

RULE-BASED DISPUTE RESOLUTION IN INTERNATIONAL TRADE LAW

*Rachel Brewster**

INTRODUCTION

WHY does the United States ever prefer to settle disputes under a system of rules rather than a system of negotiations? Power has its privileges, and one is the ability to control international negotiations. Powerful states are advantaged by negotiation-based approaches to settling disagreements because they have the resources to resolve individual disputes on favorable terms. By contrast, rule-based dispute resolution advantages weak states as a means to hold powerful states to the terms of their agreements.

Yet the United States government led the charge for rule-based dispute resolution in the World Trade Organization (“WTO”). American representatives consistently negotiated for a strong trade court over the resistance of other major industrialized governments.¹ Since that time, the United States has, predictably, been both a winner and loser in the process. It has successfully challenged European Union restrictions on American imports but failed in a challenge to the structure of the photographic film mar-

* Bigelow Fellow & Lecturer in Law at the University of Chicago Law School. Thanks to Douglas Baird, Allison Danner, Jeff Dunoff, Liz Emens, Richard Epstein, Ryan Goodman, Lloyd Gruber, Andrew Guzman, Larry Helfer, Yuch Kono, Daryl Levinson, Charles Lipson, Tim McKeown, Jide Nzelibe, Thomas Oatley, Eric Posner, Duncan Snidal, James Spindler, Matthias Staisch, Paul Stephan, Roland Stephen, Geof Stone, Terry Sullivan, Al Sykes, Lesley Wexler, Tim Wu and all the participants in the PIPES, Chicago Work-In-Progress, and Vanderbilt International Trade Workshops for their helpful comments.

¹ See John Croome, *Reshaping the World Trading System* 224–29, 277–81, 332 (1995) (recounting the negotiating history of the Uruguay Round); Terence P. Stewart & Christopher J. Callahan, *Dispute Settlement Mechanisms* 36–68 (1993); Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in *The Uruguay Round and Beyond* 101, 110–11 (Jagdish Bhagwati & Mathias Hirsch eds., 1998).

ket in Japan. In addition, the United States has lost several cases concerning its own laws, including complaints against its tax system and environmental regulations.

The U.S. government's decision to champion a trade court is puzzling given the obvious American advantage in a negotiation-based system. Access to the U.S. market is one of the primary benefits of membership in the WTO and, by limiting access to its market, the United States can resolve trading disputes on favorable terms. For years, the United States did exactly this—using the threat of unilateral sanctions to resolve issues of foreign market access while interpreting its own laws to be consistent with international obligations. Why would the United States give up this flexibility in favor of a strong international court?

This Essay will address both the puzzle of the United States' preference for rule-based dispute resolution and the broader implications for international law. First, it will examine why the U.S. government demanded an international court that would limit its bargaining power in international politics and will argue that the WTO system strengthens the President's hand in trade policy negotiations with Congress. The United States' preference—or more specifically, the President's preference—for a rule-based system derives, in part, from the President's efforts to gain greater control over trade policy at the national level. In short, a trade court imposes an international constraint that actually *increases* the President's power over lawmaking at home.

This Essay will then turn to the broader implications for international law. It will show how domestic actors—here, the President—may use international law to try to change domestic politics. In doing so, I will consider how we define what is in “the state's interests.” States, particularly developed democracies, have complex decision-making procedures. Various players within the domestic government may have dissimilar preferences for policies and, thus, different conceptions of what is in the best interests of the state. What we conceive of as the state's interests are the outcomes of the domestic political process. International law influences these state interests by altering bargaining power among different players within the government and thereby changing the outcome of domestic politics.

This understanding differs from others that focus on the “compliance pull” of international law. There, international interactions, international networks, and domestic lobbying are thought to lead government officials to alter their conceptions of state interest. Under the view presented here, government officials’ interests do not change to value international law over national law. Rather, they value international law when it offers an advantage in domestic politics.

