to the legislature, or of structural factors that cause the executive and the legislature to have a different interest. The Grossman and Helpman model discussed below, on

\(^{43}\) Id. at 410.

\(^{44}\) Helen Milner & Peter Rosendorf, Democratic Politics and International Trade Negotiations, 41:1 J. INT’L CONFL. RES. 117-146 (1997).
the other hand, assumes a unified government, or government branches with identical interests, but focuses on diverse interests of interest groups, with those interest groups influencing policy through contributions. On the other hand, Milner and Rosendorff focus on domestic information asymmetries and examine interest groups as “endorsers”—as agents able to overcome information asymmetries through their knowledge and action.

vi. Grossman and Helpman’s Trade-Oriented Political Support Model

In this subsection, I begin to develop our model, based, in part, on the Grossman-Helpman (1995) political support model designed for use in connection with international trade negotiations. In that model, lobbies are able to offer political contributions to politicians in the incumbent government. The politicians value these contributions in connection with upcoming elections. The lobbies are motivated by the opportunity to influence government. Here, for simplicity, we do not examine the distinction or the strategic relationship between legislatures and executives: we aggregate these components of government. Following the distinction suggested by Gourevitch, we are interested here in focusing attention not on the governmental processes or the type of regime, but on the constellation of political support. The lobbies make implicit offers relating prospective contributions to the policies of the government.

The government then sets its policy to aggregate a weighted sum of total contributions and aggregate social welfare. Lobbies compete for politicians’ favor. Why do I also consider aggregate social welfare, in addition to the interests of lobbies? I assume, with Grossman and Helpman, that politicians believe that their chance of re-election is also dependent on the utility level achieved by the average voter. 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. Thus, we assume that the utility function of politicians includes both total 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.” 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.”

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46 Grossman & Helpman, *supra* note 10, at 836
47 *Id.*
The Grossman-Helpman model is designed to explain the effectiveness of lobbying in regard to trade policy, and specifically, tariffs and subsidies. Individual preferences over protectionism are assumed to arise from their sector-specific endowments. Following Mancur Olson, there are some owners of factors who are able to organize, and some who are unable to do so. The unorganized owners of factors 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 simultaneously choose their political contribution schedules in the first stage, and the government sets policy in the second.”

An equilibrium will be a set of contribution schedules, one 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. Bernheim and Whinston (1986) argue that in these auction problems, bidders will have no disincentive to be truthful regarding their preferences, and that truthfulness may be a focal point among alternative Nash equilibria.

So, 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, Grossman and Helpman extend their 1994 model to examine the conditions under which two states might agree to a free trade agreement. While this extended model is not directly adaptable to a general international law model, because it uses assumptions about the welfare effects of trade liberalization, it provides a basis with which to begin.

Of course, 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.

49 Grossman and Helpman, supra note 10, at 838.
Grossman-Helpman (1995) assume that the status quo prior to an international agreement is itself a domestic political equilibrium in each state. This assumption seems appropriate. Thus, the opportunity for an international agreement should be understood as an exogenous shock to the existing domestic equilibrium. The opportunity for an international agreement changes the relative 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 (1995), 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 agreement. They use the concept of a politically Pareto efficient agreement, meaning an international agreement with the property that no party could gain politically except at the expense of the other. “Many but not all bargaining procedures lead to this efficient outcome.” 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. 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.

vii. The Dai Domestic Enforcement Model

Xinyuan Dai has developed a more general model, incorporating both electoral leverage and informational advantage as sources of influence for a domestic lobby. 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 inference of lobbies 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.” 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.

Dai explains that governments engage in different calculations when they comply with an agreement than when they negotiate it, and argues that the compliance phase is distinct from the adherence phase. One difference, not addressed by Dai, is that the adherence phase may be motivated precisely by the expectation that compliance will not be required or cannot be compelled—in this case, the decision to adhere may be a form of “cheap talk.” Another potential difference is that the creation of international law itself has behavioral effects. In fact, assuming no other change in domestic coalition politics, the difference between the adherence decision and

51 Id., at __.
53 Id. at 365.
the compliance decision is a measure of the effect of international law. As we explain below, the role of general international law lobbies, such as the ASIL, is a third difference, assuming that these lobbies are more interested in compliance than in adherence.

In Dai’s model, interest groups differ in (i) their preferences regarding compliance—e.g., one group may prefer a low compliance level, while the other prefers a high compliance level, and (ii) in their informational endowments. Dai models informational endowments as a separate variable, even though it might be that information endowments vary with the magnitude of preferences. Her main concern is that interest groups do not perfectly observe compliance efforts. However, we might speculate that in many international law areas, interest groups would perfectly observe compliance itself.

On the other hand, as in Grossman-Helpman, the government operative’s preference includes both private interest in re-election, and aggregate social welfare based on altruism. The expected value to the government operative 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 her model. The government operative’s interest in re-election makes the government operative’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. 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 re-election, and her discount factor, will affect the incumbent’s susceptibility to influence by lobbies. Finally, although Dai conflates discount factor with the issue of proximity of elections, the latter factor will tend to increase the discounted value of re-election.

