1. Political Economy of International Law: Towards a Holistic Model of State Behaviour

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I. INTRODUCTION

International relations have changed considerably since the end of the Cold War. Many new phenomena do not fit into the traditional State-centred Public International Law (PIL) normative frame, such as soft law, Non-State Actors (NSA) and hybrids[1] as well as transnational legal processes.[2] Furthermore, International Law (IL) now deals with many 'behind the border' issues that were not the concern of traditional PIL. How is IL rising to the challenge of capturing these factually new phenomena *de lege lata* and dealing with them in a normative context? When analysing old and new developments and asking why States cooperate and comply with PIL and how they design PIL, 'why' questions need to be asked. Social science provides tools to answer them and, as we submit in this Chapter, additionally we need to look into the 'billiard ball' State in order to answer them, in other words, we need to break up the black box of the State as a unitary actor and instead look at the Legoland – the bits and pieces constituting the 'unitary actor' – we live in.[3]

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[1] Kenneth Abbott and Duncan Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration' (2010) 5 Rev IOs 315 and Kenneth Abbott, Philipp Genschel, Duncan Snidal and Bernhard Zangl (eds), *International Organizations as Orchestrators* (CUP 2015).

[2] Colin Scott, Fabrizio Cafaggi and Linda Senden (eds), *The Challenges of Transnational Private Regulation: Conceptual and Constitutional Debates* (Blackwell 2011); Fabrizio Cafaggi (ed), *The Enforcement of Transnational Regulation. Ensuring Compliance in a Global World* (Edward Elgar 2012).

[3] Anne-Marie Slaughter, 'Remarks, The Big Picture: Beyond Hot Spots & Crises in Our Interconnected World' (2012) 1 Penn State JLIA 286.

Political Economy (PE) has been used in the national realm to understand political outcomes, including laws and jurisprudence applied to all substantive matters. PE identifies the interests of relevant actors as well as the characteristics of the institutions through which they pursue their interests. However, the law in action ultimately sets incentives and channels interests. International Political Economy (IPE), although using a two-level analysis, that is, the interaction between national politics and the behaviour of States on the international plane, has been largely confined to international economic relations as a subject matter. Furthermore, the PIL dimension is predominantly missing in IPE scholarship, although PIL has the potential to reorder values and interests and influence behaviour within the national realm. In order to understand the many other facets of PIL, it is necessary to extend the IPE approach to all subject matter of PIL and to include PIL's behavioural force in the analysis of State behaviour.

As Anne-Marie Slaughter urged some years ago: 'International Relations as a social science approach can make International Lawyers better *lawyers*.'[4] We believe this is the case, without dismissing detailed doctrinal work as a *conditio sine qua non* for a good understanding of the interests and incentives set by PIL: the internal perspective to the law remains most important. This Chapter outlines a general model of PE of PIL. It thereby closes a gap: in PE, the 'international' is missing, in IPE, the non-economic subject matters, as well as the law, are missing, while in PIL, the social science is missing. Combining those approaches allows for a theory of PE of PIL. To paraphrase Kant: 'PE without PIL is empty, PIL without PE is blind.' Let us already stress at this point that we present one basic model only. It is already quite complicated but it can be tweaked further, for example, by integrating other behavioural assumptions or it can be simplified by leaving out one side of the equation. The model is meant to be a starting point and a framework for analysis.

This Chapter first clarifies some methodological misunderstandings commonly arising from a legal perspective in order to clarify the utility of PE in legal analysis (II.). A short overview on the variety of IPE is given to acknowledge the connecting factors between PE and PIL (III.). Second, and as the main focus of this Chapter, we will zoom in on a PE of PIL model for understanding and explaining the formation of and compliance with PIL via internal political processes: the PE of IL is

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[4]   Anne-Marie Slaughter, 'International Law and International Relations: Millenial Lectures' (2000) 285 Recueil des Cours de l'Académie de Droit International (Recueil des Cours) 9, 26.

preliminarily explained as a two-level game (IV.) and the model is described afterwards (V.). The last part concludes (VI.).

II. THE INTEGRATION OF PE INTO PIL: METHODOLOGICAL CLARIFICATIONS FROM A LEGAL PERSPECTIVE

Often, legal scholars focus on law application and wonder why and how social science could complement or help legal analysis. How exactly can social science contribute to PIL scholarship? In order to retain methodological clarity, we will draw on legal theory in order to clarify the role of PE or IPE in law-making or law interpretation.

Traditionally, three categorical statements are possible in law, which in turn means that lawyers may take three different perspectives or roles.[5] The first to introduce this kind of distinction was Hermann Kantorowicz,[6] followed by Max Weber[7] and Hans Albert[8] as well as some of the legal sociologists in the German-speaking countries.[9] Kantorowicz composes an epistemological trilogy[10] consisting of the normative perspective

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[5]   See for an extensive discussion Anne van Aaken, *Rational-Choice in der Rechtswissenschaft. Zum Stellenwert der ökonomischen Theorie im Recht* (Nomos 2003).

[6]   Hermann Kantorowicz, *Rechtswissenschaft und Soziologie [Th. Würtemberger ed, C.F. Müller 1962 (first 1911)].* Of course, classifications are never right or wrong but only more or less useful.

[7]   Daniel Bodansky, 'International Law in Black and White' (2006) 34 Georgia J Int Comp L 285, 285 attributes this classification to Max Weber. Weber neither used this categorization in 'Sociology of Law' (1921) nor in 'Objectivity in Social Science and Policy' (1904) though he of course always made a sharp distinction (as Kantorowicz) between normative and empirical knowledge. Weber also knew the paper of Kantorowicz as he commented on the paper 'Rechtswissenschaft und Soziologie' in 1911, see Bibliography of Max-Weber Gesamtausgabe, http://www.mohr.de/en/sociology/text-editions/max-weber-gesamtausgabe/edition.html (accessed 20 Oct 2014).

[8]   Hans Albert, 'Erkenntnis und Recht. Die Jurisprudenz im Lichte des Kritizismus', in Hans Albert et al. (eds), *Rechtstheorie als Grundlagenwissenschaft der Rechtswissenschaft*, vol II (Bertelsmann Universitätsverlag 1972) at 80.

[9]   For example, Manfred Rehbinder, *Rechtssoziologie* (4th edn, Walter de Gruyter 2000), Hubert Rottleuthner, *Rechtstheorie und Rechtsoziologie* (Alber 1981) at 13.

[10]   Kantorowicz (n 6) at 69 ('erkenntnistheoretischer Trialismus').