This Essay will proceed in five Parts. Part I will briefly describe the WTO system and focus on how the United States’ bargaining position under this system differs from that enjoyed under the General Agreement on Tariffs and Trade (“GATT”) system. Part II will illustrate how current international law studies do not adequately explain why the United States sought a rule-based system. Parts III and IV will present the domestic-politics approach to understanding the government’s preferences concerning dispute resolution. The third Part will introduce the concept of a two-level game where the President is bargaining with other nations and Congress over trade policy. Drawing on a two-level game framework, this Part will examine how WTO dispute resolution alters domestic bargaining and will discuss three WTO cases. The WTO procedure effectively creates an international constraint on the executive in domestic bargaining, which aids the President in negotiations with legislators. The fourth Part of this Essay will address why Congress accepts changes in the WTO system. The Conclusion will discuss how this study changes our view of international law. States’ preferences for a rule-based system of international law can turn on how domestic policy decisions are made and how international law can change domestic politics.

I. THE WTO DISPUTE RESOLUTION SYSTEM

The WTO system of dispute resolution, labeled the Dispute Settlement Understanding (“DSU”), developed out of the panel system of the GATT. Comprehensive discussions of the changes between the GATT and WTO systems are readily available

elsewhere, so this section focuses on how the developments altered bargaining between states.²

Members of the GATT (“contracting parties” in GATT terms) traditionally acted by consensus. Although this system worked for rounds of negotiation, where contracting parties could offer benefits in turn for concessions, it did not work as well in dispute resolution.³ If a state violated the terms of the GATT, injured states could protest and request the formation of a dispute resolution panel to hear the merits of the dispute. Under the consensus rule, however, the findings of the panel had to be adopted by all of the contracting parties. This effectively gave every government, including the losing government, a veto over panel determinations until 1989.⁴ Contracting parties allowed panels to proceed, but could

² See John H. Jackson, *The World Trading System* (2d ed. 1997); David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization* (1999); William J. Davey, *The WTO Dispute Settlement Mechanism* (Ill. Pub. L. Res. Paper No. 03-08, 2003), available at <http://papers.ssrn.com/abstract=419943>.

³ The GATT system did not provide explicitly for dispute resolution; rather, the panel system developed by default. See Hudec, *supra* note 1, at 102-03. The GATT was not intended to be the foundational agreement for the world trading system. Instead, the contracting parties to the original 1947 GATT agreement set out the institutional structure of the trading system in the International Trade Organization (“ITO”) agreement, negotiated between 1946 and 1948, which provided for a formal dispute resolution procedure. The GATT was simply an interim measure to reduce barriers to trade while the ITO agreement was negotiated. Palmeter & Mavroidis, *supra* note 2, at 3. The ITO, however, was never ratified by the United States and the GATT became the foundational agreement in the ITO’s absence. See Jackson, *supra* note 2, at 37-38, 112-14; Palmeter & Mavroidis, *supra* note 2, at 1-7; see also Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (2d ed. 1990).

⁴ Governments could block the GATT dispute resolution system in four ways: by blocking the formation of a panel, refusing to select members of the panel, refusing to adopt the panel report, or blocking the authorization of sanctions. See Davey, *supra* note 2, at 8. Successive rounds of GATT negotiations further developed the process of dispute resolution. In the 1979 Tokyo Round, the contracting parties formalized the panel procedure, although any government could still block the formation of a panel or the panel report. See Jackson, *supra* note 2, at 116-17; Palmeter & Mavroidis, *supra* note 2, at 7-11. The 1989 Montreal Rules, negotiated as a set of interim rules during the Uruguay Round negotiations (1986-93), limited the parties’ ability to block the formation of a panel or the adoption of the panel’s report. These measures were incorporated into the final Uruguay Round Agreement. See Palmeter & Mavroidis, *supra* note 2, at 10-11.

block panel decisions or drag out implementation of the decision for three or more years.⁵

Without a well-functioning legal system, trade disputes were often resolved by negotiations between the interested parties, rather than decided on the merits of the case. Although the GATT regime did not have centralized enforcement, economically powerful governments monitored and enforced their interpretations of trade law by imposing sanctions on perceived violators.⁶ Most notably, the U.S. government unilaterally threatened sanctions to remedy what it perceived as unfair trading practices.⁷ By statute, Congress authorized (and attempted to require) the President to raise tariff rates against foreign nations that he determined were either violating international trade law (Section 301 sanctions) or failing to respect intellectual property rights (Special 301 sanctions).⁸ Although the decentralized enforcement of trade rules was arguably a violation of existing GATT law, unilateral sanctioning was both common and perceived as necessary given the weakness of the GATT dispute resolution system.