3. Developing a Social Scientific Domestic Politics-Based Model of Compliance with International Law

As mentioned above, I begin with the Grossman and Helpman political support model, which they developed for use in connection with trade policy. Incumbent governments are thus 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, and so some incentive to implement policies that enhance organized interest group welfare is assumed. Second, voters are assumed to respond in their voting behavior to their own welfare, and so some incentive to implement policies that enhance voter welfare is assumed.

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54 Dai, supra note 52, at 369.
55 Id., at 374.
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 the operative component, and 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 lobby that generally appears to be in favor of international legal adherence and compliance. That type of lobby is exemplified, in the United States, by the members of the American Society of International Law. I will discuss this type of lobby in greater detail below.

However, it also seems defensible to assume that some international legal rules will provide net benefits either (i) globally, or (ii) to the particular state examined, or (iii) both. Assuming a perfectly representative or accountable domestic government, we can expect that only international legal rules that benefit the particular state examined will come into effect for that particular state. We may also assume that a bilateral, plurilateral, or multilateral rule will only come into effect if it benefits each state party to the rule, compared to the status quo.

We are therefore assuming that each international legal rule that comes into existence is politically Pareto efficient. As we know nothing about the preferences of particular lobbies, or of states themselves, it is otherwise impossible to say which international legal rules are efficient.

56 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 American Society of International Law.

57 It may be possible to threaten to revert to a Nash position that is worse than the status quo. For example, in the end of the Uruguay Round negotiations, the U.S. withdrew from the original GATT agreement, threatening other states with a position that would be worse for them than the status quo.
and which are not. Furthermore, as suggested by the concept of political Pareto efficiency, unless we assume that governments are perfectly representative, we are not even entitled to assume that acceptance of a particular international legal rule is welfare-enhancing for the accepting state (as opposed to the government operatives).

However, it is important to recognize that, once we drop the assumption of perfect representation, “compliance can be rational even if the country as a whole pays for it more than benefits from it.” 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 addressed in this article 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 changes, in an “obsolescing bargains” sense. Thus, again, 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: 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 determine 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 determine to adhere to an international agreement. It is possible that adherence to an 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.


61 See, e.g., LEGALIZATION AND WORLD POLITICS (Judith Goldstein, Miles Kahler, Robert Keohane, and Anne-Marie Slaughter, eds. MIT Press, 2001).
I further assume that in order for any state to determine to comply with an international legal rule, a coalition of domestic lobbies must form that is strong enough to determine national behavior. As discussed below, 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 U.S. for this type of model to apply. 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. 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

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 (i) included in the measure of political strength, or (ii) covariable 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.

c. Reciprocity

The theory assumes that a state complies with international law where its domestic politics supports compliance more than it supports non-compliance. The theory is eclectic with respect to the types of interests various lobbies may have: importantly, 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 (1995), 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.

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It is important to note that reciprocity may be complex: it is not necessarily tit-for-tat where each state promises the same performance. 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, including ethnic affinity, political stability concerns, or simple empathy, 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 counter-party 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.

d. Role of the Pro-International Law Lobby (PILL)

Lobbyists in favor of broad compliance with international law often speak in terms of the broadest reciprocity: be careful about violating rules today, as you may wish to rely on those or other rules in the future.

Realists and rationalists have long asked whether international law has any force—whether it works to add to incentives for compliance. In response, advocates of international law have asserted (a) descriptively, that international law does work, and (b) normatively, that international law should work. Both these arguments are addressed to policy-makers. The combination of these arguments poses a methodological problem: does the normative argument by the “pro-international law lobby” (“PILL”) induce compliance, resulting in the confirmation of the descriptive argument? Indeed, the question is whether the fact that the PILL argues that international law should work, makes it more likely that it does work. This is a constructivist question.

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. The PILL therefore argues for more international law. But they also would be expected to argue for more compliance, as more compliance would

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63 See Putnam, supra note 32, at 447.

64 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 (Washington, DC: Institute for International Economics 2003).
be expected to evidence the importance of international law, and therefore add to the prestige and income of international lawyers. Furthermore, more compliance with international law might be expected to result in more international law, with the beneficial effects for the PILL mentioned above. 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 American Society of International Law (“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.” So, we might add a further reason to lobby for adherence and compliance with international law: this will help to induce greater study of international law, which redounds to the benefit of professors who form a core leadership group within ASIL. 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. 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 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 (i) the PILL, and (ii) government officials. Indeed, 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

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government officials. A 2002 Chicago Council on Foreign Relations survey showed that 43% of Americans considered strengthening international law a “very important” foreign policy goal, while another 43% rated it as “somewhat” important. In a more recent World Public Opinion survey, respondents in 17 of 21 countries placed compliance with international law above national interest.

It is important to note that there may also be an anti-international law lobby. 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 textually a model of how domestic coalitions would be affected by, and would affect, international law.

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. 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 new or different ones) 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:

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J: policy goal is x (e.g., *either* consumers seeking free trade in bananas imported to H\(^69\), *or* environmentalists seeking carbon reduction)

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

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

\(P_{h1}\): 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).