(*Wertwissenschaft*)[11] (in the social science sense: normative science), the sociological perspective (*Realwissenschaft*; positive science), and the law application or doctrinal perspective (*Normwissenschaft*). He also distinguished between the general level and the specific level within those three columns.[12] The normative and the sociological (or economic) perspective take an external point of view on the law whereas the doctrinal perspective takes an internal point of view.[13]

The normative perspective includes questions of how (international) law *ought* to be. At a general knowledge level this is meant to be legal philosophy: what kind of goals ought PIL pursue? The specific level includes legal policy questions, for example, how to design international institutions (*de lege ferenda*) with a view to achieving the stated goals (for example, peace, human rights, free trade, climate change mitigation), including the effectiveness of the law. The discussion on which goals are to be pursued and how they are to be justified thus belongs to the normative perspective. The question of how best to pursue them, though, necessarily includes social science knowledge; norm idealism without reality check is at best naïve, at worst untruthful. Furthermore, there might be assumptions of what normative goals actors ought to pursue, for example, public welfare; whether politicians pursue them in reality is in turn a question of positive science and enters the assumptions of the PE model, as will be elaborated below.

The second column entails the sociological perspective or positive explanation in the social science sense ('positive analysis' in the social science sense, not to be confused with legal positivism[14]). Here, descriptive, explanatory and predictive questions can be asked. Usually one proceeds by developing a hypothesis which may be (should be) empirically tested. There are thus again two levels: the abstract or theoretical level which can use as underlying theory rational choice (as done by economists and a lot of political scientists), behavioural economics[15] or

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[11]   Bodansky (n 7) at 285 calls this the ethical perspective.
[12]   Kantorowicz (n 6) at 92 (generalisierende und individualisierende Erkenntnis).
[13]   Seminal: Herbert L A Hart, *The Concept of Law* (3rd edn, OUP 2012).
[14]   Lawyers and social scientists use different notions of positivism. Although both deal with 'what is', they are fundamentally different methodological approaches. Whereas legal positivism asks 'what is law', social science positive analysis is descriptive and explanatory with the help of models and empirical analysis. Usually causal relationships are looked for.
[15]   See for that approach, Anne van Aaken, 'Behavioral International Law and Economics' (2014) 55 Harv Int L J 421. For a behavioral approach to PE, see Jan

more constructivist approaches. The important point to stress is that different behavioural assumptions may underlie the models of PE of PIL; ideally those should be spelt out explicitly. Differences of approaches in IPE are thus mainly linked to differences in underlying theories and hypotheses. On the level of empirics, quantitative or qualitative methods can be used.

The causes and effects of PIL come to the fore, depending on whether PIL is used as *explanans* (independent variable) or *explanandum* (dependent variable). Social scientific methods can be used both to explain the consequences of PIL, including of whether PIL is effective (law as *explanans*) as well as the determinants of its creation (law as *explanandum*). Whereas much research has focused on the consequences of PIL, the focus of PE and IPE is to explain political and legal outcomes. Although those questions should be distinguished (law is either on the left or right side of the equation: only half of a causal cycle), they are not independent from each other if the whole cycle is to be analysed – depending on the consequences, States are supposed to be more or less inclined to cooperate in international relations, depending on internal interest constellations. This is what the model presented in this Chapter aims to achieve. It has been the merit of IPE to empirically construct the outcome *(explanandum)* by focusing as a first step on the interests of the actors, which are in turn affected by the assumed consequences of norms, for example, trade liberalization norms (*explanans*).[16] Interests of actors in certain policies are thus deduced from the consequences of those policies. Only that kind of knowledge enables IL scholars to understand why and how States cooperate. Here again, one may distinguish the general from the specific level. Whereas on the general level discussions on the merits of different social science theories and their respective hypotheses take place (for example, rationalist vs. constructivist views on how PIL functions), on the specific level, a scholar may work empirically on a specific issue and try to (in)validate a hypothesis.

Schnellenbach and Christian Schubert, 'Behavioral Political Economy: A Survey', CESifo Working Paper No. 4988, available at http://www.cesifo-group.de/portal/page/portal/lang-en/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2014/wp-cesifo-2014-09/cesifo1_wp4988.pdf (2014).

[16]   David A Lake, 'International Political Economy', in Barry R Weingast and Donald A Wittman (eds), *The Oxford Handbook of Political Economy* (OUP 2006), 763 ff. Interest or preferences over alternative policies of different groups are derived from the distributional implications of alternative policies.

Last, but not least, there is the third column which is the traditional domain of international lawyers, namely the doctrinal perspective, which Kantorowicz called 'Normwissenschaft' or in legal theory would be called 'Rechtsanwendungswissenschaft' (science of law application). Here, as primary methodology, hermeneutics is used, something social science (including economics) cannot contribute to at first sight. European international lawyers tend to concentrate on this column. Here again, two levels may be distinguished: the level of methods of interpretation on the general level as well as the doctrinal analysis on the specific level.

The systematic starting point for the interpretation of treaties is Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[17] Some interpretative methods not only leave open a window for social science knowledge but even demand it, for example, in teleological interpretation (object and purpose as mentioned in Art. 31 (1) VCLT), in openly consequentialist argumentation, in comparative interpretation, or within the principle of proportionality (for example, necessity under Art. XX (b) GATT or Art. 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR)).[18] All of those interpretive methods are based, structurally, on means-end-rationality. The 'object and purpose' provides a clear example of this. The relationship between the means (the alternative interpretations) and the end (the purpose of the treaty) is a hypothesis on real-world consequences. An evidence-based interpretation would use social science, in order to shed light and convincingly argue for the presumed causal relationship between the end and the means. The same reasoning applies, for example, for proportionality or necessity analysis which request a comparative least intrusive means test.[19] If one does not confine teleological interpretation to legal consequences but includes real world consequences, social science insights are needed, be

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[17]   See instead of many Richard K Gardiner, *Treaty Interpretation* (OUP 2008); Sir Jennings and Arthur Watts (eds), *Oppenheim's International Law*, Vol. I, Parts 2 to 4: Peace (Longman 1992/1905) 1266 ff. Those rules of interpretation are accepted as Customary International Law (CIL). See for supplementary means of interpretation such as *contra preferentem*, *in dubio mitius* or *expressio unius est exclusio alterus* ibid 1277 ff.

[18]   Anne van Aaken, 'Defragmentation of International Law through Constitutional Interpretation: A Methodological Proposal' (2009) 16 Indiana J Glob Leg Stud 483.

[19]   Extensively, see van Aaken (n 5) and Anne van Aaken, 'Opportunities for and Limits to an Economic Analysis of International Economic Law' (2011) Transnational Corporations Review, available at http://journal.tnc-online.org/ 27.

they hypotheses or, better, empirical insights into causal relationships. Economics is the most advanced discipline in discovering those relationships.[20]

Examples for questions at the doctrinal level are whether the invasion of Iraq in 2003 violated the UN Charter, how to understand the potential victim requirement under the standing norms of regional human rights treaties or whether a country in severe economic crisis could justify its necessity measures under Art. 25 ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) or respective essential security escape clauses in Bilateral Investment Treaties (BITs). Here, a PIL scholar takes the perspective of a judge, a legal advisor to government or a lawyer for her client and asks first of all what the law is. Taking this internal perspective on the law has been the traditional task of lawyers. No matter what kind of norms (soft or hard) are relevant for changing States' behaviour, only the sources of IL as stated in Art. 38 (1) International Court of Justice (ICJ) Statute are relevant for this task.[21] On questions of legal validity, legal positivism is probably still the way to go.[22] Nevertheless, interpretation of soft law, since it can be relevant for States' behaviour, is not to be neglected in a social science perspective or if soft law enters 'hard' law, as for example, the incorporation of Codex

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[20]　Edward O Wilson, *Consilience: The Unity of Knowledge* (Alfred A Knopf 1998) at 195: 'This discipline [economics] … deserves the title often given to it, Queen of the social science'.