The bargaining context of the GATT system can be roughly characterized as a power-based system.⁹ The GATT system could not effectively resolve government complaints, so disputes were instead addressed through government-to-government negotiation. The outcome of these negotiations could be based on many factors, including the relationship between the two states (including non-

⁵ See A. Jane Bradley, Implementing the Results of GATT Panel Proceedings: An Area for Uruguay Round Consideration, *in* The New GATT Round of Multilateral Trade Negotiations 345, 349 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988).

⁶ See Robert E. Hudec, Mirror, Mirror on the Wall: The Concept of Fairness in U.S. Foreign Trade Policy, *reprinted in* Robert E. Hudec, *Essays on the Nature of International Trade Law* 227, 227 (1999).

⁷ See generally Thomas O. Bayard & Kimberly Ann Elliott, Reciprocity and Retaliation in U.S. Trade Policy (1994); Jagdish Bhagwati, Aggressive Unilateralism: An Overview, *in* *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System 1* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter *Aggressive Unilateralism*].

⁸ Trade Act of 1974, 19 U.S.C. §§ 2411–20 (2000); see Bhagwati, *Aggressive Unilateralism*, *supra* note 7, at 1–6.

⁹ Professor Jackson uses the dichotomy between rule- and power-based systems to describe changes in the international trading system. See Jackson, *supra* note 2, 109–12.

economic relations) and the relative importance of each state's home market to the other's exporters.

The WTO system was an attempt to centralize dispute settlement. Rather than having individual states both make their own determinations of trade law violations and enforce those determinations, the WTO system adopted a two-part approach. First, it ended the de facto veto over panel decisions and employed a reverse-consensus rule: The panel decision would be accepted unless every contracting member voted to reject the panel's determination. Because panel decisions would now be very hard to overturn, the WTO system incorporated an appellate procedure to check panel decision-making.¹⁰ The system is designed to adjudicate all cases, including appeals, within sixteen months.¹¹

Second, the WTO attempted to end decentralized enforcement of trade rules. Under the new system, states cannot employ sanctions for violations of trade rules unless authorized to do so by the WTO. The use of unilateral sanctions was also prohibited under the GATT system, but the rule was ignored because other means of enforcement were effectively unavailable. Under WTO rules, there is no longer a justification for using unilateral sanctions, and the rule banning decentralized enforcement is the foundation of the new system.¹²

When a defendant government fails to comply with a panel ruling, the parties must negotiate a compensatory solution—namely, compensation or the withdrawal of trade benefits to the defendant state. Under WTO rules, the level of compensation should be

¹⁰ But who watches the watchman? See Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 *Law & Pol'y Int'l Bus.* 109, 112–13 (2002) (arguing the appellate body is not following WTO dumping rules); see also Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 *Chi. J. Int'l L.* 333, 336–38 (2002) (discussing the agency costs of international adjudication).

¹¹ This timeline was negotiated at the insistence of the United States to keep WTO dispute resolution within the time frame for imposing Section 301 sanctions. If the DSU system took longer than sixteen months, then federal law could require the President to impose sanctions for alleged violations of international trade law before the WTO had ruled. See Trade Act of 1974, § 301, 19 U.S.C. §§ 2411, 2414 (2000).

¹² Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 1125 (1994) [hereinafter DSU].

roughly equal to the *present* injury from the violation; compensation is not available for injury that occurs while the complaint is being adjudicated.¹³ If the parties fail to reach an agreement on compensation, the issue is referred to an arbitration panel that determines the maximum level of sanctions.¹⁴ The rules are thus designed to take the power to authorize sanctions out of the hands of individual states. For instance, the United States' use of sanctions—the so-called Section 301 sanctions—is not permitted under the WTO system unless a panel authorizes the sanctions and the sanctions are within the limits set by arbitration.¹⁵

In practice, the WTO system of dispute resolution retains aspects of a negotiation system. If there is an alleged violation of trade rules, injured parties may request a panel to determine the merits of the dispute. The parties are obligated to attempt to reach a negotiated solution before the panel ruling, but the defendant government cannot block the eventual formation of a panel. If a panel is formed, the panel's ruling is adopted unless all of the contracting parties reject the decision. The decision is subject to appellate review. Even at this stage, the system involves negotiation. In practice, the parties can reach a settlement that does not comply with the letter of the panel's ruling, just as parties in domestic cases can settle for less than the judgment.