\(G_{h1}\): government of H (excluding the effects already reflected by J,K,L and \(P_{h}\)), as a separate “lobby” 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 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 if \(J + P_{h1} + G_{h1} > K\), then no international law would be needed to induce x. However, assume that at \(T_1\), \(K > J + P_{h1} + G_{h1}\). (We are assuming international law with “depth”.) Therefore, the domestic equilibrium at \(T_1\) is not x. However, assume that \(J + L + P_{h2} + G_{h2} > K\). Therefore, international law that induces a shift from \(P_{h1}\) to \(P_{h2}\), and from \(G_{h1}\) to \(G_{h2}\), and that engages the lobbying power of L, could cause a shift from not x to x. Indeed, a change in any one of these factors could be sufficient to cause this shift—it depends on the relevant magnitudes, and how great the magnitude of the requisite shift is. For example, under some circumstances, the shift from \(P_{h1}\) to \(P_{h2}\) will be sufficient to cause compliance by itself. Or the addition of L might be sufficient by itself. Or all of the changes together might be insufficient. Therefore, no single factor can be used to predict compliance in all cases.

It is important to note that in this model, international law only causes effects pursuant to the above assumptions regarding relative magnitudes of lobbies. This model does not utilize

\(69\) 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, and there is also (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 (following Grossman/Helpman 1994) in public welfare as a way to increase voting support.
“compliance pull” or other effect of international law, separate from the force of the national lobbies that care about compliance with international law.

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. Therefore, an international legal rule that increases public welfare is more likely to achieve both adherence and compliance.

F lobbies:

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

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

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

Pf: policy goal is adherence to international law at T1 (Pf1) and compliance with international law at T2 (Pf2). Assume that Pf2 > Pf1 (international law lobbies are harmed more by non-compliance than by non-adherence).

Gf: government of F (excluding the effects already reflected by M,N,Q, and Pf), as a separate “lobby” 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 retaliation in connection with non-adherence at T1 (Gf1) and non-compliance at T2 (Gf2). Assume that Gf2 > Gf1 (there is greater concern for retaliation against non-compliance than against non-adherence).

Assume that at T1, N > M + Pf1 + Gf1, therefore domestic equilibrium is not y; assume that at T2, M+Q+Pf2+Gf2 > N.

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. We have assumed that the party in each of H and F concerned about the measures taken by the other state, when its lobbying is added to the party interested in x and y, respectively, is able to overcome the party interested in not x and not y, respectively. So, at T1, under interaction, a new equilibrium arises, of x and y, inducing adherence to an international agreement.

70 It is not necessarily superior from a public welfare standpoint.
However, at T₂, the compliance phase, assuming that each policy preference remains the same in direction and magnitude, this structure takes on the characteristics of a prisoner’s dilemma game. That is, if H can defect and move to not x, while F plays y, H can garner the most political support. 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, P₂ and G₂ may be sufficient in magnitude, especially when aggregated over time or over multiple cooperation contexts, to exceed the value of defection, escaping the prisoner’s dilemma.

Note that at T₁, 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 P₁ to P₂ and from P₁ to P₂, 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.

4. Implications of the Model, Directions for Future Research, and Conclusion

a. Implications

Further development and use of this model will depend on the ability to identify proxies for power and interest of lobbies. In financial areas, wealth and amount at stake may serve; in other areas size of membership and survey data regarding the magnitude of individual concern may be helpful. However, as a guide to negotiators and policy-makers, 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 P₂ > P₁ and G₂ > G₁, 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,

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71 Putnam suggests that policymakers generally have an incentive to cheat. Putnam, supra note 32, at 438.
72 For a full discussion of the prisoner’s dilemma dynamic in compliance with international law, and the circumstances under which it may be escaped, see George Norman & Joel P. Trachtman, The Customary International Law Game, 99 AM. J. INT’L L. 541 (2005).
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 “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 \( T_1 \) therefore become wealthier or otherwise stronger at \( T_2 \). 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 international law, or for governmental preferences, 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 magnitude 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 inducing compliance at any stage.
What else can we do with this model?

1. We can show that international retaliation, reputation or reciprocity can never be certain to cause compliance. Compliance will always depend on the constellation of domestic political forces in the relevant state.

2. If it were possible to estimate the 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 seek to compare compliance measures to measures of relative numbers of members of the International Law Association, an international organization comprised of national branches in 44 countries around the world, in order to examine whether greater concentration of international lawyers is correlated with greater propensity to comply. However, it could be that causation runs in both directions. 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.

3. 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.

4. 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.

5. 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 otherwise 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 role of $P$ and $G$ through adherence, and inducing support from a separate domestic lobby through reciprocity.

6. 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. Directions for Future Research

Future research will be needed to provide empirical support for this model. 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 compliance with domestic law. Important extensions might
include factoring in uncertainty regarding enforcement, and the role and choice of enforcement
resources and institutions.

c. Conclusion

This article has 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 are always 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 would generally increase domestic
welfare.

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—a number of types of testable hypotheses—that may be followed in order to
evaluate and possibly revise or extend the theory developed here.