[21]　The debate on the importance of soft law is exploding. Nevertheless, even if one assumes the importance of soft law for changing States' behaviour, as for example, Eibe Riedel, 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?' (1991) 2 EJIL 58, there seems to be a wide consensus that the sources of IL should not be extended (though of course there is a wide discussion on the importance of soft law as a means of interpretation of hard law or its role in forming CIL). See instead of many Daniel Thürer, 'Soft Law', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, Vol. 4 (OUP 2000) 452 ff. For a different view including soft law as a source of law, see Andrew T Guzman, 'A Compliance Based Theory of International Law' (2002) 90 Calif L Rev 1823.

[22]　This is a small problem for treaties: they are valid through consent even if not effective. Consent would also still be needed on a 'constitutional level', even if there is a delegation of law-making to International Organizations. See for a game theoretical analysis of the trend of eroding the traditional consent model in PIL, Laurence R Helfer, 'Participation, Compliance, and Nonconsensual International Lawmaking' 2008 U Ill L Rev 71. The problem is greater with CIL: here, sociological factors might be necessary in order to determine validity of CIL and a fusion of a doctrinal and a sociological perspective might be necessary.

Alimentarius in the WTO agreements.[23] Differences in approaches to legal science arise forcefully on the question of law application, that is the extent and the way by which the normative and the social science perspective may enter the doctrinal perspective. Here, the difference between European and American IL scholars may be the largest; the latter being generally more open to the normative as well as the positive approach than the former. We firmly believe that a purely internal point of view can gain greatly from including also external perspectives on the law. More than that, we believe that self-contained legal analysis without social science insights tend to be deficient since they do not take into account the underlying social problems to be solved by law. Social science strengthens legal analysis, it does not weaken it.

Those columns or perspectives do not stand unconnected to each other. Positive description, explanation and prognosis can be used to derive normative critique; positive explanation is indispensable to the effective pursuit of certain goals.[24] This shows again how closely interconnected the three columns are in practice. International constitutionalism as a normative approach can benefit from social science insights as to how to pursue those normative goals most effectively. It needs a functional approach, just as does transnational governance.[25] On questions of legal policy and institutional design, there is broad consensus that social science should be taken into account: there is thus a direct input from social science to IL design. Furthermore, when law is taken as *explanandum*, that is, the PE question is asked of why we have a particular PIL rule, a theory is needed to explain why the actors chose what kind of law. This theory will often include law as *explanans*: what consequences the actors expected from the particular legal rule. In PE and IPE, it is assumed that actors follow their interests and theories about the consequences of PIL – that is, actors which expect to benefit (rightly or wrongly) from certain norms are assumed to be in favour of that policy (and lobby for it). This assumption will be taken up below in part IV.

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[23]   See the chapter by Ramses A Wessel and Evisa Kica in this Volume.
[24]   Daniel A Farber, 'Positive Theory as Normative Critique' (1994) 68 Southern Calif L Rev 1565.
[25]   Anne van Aaken, 'A Functional Approach to International Constitutionalism: The Value Added of a Social Science Contribution' (2012) 127 ARSP Beiheft 155; Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013).

III. VARIETIES OF INTERNATIONAL POLITICAL ECONOMY

The holistic study of law, politics and economics has its roots in moral philosophy (Adam Smith, JS Mill, Karl Marx) when politics, law and economics were not yet separated and law was not yet reduced to irrelevance as in (most) economic models of law starting in the 1880s with the marginal revolution. Thus, PE and IPE have ancient roots. Since we zoom in on PE of PIL in the next part, explaining how the national and international realm interconnect, we will deal with IPE first.

Economics is not only a subject matter but also a specific methodological approach – the rational choice approach which is also used by political scientists.[26] A prominent misunderstanding arises from the fact that economics is often viewed as dealing only with the subject matter of the economy or business, that is only economic variables are looked at and everything else is irrelevant to the analysis. Some parts of economic science indeed confine themselves to purely economic variables, for example, classical macroeconomics. Traditionally, also, IPE has been confined to economic matters,[27] namely international economic relations. Then it is also more permissible to confine the analysis to purely economic goals, such as efficiency, economic growth or distributional questions. But increasingly, economics as a social science methodology analyses other subject matters, including IL with all its substantive areas that justify and even call for a broader definition of goals – public welfare (welfarism) which in turn then has to be refined for each subject matter and can include goals such as environmental protection, health or other human rights. Taking economics as a methodology, legal scholars have used economic approaches, including game theory and contract theory, to explain States' behaviour in international relations but have largely concentrated on the State as a 'billiard ball', thus leaving out the two-level PE analysis.[28] Furthermore, the economic approach has been extended ever more towards behavioural economics, abandoning the

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[26]   Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (CUP 2013).

[27]   See Lake (n 16) at 758.

[28]   Jeffrey L Dunoff and Joel P Trachtman, 'Economic Analysis of International Law' (1999) 24 Yale J Int L 1; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005); Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008); Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008).

assumption of full rationality, and using psychological insights.[29] PE is the application of economic methodology to the field of politics, traditionally in the national realm only, without connection to the international plane. PE is therefore not confined to economic matters but can be and is extended to virtually all issues by drawing on the economic (social scientific) approach.[30] PE studies political processes to explain outcomes, including law (law as *explanandum*); this research is conducted by positive political theory, Public Choice or (New) Institutional Economics. It is the second column in the categorization of Kantorowicz and it is needed for the explanation of State behaviour in law creation and compliance.

Whereas PE is rather defined by its economic methodology, being focused on national politics, IPE has long been defined by its substantive subject matter, namely international economic relations, when rediscovered as a field of research.[31] IPE always recognized that decisions concerning international economy rested on domestic policies but still was mostly confined to the substantive field of economics (whereas the rest of PE is mainly unified by research questions and methodology but confined to explaining national policies and institutions). In spite of this, there are many understandings of IPE: it is 'a notoriously diverse field of study'[32] and is becoming ever more diverse.