The economic power of the parties remains important because governments must still resort to self-help mechanisms—limiting national market access—to enforce WTO decisions. Consequently, governments that have large import markets have greater economic power to sanction violators. Governments with large internal markets, such as the United States and the European Union, have the capacity to “enforce” judgment awards. By contrast, governments with smaller home markets, such as Costa Rica or Thailand, may not have the capacity to enforce an award.¹⁶ The ultimate

¹³ DSU, *supra* note 12, art. 22.4; see also Palmeter & Mavroidis, *supra* note 2, at 168–71.

¹⁴ DSU, *supra* note 12, arts. 22.6 & 22.7. For a clear description of DSU sanctioning procedures, see Palmeter & Mavroidis, *supra* note 2, at 168–71.

¹⁵ See Panel Report, United States—Sections 301–310 of the Trade Act of 1974, WT/DS152/R (Dec. 22, 1999).

¹⁶ The complaining state may find that the level of sanctions they can threaten is too low to bother to apply sanctions at all. For example, under the GATT system the Netherlands was authorized, but never did impose sanctions on the United States in

negotiated solution to trade disputes thus may depend on the economic power of the complaining government.¹⁷ For instance, a negotiated settlement between the European Union and the United States will be much closer to the panel ruling than a negotiated settlement between Thailand and the United States. The European Union's market is larger than Thailand's and thus the European Union has a greater capacity to sanction the United States by restricting access to its market. The United States would therefore likely be willing to make greater concessions to the European Union than Thailand after an adverse panel ruling.

Nonetheless, the revised WTO system is a break from past practice that alters the nature of trade policy bargaining. Governments have ceded decision-making power over definition of the substantive treaty rules to a third party arbitrator. Parties are bound to WTO findings of trade rule violations. Additionally, a complainant government cannot threaten sanctions if the WTO panel finds that no violation has occurred. For instance, the United States government's ability to pressure the Japanese government into modifying the structure of its film market was significantly curtailed once the panel found in favor of Japan.¹⁸

Together, these structural changes in dispute resolution have changed trade law within the United States in two ways: They have made temporary violations of trade agreements easier but permanent violations more costly. First, temporary violations are easier because the contracting parties have agreed to refrain from retaliatory sanctions until the complaint has been adjudicated at the WTO. If the WTO finds that a violation has occurred, then the compensatory sanctions can only be applied for injury caused after the panel has ruled. Governments can thus apply protection in vio-

response to trade barriers on dairy products. See *Netherlands Measures of Suspension of Obligations to the United States* (Nov. 8, 1952) GATT B.I.S.D. (1st Supp.) at 32 (1953); see also Jackson, *supra* note 2, at 116; Palmetier & Mavroidis, *supra* note 2, at 168.

¹⁷ Several trade scholars have presented proposals to change the remedy stage to equalize power between states. See, e.g., Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 *Am. J. Int'l L.* 335, 342–45 (2000) (arguing that states not injured by trade violations should be permitted to adopt sanctions to enforce WTO judgments).

¹⁸ See Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, at 488–89 (Mar. 31, 1998).

lation of trade rules until the international litigation is complete (approximately sixteen months) without penalty.

Second, the WTO system has made permanent violations of the trade agreement more costly because sanctions are more certain. The threat of counter-retaliation or delay was ever present under the GATT.¹⁹ Either the complaining government waited until the international litigation was completed (in which case the defendant government could delay the panel report or implementation of the decision for years²⁰), or it applied sanctions unilaterally. Unilateral sanctions were also violations of the trade agreement, however, and the defendant state could threaten counter-retaliation. This threat was particularly effective for economically powerful defendant states that could block market access to complaining states.