Cohen orders the diversity of IPE approaches by dimensions of substance or style.[33] *First*, is the question of which units are the basic unit of analysis (ontology): States, firms, Non-governmental Organizations (NGOs), courts, individuals or the system as a whole? Although all theories are at their core individualist, for pragmatic purposes, researchers often bundle together individuals that can reasonably be assumed to share their interests into groups, for example, firms, NGOs,

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[29]   van Aaken (n 15) with further references.
[30]   See for the subjects of study of PE, Barry R Weingast and Donald A Wittman (eds), *The Oxford Handbook of Political Economy* (OUP 2006) with contributions ranging from voter behaviour and pressure groups to legislative bodies, constitutional theory, property rights protection democracy and capitalism.
[31]   See the seminal article of Susan Strange, 'International Economics and International Relations: A Case of Mutual Neglect'(1970) 46 Int Aff 304.
[32]   Anthony Payne, 'The Study of Governance in a Global Political Economy', in Nicola Phillips (ed), *Globalizing International Political Economy* (Palgrave Macmillan 2005) 69.
[33]   Benjamin J Cohen, *International Political Economy* (Edward Elgar 2014) 8.

unions.[34] *Second*, the agenda: what are the most important issues to be addressed? Is it material welfare and its distribution, or is it the interest in governance and decision-making? Are those questions confined to regions, continents or rather global? *Third*, very importantly, is the question: is the research normatively driven, seeking to achieve certain values, or is the research 'positive', focused on explanation, intended to enhance our understanding of the world? *Fourth*, how open to other disciplines is the conducted research? Is rational choice the only way to go or are other disciplines, such as psychology, anthropology, and history, easily incorporated? And *last, but not least*, epistemology: what methodologies are used? Analytical theories, empirical work, the latter only quantitative or also qualitative? The illumination of the different dimensions is useful in order to understand the permissible variety of research conducted under the heading of 'IPE' included in this book.

Cohen regrets that mostly IPE has been identified with English speaking research, neglecting the diversity existing worldwide.[35] Those other perspectives take different approaches to the above-mentioned dimensions. Traditionally, there has been an American and a British School of IPE (although there are others as well). All schools are concerned with the interaction of the State (viewed as the relevant actor) and economics as well as international economic relations. As Helen Milner has put it: 'The central questions all relate to the interaction of politics and economics among States'.[36] Nevertheless, they differ considerably in their assumptions and normative thrust. Whereas one theory, dependency theory, dealt with the question of the economy and prospects of development in poor countries in the 1970s,[37] hegemonic stability theory asked whether a single hegemonic State was necessary and sufficient for international economic cooperation to arise.[38] Often, IPE has been equated with Open Economy Politics (OEP), although this is just one branch of IPE and close to the American school, using the

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[34] Lake (n 16) 763.

[35] Cohen (n 33) 4 ff. He deals in this book with the American and the British School (including their fringes) as well as the continental European, the Latin American and the Chinese approach.

[36] Helen Milner, 'Reflections on the Field of International Political Economy', in Michael Brecher and Frank P Harvey (eds), *Conflict, Security, Foreign Policy, and International Political Economy: Past, Paths and Future Directions in International Studies* (University of Michigan Press 2002) 214.

[37] Cohen (n 33) 96 ff.

[38] For more details, see Lake (n 16) 761 ff.

rationalist approach, focusing on the interaction of domestic and international frontiers, still involved with the subject matter of economics.[39] It is concerned with defining or deriving the interest of the different national constituencies, the institutions aggregating societal conflicts and the conditions of bargaining of opposing domestic groups. With those national interests aggregated through institutions towards a 'national policy', OEP can then turn to the international bargaining necessary because of externalities. Usually this direction of causal inference is taken. Less focus has been placed on the influence of IL and institutions on domestic policies. This influence will be taken into consideration in the model developed below.

Whereas the American School of IPE used the rational choice approach and was more free-trade leaning, the British School used also a constructivist approach and exhibits more critical thinking, including distributional issues. Thus, while IPE uses a two-level analysis in order to explain international relations, it is mainly confined to economic international relations, by tradition mostly trade relations.[40] Furthermore, while it views PIL sometimes as an outcome of international bargaining, it neglects the influence of PIL on domestic outcomes.

In the following, a model is developed which integrates PIL more holistically in a PE model: PIL is viewed as *explanans* as well as *explanandum*, closing the causal cycle. The central unit of analysis is thus domestic interests.

In order to qualify as an IPE model, it must incorporate a theory of political decision-making. The model developed focuses on the balance of interests and power in the domestic setting, examining how the domestic PE determines the ability of States to form and comply with IL in the international context. It is not confined to international economic relations but is applicable to all subject matters. It incorporates PIL as an *explanandum* by assuming that IL is formed only when national politics produces a demand for international cooperation. So it is domestic preferences of the demanding country that cause the initial unilateral

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[39]   Seminal, Peter Katzenstein, 'International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States' (1976) 30 Int Org 1. See for an example of topics connected to economics, but analysing different actors, Anthony Payne and Nicola Phillips (eds), *Handbook of the International Political Economy of Governance* (Edward Elgar 2014).

[40]   See the chapters of Lehmann and Fabbricotti in this Volume.

demand for international cooperation, and domestic preferences of partner countries that determine whether there is sufficient reciprocity – specific or diffuse – to make acceptance of an international legal rule attractive.

But in order to have a complete theory of why States demand and create IL, we must also develop a theory of how IL has effects in the real world of domestic politics. Here again, we focus on the interests of States, and assume that, in addition to the constellation of national interests that result in demand for the international legal rule, and may continue to support the reciprocal rule initially agreed, there are also national interests – including the government itself or national courts – that are interested in promoting the international legal system and its reliability, either for selfish or altruistic reasons. Lawyers have for a long time looked at those interactions – national to international and back – but without using social science. In the view of the present authors this neglect is to be remedied.

In a sense, the PE model of PIL developed in the next paragraph is simply an extension of the national PE model of public policy. The extension is into the international setting, where an expanded range of tradeoffs and exchanges is possible. Exchange of public policy commitments across borders, as in the market for goods and services, takes place when exchange can increase the welfare of the participants in the exchange. PIL is one instrument of international cooperation – one instrument of international exchange of policy commitments.

IV. POLITICAL ECONOMY OF INTERNATIONAL LAW AS A TWO-LEVEL GAME

In this Section, we explore the application to PIL of Kantorowicz's second pillar: the sociological perspective (Realwissenschaft; positive science). As we stated in Section II, we are concerned in the second pillar with the causes and effects of IL – why States make IL, and why they comply with IL.

A PE approach to IL must be based on welfarism, which suggests theories that assume that individuals make IL through States in order to better their lot. This is a liberal, methodologically individualist, and preference-based approach. Having said that, there is room for ideational or constructivist reasons for IL. This is because legal change is always mediated through perception and ideas. Legal change is also mediated through political mechanisms, which achieve welfare with varying degrees of fidelity.

An important alternative perspective focuses not on public welfare, but on political welfare – the welfare of government officials, including their efforts to secure political support. This 'public choice' approach has important descriptive power, but it must either incorporate a measure of public welfare, or concede incompleteness. It can incorporate a measure of public welfare by recognizing that to some extent political support will be based on the ability of politicians to deliver enhanced welfare to their citizens.

Reconciling public welfare, public choice, and constructivism, it might be said that public welfare is mediated through ideas, and that our ideas about public policy are largely mediated – are given effect – through national political systems.