The WTO eliminates these problems by putting the contracting parties on a stricter timeline and authorizing specific levels of sanctions. Sanctions are thereby legitimized, while unilateral counter-retaliation is not. Although the WTO effectively permits temporary violations and limits the degree to which complaining states can sanction violators, the system raises the costs of permanent violations. Governments are regularly authorized to apply sanctions against violators, and economically powerful governments cannot use the threat of counter-retaliation to forestall these penalties.²¹ By centralizing the authority to use sanctions, the WTO system increases enforcement by making threats of sanctions more credible.

The WTO changes the bargaining position of the United States in negotiations over trade law compliance. The rule-based system increases enforcement of trade law against U.S. trade practices; curtailing the use of defensive sanctions adds credibility to the foreign threats of sanctions. The United States' offensive use of sanc-

¹⁹ See Stewart & Callahan, *supra* note 1, at 12.

²⁰ Under the GATT system, panel reports could be blocked and respondent governments could maintain that their trade practices were consistent with international obligations. See Robert E. Hudec, "Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments, *reprinted in* *Essays on the Nature of International Trade Law*, *supra* note 6, at 117, 120 (noting that in the late 1970s, the European Union began blocking adverse decisions against it; the United States engaged in similar actions to block).

²¹ See Kyle Bagwell & Robert W. Staiger, *The Economics of the World Trading System* 54 (2002); Jackson, *supra* note 2, at 124-27; see also Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 54-60 (2d ed. 1999).

tions is also constrained. The WTO system restricts the use of sanctions absent a finding of violation by a panel. Consequently, the United States' ability to unilaterally determine if its trading partners are violating trade rules is limited.

II. CURRENT EXPLANATIONS OF U.S. STRATEGY

The United States government's decision to champion the WTO system of rule-based dispute resolution is puzzling when considered against the alternative of power-based bargaining. Under the GATT regime, the United States could challenge the trading practices of other states while shielding its own laws from similar attacks. Although the GATT system prohibited unilateral retaliation, states regularly engaged in unilateral action because of the GATT institutions' inability to enforce trade rules effectively. It thus seems odd that the United States government would press the issue of rule-based dispute resolution. Other governments, who would presumably benefit from greater enforcement of trade rules against the United States, were also reluctant to embrace a rule-based system. The European Community and the Japanese government resisted this system, as did many American legislators. Current international law theories of dispute resolution provide unsatisfactory explanations for why the United States pressed for a rule-based dispute resolution system. Most accounts from international law focus on government-to-government negotiations, but ignore domestic bargaining over trade policy.

An exception to this trend is the argument, advanced by Professors Alan Sykes and Warren Schwartz, that governments supported the new WTO structure as a means to permit *more* defections to the agreement—the Dispute Settlement Understanding was designed to permit efficient breaches of the WTO contract.²² Using a political economy sense of efficiency, they argue that the problem with the GATT was not compliance, but over-deterrence: Governments could threaten to sanction defections and thus pre-

²² See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in The World Trade Organization*, 31 *J. Legal Stud.* S179, S182–92 (2002). Professor Peter Rosendorff makes the same argument in more formal terms. See B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 *Am. Pol. Sci. Rev.* 389, 390 (2005).

vent governments from violating the agreement even when the violator would be willing to pay adequate compensation. They maintain that the only real change accomplished in the WTO structure is a limit on injured states' sanctioning ability.²³ Consequently, the WTO system was designed to limit punishment of violators and allow more defection rather than less.