As noted above, a model that included in the determinants of national policy only public welfare would be deficient, as would a model that included in the determinants of national policy only political welfare. Rather, national policy will be determined by a combination of the welfare of political actors and their constituents. Public choice models that include public welfare as a determinant of political welfare are sufficient to do so. So are public welfare models that recognize the mediating effect of politics. Whatever model is chosen, there will be circumstances in which a greater aggregate of public and political welfare may be achieved by international cooperation. To the extent that public welfare is a vector in national decision-making, national governments will tend to seek international cooperation that enhances public welfare.

Any understanding of international cooperation through law must be infused with respect for the practical, State-based, political process by which formal cooperation occurs, and it must include a mechanism by which States would determine to create organizational structures which facilitate cooperation. It must develop a perspective on the interaction between multiple domestic political processes, and it must develop a theory of the creation of international organizations.

Mitrany observed as follows:

> Our social activities are cut off arbitrarily at the limit of the State and, if at all, are allowed to be linked to the same activities across the border only by means of uncertain and cramping political ligatures. What is here proposed is simply that these political amputations should cease. Whenever useful or necessary the several activities would be released to function as one unit throughout the length of their natural course.[41]

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[41] David Mitrany, *A Working Peace System* (Chicago Quadrangle Press 1966) 82.

Yet Mitrany did not develop the full implications of the extension of politics across borders. IL is the formal mechanism by which such extension occurs in the modern world, and international legal rules and institutions make up the formal link between separate domestic political systems.

International relations and IL form a mechanism by which the domestic politics of different States may be linked, modifying the otherwise applicable political equilibrium in different States. The interaction of States matters for domestic politics, and in fact is simply an extension of domestic politics. But it is an extension that constitutes functional cross-national political equilibria, and in effect, communities. These communities often require law, and increasingly require international organizations.

IV.1. The Methodological Individualism from Unilateralism to Multilateralism

The liberal theory of international relations, developed by Andrew Moravcsik, calls attention to the domestic sources of international relations preferences.[42] Thus, 'the demands of individuals and societal groups are treated as analytically prior to politics.'[43] Liberal theory focuses on preferences of States, resulting from the aggregation of individual preferences by the State's political mechanisms. Governments then act purposively in world politics on the basis of these preferences. Thus, preferences are the cause of State behaviour within a world system that provides constraints based on other States' preferences.

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, in which States seek modifications of the behaviour of other States, provides an additional, dynamic source of stimuli that may disrupt otherwise extant national political equilibria.

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

[43] Ibid at 517.

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',[44] the relationship between domestic politics and international relations has a particular directional structure. Liberal theory envisions States entering the 'market' of international relations to satisfy preferences.[45] The State is a dynamic aggregator of individual, group, and coalition preferences.

IV.2.   The Domestic Causes of International Law

A number of factors within the domestic politico-legal sphere may cause States to make (adhere to), and to comply with, IL. It is unlikely that any mono-causal explanation would be broadly successful, and this field would benefit from empirical evaluation of the relative causal power of different factors in different contexts. The literature has focused on the following categories of causal factors: (i) domestic structure,[46] (ii) ideas and managerial factors,[47] (iii) domestic litigation and interest groups, and (iv) domestic interests and partisan politics. We focus here on domestic interests and partisan politics, or preferences, simply because we speculate that a preference-based explanation of entry into and compliance with law will generally provide the greatest explanatory power. Our speculation is supported by a broad consensus in social science that preferences have great (although definitely not exclusive) causal power. However, this is not based on empirical validation in particular cases, and we would expect other causal factors to be important in specific circumstances.

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[44]   See Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 Int Org 427. On Putnam's Two-Level Game Theory see the chapter by Benvenisti in this Volume.

[45]   See, for example, Dunoff and Trachtman (n 28) analogizing the 'market of international relations' to the market of goods, except that states trade in units of power.

[46]   Helen Milner and Peter Rosendorff, 'Democratic Politics and International Trade Negotiations' (1997) 41 JCR 117–46.

[47]   See, for example, Harold Hongju Koh, 'Internalization Through Socialization' (2005) 54 Duke L J 975; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L J 2599; Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 Int Org 175; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

In his seminal 1978 article, 'The Second Image Reversed: The International Sources of Domestic Politics',[48] 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.[49] In his leading article, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games',[50] Putnam focuses attention on the role of international pressure – foreign demands – in inducing domestic political change.

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.'[51]

While this provides important insights, especially as to the position of government officials caught in between, another perspective might suggest that there is no real conflict between these games. Rather, opportunities in the international game shape the strategy for maximizing an aggregate basket of preferences in the domestic game. The State is always maximizing its preferences under constraint. It is as erroneous to say that there is an inconsistency between the international and the domestic as it is to say that a corporation, entering the market, is in conflict with the market. It seeks the benefits of the market, in terms of the ability to purchase and to sell.[52]

Putnam is right in his core insight that if we examine the domestic game, we may find that there is an opportunity for a domestic equilibrium which would not exist except for the existence of the international game (what Putnam refers to as a 'synergistic linkage').[53] This is not the

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[48]   Peter Gourevitch, 'The Second Image Reversed: The International Sources of Domestic Politics' (1978) 32 Int Org 881.

[49]   Kenneth Waltz developed the idea of three images. The first image examines the role of individuals in international relations. The second focuses on the effects of domestic politics on international relations, while the third focuses on the effects of the international system on international relations. Consider Kenneth Waltz, *Man, The State, and War: A Theoretical Analysis* (Columbia University Press 1959).

[50]   See Putnam (n 44).

[51]   Ibid at 434.

[52]   For a broader argument along these lines, consider Trachtman (above, n 25).

[53]   Putnam (n 44) at 447–48.

exception, however, but the rule in international cooperation and IL. As Jongryn Mo points out, domestic bargaining is endogenous to international cooperation – it is affected by opportunities for international cooperation.[54] 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 political welfare or from a public welfare standpoint.

It is important to focus on the role of realignments on the domestic board: on the fact that entry into, and compliance with, IL is *always* motivated by either the prospect of change in domestic coalitions that the new IL causes, or by the prospect of avoiding unattractive change from an existing beneficial coalition. It focuses on the implications of these realignments for compliance. If there were no modification of domestic coalitions, there would be no purpose for IL – once it is accepted that compliance is always a domestic political decision, IL will only be effective if it modifies domestic politics.

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. 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.[55]

V.   A MODEL OF ADHERENCE TO, AND COMPLIANCE WITH, INTERNATIONAL LAW

In this Section, we begin to develop this Chapter's model, based, in part, on the Gene Grossman–Elhanan Helpman political support model

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[54]   Jongryn Mo, 'The Logic of Two-Level Games with Endogenous Domestic Coalitions' (1994) 38 JCR 402.
[55]   Ibid at 406.

designed for use in connection with international trade negotiations.[56] In that model, incumbent governments are assumed to seek to maximize a political support function. This political support function is assumed to have two components. *First*, organized interest groups are assumed to make political contributions that can assist in re-election, providing an incentive for governments to implement policies that enhance organized interest group welfare. *Second*, voters are assumed to respond in their voting behaviour to their own welfare, and so one can expect some incentive to implement policies that enhance voter welfare.[57] The government then sets its policy to aggregate a weighted sum of total contributions and aggregate social welfare. Politicians thus seek to please the 'winning' lobbies and the electorate as a whole.

We adapt the Grossman–Helpman model of the lobbying process as follows: Each lobby, representing a particular policy decision in connection with IL (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.'[58] This model has the structure of a common agency problem: a situation where several principals seek to influence the behaviour 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.'[59]

The Grossman–Helpman model is designed to explain the effectiveness of lobbying in regard to trade policy, and specifically, tariffs and subsidies.[60] Individual preferences over protectionism are assumed to

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[56]   See Gene M Grossman and Elhanan Helpman, 'Trade Wars and Trade Talks' (1995) 103 J Pol Econ 675, 678.

[57]   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.

[58]   Gene M Grossman and Elhanan Helpman, 'Protection for Sale' (1994) 84 Am Econ Rev 833, 836.

[59]   Ibid.

[60]   Ibid at 834 ('This paper seeks to explain the equilibrium structure of trade protection. We are interested in understanding which special interest groups will be especially successful in capturing private benefits from the political process.').

arise from their sector-specific endowments. Following Mancur Olson, there are some owners of factors of production who are able to organize, and some who are unable to do so.[61] The unorganized owners of factors of production do not make contributions, and so lack this type of influence over policy. We assume that each lobby structures its contribution schedule to maximize the total welfare of its members. Like Grossman and Helpman, we are 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.'[62]

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

In their 1995 work, 'The Politics of Free Trade Agreements',[63] Grossman and Helpman extend their 1994 model to examine the conditions under which two States might agree to a free trade agreement. This model uses assumptions about the welfare effects of trade liberalization and addresses adherence rather than compliance. Therefore, this extended model is not directly adaptable to a general IL model of compliance. However, it provides a good basis for a broader model of entry into IL (adherence), and can be extended to analyse compliance.

Grossman and Helpman assume that the status quo prior to an international agreement is itself a domestic political equilibrium in each State.[64] This assumption seems appropriate. Thus, the opportunity for an international agreement can be understood as an exogenous shock to the existing domestic equilibrium. The opportunity for an international agreement changes the relative prices. In the trade context, the possibility for foreign compliance with a commitment to liberalize makes the price

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

[62] Grossman and Helpman (n 58) at 838.

[63] Gene M Grossman and Elhanan Helpman, 'The Politics of Free-Trade Agreements' (1995) 85 Am Econ Rev 667.

[64] Ibid at 668–70.

of domestic protectionism higher by engaging the concerns of domestic producers for export.

Grossman and Helpman, in the context of the establishment of a free trade agreement, find that in order for an agreement to be entered into, there must be a sufficient number of exporters in each country prepared to lobby for the agreement, on the basis of the welfare gains these lobbies would achieve by virtue of the performance by the other State of its market liberalization obligations under the agreement.[65] They use the concept of a politically Pareto efficient agreement, meaning an agreement with the property that no party could gain politically except at the expense of the other.[66] The specific equilibrium selected would depend, under perfect information, on the relative positions of the two States, including their discount factors or degree of patience, and each State's relative aggregate welfare under the status quo.

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

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

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[65] Grossman and Helpman (n 58) at 847–49 (describing under what conditions that the interests of various lobbying groups may align to make trade agreements across coalitions and countries possible).

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

adherence and compliance.[67] That type of lobby is exemplified by organizations of international lawyers such as, in the US, the members of the American Society of International Law (ASIL). We will discuss this type of lobby in greater detail below.

Turning now to the issue of compliance, it is important to recognize that, in this PE model, 'compliance can be rational even if the country as a whole pays for it more than benefits from it', because political power is not necessarily congruent with public welfare.[68] 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.

The question regarding compliance 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)? We also assume that domestic politics change, in an 'obsolescing bargains'[69] sense.[70] Thus, the coalition that supports adherence at t_1 may not have the same structure or magnitude, and may not even support compliance, at t_2.

We assume an international legal rule with some 'depth' in the sense described in the 'legalization' literature:[71] the rule requires behaviour 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 IL would not decide to conform national behaviour to the rule. This is a slightly different issue from the question, addressed for example by Grossman and Helpman, of whether the domestic political process would decide to adhere to an international agreement. It

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[67]　Of course, there will be exceptions. For example, some rules of IL may be found to be objectionable by some portion of the membership of the ASIL.

[68]　Xinyuan Dai, *International Institutions and National Policies* (CUP 2007) 6.

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

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

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

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 IL. 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.

It is here further assumed that in order for any State to decide to comply with an international legal rule, there must be a coalition of domestic lobbies that is strong enough to determine national behaviour. This assumption can survive the diversity of national politics: it is not necessary to have an interest-group-based politics such as that of the US for this type of model to apply. Even autocracies involve sensitivity to political support, although the relative importance of political support compared to government policy may differ markedly. Furthermore, decision-making may, in some circumstances, take place in arenas that are insulated from interest group politics, and even from executive policy. This is the case with international legal rules that have direct effect, in which the decision is delegated exclusively to courts. We focus on lobbies more broadly, recognizing that other mechanisms, such as courts, may play the critical role in compliance.[72]

V.1.   Reciprocity

A number of scholars have examined reciprocity, or retaliation, as a means of inducing compliance with IL.[73] This theoretical approach is elegant and compelling: States comply with IL 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.[74]

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[72]   See Anne van Aaken, 'Effectuating Public International Law Through Market Mechanisms' (2009) 165 JITE 33.

[73]   See, for example, Robert O Keohane, *After Hegemony* (Princeton University Press 2005) 104–05, 128–31; Guzman (n 28) 33–48, 211–12 (listing reputation, reciprocity, and retaliation as costs that deter States from noncompliance).

[74]   Robert O Keohane, 'Reciprocity in International Relations' (1986) 40 Int Org 1, 4.

Most work in this area has arisen from a growing rationalist debate regarding compliance with Customary International Law (CIL).[75] Norman and Trachtman,[76] for example, developed a repeated multilateral prisoner's dilemma model of formation of, and compliance with, CIL. This model is based on the potential for retaliatory defection. It focuses on the parameters of the multilateral prisoner's dilemma in the CIL context. These parameters include: (i) the relative value of cooperation versus defection, (ii) the number of States effectively involved, (iii) the extent to which increasing the number of States involved increases the value of cooperation or the detriments of defection, including whether the particular issue has characteristics of a common problem, a public good, or a network good, (iv) the information available to the States involved regarding compliance and defection, (v) the relative patience of States in valuing the benefits of long-term cooperation compared to short-term defection, (vi) the expected duration of interaction, (vii) the frequency of interaction, and (viii) the existence of other bilateral or multilateral relationships among the States involved.[77]

Norman and Trachtman highlighted some of the characteristics of different States' domestic politics that might affect their level of patience and their resulting propensity to accept and comply with rules of CIL. (In custom, the adherence phase and compliance phase may be less distinct than in treaty.) However, they did not analyse the *decision-making* process within States or the lobbying game within States. Other rationalist approaches focusing on reciprocity or retaliation are characterized by the same limitation.

However, it is clear that a State's decision to adhere to and comply with IL is dependent on domestic politics. We must recognize that States have a variety of interests, represented by different interest groups. Certain domestic lobbies are motivated by the possibility of direct foreign reciprocity and other domestic lobbies are motivated by respect for IL. As discussed in more detail below, it is possible that respect for IL may also be understood as a special kind of diffuse reciprocity.

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[75]   Consider Goldsmith and Posner (n 28); Guzman (n 21) 1823; Edward T Swaine, 'Rational Custom' (2002) 52 Duke L J 559; Pierre-Hugues Verdier, 'Cooperative States: International Relations, State Responsibility and the Problem of Custom' (2002) 42 VJIL 839. The Goldsmith and Posner book has spawned a rich responsive literature. See, for example, George Norman and Joel P Trachtman, 'The Customary International Law Game' (2005) 99 AJIL 541, 541.

[76]   Norman and Trachtman, ibid.

[77]   Ibid at 542.

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,[78] exporters are a domestic constituency interested in foreign liberalization. Therefore, exporters are concerned with domestic compliance with liberalization commitments in order to ensure against reciprocal punishment in the form of protectionism abroad.

It is important to note that reciprocity may be complex: it is not necessarily tit-for-tat where each State promises the same performance.[79] Indeed, the possibility for complex barter or package deals increases the set of possible transactions. For example, while State A may be concerned with human rights in State B, for any number of reasons, State B may be unconcerned with human rights in State A. But State B may be concerned with trade liberalization in State A, perhaps because State A already has sufficient autonomous reasons for providing a satisfactory level of human rights. In fact, IL increases the opportunities for complex barter by allowing diverse performances to be linked and supported by broad fidelity to IL.

Uncertainty as to which commitments the counterparty will suspend in response to a violation would limit the likelihood that the domestic lobby concerned with those commitments will lobby for compliance. There may be a collective action problem among possible lobbies. One way to reduce the effects of this collective action problem would be to designate in advance, and specifically, the type of retaliatory action that the counterparty will take.[80]

V.2. The Role of Government and the Public International Law Lobby

It is useful to examine two sources of influence that might provide a more general influence on adherence to and compliance with IL. Each State will have a government interested in maximizing political support or welfare more generally. The availability of IL as a general tool is important to each government, because each government will value the ability to deliver greater welfare to its citizens where IL serves to do so.

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[78] Grossman and Helpman (n 56) at 687.
[79] See Putnam (n 44) 446–47.
[80] 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* (Peterson Institute for International Economics 2003) 79–89.

For this reason, each government will have at least some interest in supporting the international legal system. Each State may also have a private group interested in supporting the international legal system in general. This might be called the 'Public International Law Lobby' or 'PILL.' One might expect the PILL to be composed largely of international lawyers.

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

The PILL would thus be expected to support compliance with IL under most circumstances. The word 'most' rather than 'all' is used here because there is an occasional debate regarding whether 'legitimacy' may trump legality, especially in connection with humanitarian intervention.[81] Putting those exceptional circumstances aside, the PILL effect might be considered as fairly constant across IL 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 BITs. On the other hand, the PILL might more broadly advocate adherence to more IL restraining the use of force or promoting human rights. However, one would expect the PILL to be more likely to advocate *compliance* with IL 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

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

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

It is important to note that there may also be an anti-IL lobby.[82] To the extent that such a lobby exists, its effects can be netted against the PILL, and to the extent that the anti-IL lobby is stronger than the PILL, then the PILL variable would simply be negative.

V.3.   Towards a Model

The following discussion is intended to outline a model of how domestic coalitions would be affected by, and would affect, adherence to and compliance with IL.

Assume two States, H and F. Assume H and F each has exactly four lobbies, and that the respective governments of H and F represent a fifth 'interest group', each with the policy goal profiles set forth below. Assume perfect knowledge by each player of the policy preferences and magnitudes of each lobby. Magnitude is a measure of the political valence of each lobby, although as noted above it could include knowledge endowment as to compliance. The model would involve four stages. In the first stage, the lobbies in each country set contribution schedules to influence their government. In the second stage, the governments negotiate an agreement. In the third stage, lobbies (perhaps including new or different ones, and perhaps with different magnitudes) lobby about compliance. In the last stage, governments simultaneously choose whether or not to comply. In the following discussion, we 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.

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[82]   Consider Peter Spiro, 'The New Sovereigntists' (Nov/Dec 2000) 79 For Aff 6.

H lobbies:

J: policy goal is x (for example, *either* consumers seeking free trade in bananas imported to H,[83] *or* environmentalists seeking carbon reduction).

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

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

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

G_h: government of H (excluding the effects already reflected by J, K, L and P_h), as a separate 'interest group' that seeks to maximize its voting support by maximizing general public welfare in connection, *inter alia,* with adherence and compliance and concern for reciprocity and retaliation in connection with non-adherence at t_1 (G_{h1}) and non-compliance at t_2 (G_{h2}). Assume that $G_{h2} > G_{h1}$ (there is greater concern for retaliation against non-compliance than against non-adherence).

If domestic equilibrium at t_1 were x (the preferred policy of J), that is J > K, then no IL would be needed to induce x. However, assume that at t_1, K > J. (We are assuming IL with 'depth.') Therefore, the domestic equilibrium at t_1 is not x: H would not enter into an international agreement. However, assume that $J + L + P_{h1} + G_{h1} > K$. Therefore, IL that engages the lobbying power of L could cause a shift from not x to x at the adherence stage (t_1), inducing adherence to a rule of IL. Once that rule of IL is established, there is a shift from P_{h1} to P_{h2}, and from G_{h1} to G_{h2}. According to our assumptions, these shifts would be expected to

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

increase the tendency to comply. In order to determine actual compliance, we would need to examine whether at any given time $J + L + P_{h2} + G_{h2} > K$.

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

Also, recall that the issue specific lobbies are not the only determinants of public policy. Under the assumptions of the Grossman–Helpman model, broader public welfare enters the equation through G by virtue of voting.[84] Therefore, an international legal rule that increases public welfare is more likely to achieve both adherence and compliance.

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

F lobbies:

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

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

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

P_f: policy goal is adherence to IL at t_1 (P_{f1}) and compliance with IL at t_2 (P_{f2}). Assume that $P_{f2} > P_{f1}$ (IL lobbies are harmed more by non-compliance than by non-adherence).

G_f: government of F (excluding the effects already reflected by M, N, Q, and P_f), as a separate 'lobby' that seeks to maximize its voting support by maximizing general public welfare in connection, *inter alia,* with adherence, compliance, and concern for reciprocity and retaliation

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84 Grossman and Helpman (n 58) at 847–49.

in connection with non-adherence at t_1 (G_{f1}) and non-compliance at t_2 (G_{f2}). Assume that $G_{f2} > G_{f1}$ (there is greater concern for retaliation against non-compliance than against non-adherence).

Assume that at t_1, $N > M + P_{f1} + G_{f1}$, therefore domestic equilibrium is not y. However, assume that, $M + Q + P_{f1} + G_1 > N$. The situation of F then parallels that of H.

Therefore, and this points to the critical function of international cooperation, if H and F are considered separately, they have separate equilibria of not x and not y. But at t_1, 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.[85] We have assumed that L and Q (the parties in each of H and F concerned about the measures taken by the other State), when their respective influence is added to J and M, respectively, is able to overcome K and N, respectively. So, at t_1, under interaction, a new equilibrium arises, of x and y, inducing adherence to an international agreement.

However, at t_2, the compliance phase, this structure may take on the characteristics of a prisoner's dilemma game. That is, if H can defect and move to not x, while F plays y, it might be that H can garner the most political support.[86] However, assuming all positions remain the same as at t_1, if H defects, then F can defect in response, resulting in a non-cooperative equilibrium. But, assuming that $P_2 > P_1$, and $G_2 > G_1$, the differences in these factors may be sufficient in magnitude, especially when aggregated over time or over multiple cooperation contexts, to exceed the value of defection, avoiding the prisoner's dilemma.[87] In fact concern regarding the integrity of the IL system to enable it to continue to produce political welfare-increasing agreements may be included in P_2 and G_2.

Note that at t_1, the forces in H and F supporting not x and not y, respectively, will be expected to oppose the creation of the international

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[85]   It is not necessarily superior from a public welfare standpoint.

[86]   Putnam suggests that policymakers generally have an incentive to cheat. Putnam (n 44) 438 (citing Matthew E Canzoneri and Jo Anna Gray, 'Two Essays on Monetary Policy in an Interdependent World' (Feb 1983), International Finance Discussion Paper, 219 (Board of Governors of the Federal Reserve System)).

[87]   For a full discussion of the prisoner's dilemma dynamic see the chapter by Meredith Kolsky Lewis in this Volume.

linkage that changes the equilibrium to their detriment. In addition, these forces will be expected to oppose the creation of international legal rules that will result in the shift from P_1 to P_2 and from G_1 to G_2, which these forces anticipate will entrench their disfavoured 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.

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

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

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

How can policy preferences change in ways that might give rise to non-compliance? In other words, in what ways are international cooperation arrangements not self-enforcing?

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', we mean that the investment in compliance by one party would be less valuable to that party if the other party does not carry out its side of the bargain. This is no different from any other asset specificity in contracting. But under asset specificity, a greater role for a PILL, or for governmental preferences for compliance, may be required to induce compliance with IL, 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.

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.

Third, the political magnitude of various lobbies may change over time. A prediction made at t_1 regarding the lobbying valence of various lobbies may have a high probability of being accurate at t_1, but would be expected to become less likely to be accurate over time. Consider, for example, circumstances of sudden great political change, such as a revolution.

Fourth, this model suggests that uncertainty regarding domestic coalitions to support compliance would increase over time. It thus might suggest that governments may assess the value of reciprocal commitments over a delimited period of time, rather than over an indefinite period of time. This would reduce the magnitude of the shadow of the future in inducing compliance at any stage.

Fifth, we can show that international retaliation, reputation, and reciprocity cannot ensure compliance. Compliance will always depend on the constellation of domestic political forces in the relevant State.

Sixth, we may be able to suggest reasons for bilateralism versus multilateralism, *mutatis mutandis*: bilateralism might allow for the construction of more nuanced political coalitions to induce compliance, individualized to the particular international legal transaction.

Seventh, we might be able to explain the use by domestic governments of international legal commitments at t_1 to lock in a policy that is supported by a domestic equilibrium at t_1, where there is a preference over future policy. Government at t_1 may do so by increasing the effect of P and G through adherence, and inducing support from a separate domestic lobby through reciprocity.

Eighth, we may be able to assist in determining whether entry into a particular international legal commitment is done insincerely, without intent to comply. Counterparties would wish to evaluate whether there is sufficient domestic support for compliance with the commitments on which they rely.

VI. OUTLOOK: THE POTENTIAL AND THE LIMITS OF PE OR PIL

This Chapter theorizes that IL is made by strategic States willing to reduce their autonomy along certain dimensions in order to increase the satisfaction of their preferences along other dimensions, where after the commensuration of these two dimensions, each State's government counts itself better off. The mechanism of the State's decision-making regarding this trade-off 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 IL – could result in a political surplus, that surplus may induce a coalition to act to achieve it.

The Chapter has developed a rationalist theory of adherence to and compliance with IL that takes account of the internal decision-making processes of States. It has always been true that the domestic public policy process has formed coalitions in order to make public policy, and that there have always been dissenters. The international relations context can be understood as an expansion of the possibilities for trade-offs 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 IL 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, IL forms a transmission belt that can link domestic lobbies transnationally. Indeed, by virtue of the expansion of the scope of the possibilities for Pareto improving political transactions, the international extension of the scope of domestic politics, where it occurs, would generally be expected to increase *domestic* welfare. Of course, the move from domestic *political* welfare to actual welfare depends on the extent to which domestic politics reflects actual welfare. In any event, a government that wishes to deliver the most to its people, or at least to get the most political support, will be required to enter the IL market for some transactions.

The rationalist theory of adherence and compliance developed here provides a novel way of analysing the possibilities for compliance with IL. It suggests a number of empirical research strategies that may be followed in order to evaluate and possibly revise or extend the theory developed here. Perhaps more importantly, it provides a useful template by which States may evaluate the possibility that their counterparties will comply with their international legal obligations. As States approach important international public policy issues such as global warming, terrorism, and international financial crises, this evaluative tool will allow them to be realistic regarding the utility of proposed international legal rules. Although the model might be difficult to test in various settings, it gives a template to the researcher with all important variables which should be included. In this sense, it provides a frame and a guideline within which PE of IL can be applied to different research questions.

There are limits to the model presented in two respects. It is at the same time over- and under-complex. We are aware that partial models have great merits and it surpasses the capacity of any article dealing with a PE question of IL to deal with the holistic model, that is, both sides of the equation. Thus, concentrating only on one side is surely justified; however, it is important to keep the whole picture in mind. The model helps to do that by creating a thinking frame, a template. At the same time, the model is under-complex since it is impossible for epistemological reasons to capture reality one-to-one. Every social science insight necessarily has to abstract and concentrate on the most important explanatory variables. This is sometimes quite unsatisfactory from a lawyer's perspective, being used to delving into the intricacies of single cases.

   A model of PE of PIL helps to add social science insights and answer the 'why' questions urgently posed to international lawyers in a changing world. We need to zoom in and understand the micro-foundations of behaviour in connection with PIL. This template model is a first attempt to bring different questions together and build a frame within which international lawyers can answer questions on the current, not yet normatively captured developments of international relations.