Schwartz and Sykes provide a satisfying explanation for why sanctions in the WTO system are limited to those that compensate, and not deter, breach. Their account, however, does not provide an answer to why the United States government supported the WTO. The United States should have been able to efficiently breach the substantive economic contract regardless of the WTO procedure by negotiating informal side payments. Over-deterrence is only a problem for relatively small-market states where the sanctions from large-market states might eliminate opportunities for politically beneficial deals. Given the size of the United States market relative to the size of other possible sanctioning government's markets, it is unlikely that the United States government needed the WTO to facilitate efficient breaches.²⁴

III. AN ALTERNATIVE APPROACH: DOMESTIC BARGAINING POWER

Professor Robert Hudec suggests that the European Union finally overcame its reluctance to consent to rule-based dispute resolution as a way to constrain the U.S. Congress.²⁵ At the time of the Uruguay Round negotiation, Congress was undertaking domestic legislation which would further require the President to impose sanctions when domestic agencies concluded that other governments had violated trade laws. European nations viewed the WTO

²³ “[C]onsider the question of what really changes under the new DSU. . . . The primary difference is that [sanctioning] measures can now be reviewed by a binding arbitral panel for excessiveness before they can be put into place, whereas before they were unilaterally announced and implemented without review by the GATT.” Schwartz & Sykes, *supra* note 22, at S203.

²⁴ Professor Sykes discusses how contracting parties could make such politically efficient breaches under GATT rules. See Alan O. Sykes, Protectionism as a “Safe-guard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations, 58 U. Chi. L. Rev. 255, 278–83 (1991).

²⁵ See Robert E. Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 8 Minn. J. Global Trade 1, 13–14 (1999).

as a way to neutralize the American use of unilateral sanctions. Hudec's explanation helps us understand why other governments conceded to the U.S. request for rule-based dispute resolution, but it does not explain why the United States itself wanted a system of rules rather than a system of negotiation.

The President, I will argue, had reasons similar to those of our trading partners to push for a rule-based dispute resolution mechanism. By placing an international constraint on the President, the WTO improves the President's bargaining power with Congress. Binding international procedures, which the executive can negotiate, limit the ability of Congress to impose its own rules on the conduct of trade policy in the domestic policy sphere. While rule-based dispute resolution limits the ability of the United States to use its economic power internationally, the WTO system increases the relative power of the executive over substantive trade law. The U.S. government's outward preference for binding dispute resolution is thus best understood by considering the domestic politics of trade policy.

To demonstrate this argument, I present a bargaining framework where the President is engaging in both international and domestic negotiations. Professor Robert Putnam has described this framework as a two-level game.²⁶ Government representatives must reach an agreement in international negotiations that can be ratified at home. Putnam argues that the domestic-level game affects international bargaining by serving as a credible constraint. Diplomats can effectively refuse to make concessions if the other government's representatives believe that the concessions would be politically unacceptable at home. The reverse is also true: Changes in the international system can alter the way that issues are considered in domestic politics and influence the bargaining dynamics at home.²⁷

²⁶ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *Int'l Org.* 427, 434 (1988).

²⁷ Dan Drezner has recently edited a volume on this effect. See Daniel W. Drezner, *Introduction: The Interaction of Domestic and International Institutions*, in *Locating the Proper Authorities 2* (Daniel W. Drezner ed., 2003); Duncan Snidal & Alexander Thompson, *International Commitments and Domestic Politics: Institutions and Actors at Two Levels*, in *Locating the Proper Authorities*, *supra*, at 197.

A. The Two-Level Game Framework

Constraints can increase a party's bargaining power. This conclusion at first seems counterintuitive: The party with the most flexibility in negotiations would appear to have an advantage because it has more options. Yet constraints may prove beneficial by lending credibility to a party's negotiating position.²⁸ For instance, governments often must have legislatures ratify any agreement reached in international negotiations. If Government *A* is known to have a legislature that will not ratify any agreement that includes a particular concession, then Government *A*'s refusal to grant that concession will be credible in international negotiations. Government *B* will not ask for the concession when the domestic constraint exists, even if it would have pressed for the concession otherwise. Of course, strong constraints can also be detrimental to concluding agreements if the constraints stop the parties from reaching any agreement at all. Agreement may be impossible if the two parties have legislatures that will not ratify any accord that does not give the largest share of the gains to their side.²⁹

In a two-level game, an agreement must be acceptable on both the international and domestic levels, but the levels are not analytically separate. Restrictions on either level influence the bargaining on the other level by imposing credible constraints. Extending this logic, other bargaining theorists have sought to determine when governments will *create domestic constraints* to improve their international bargaining power. Professor Jongryn Mo provides a

²⁸ Thomas C. Schelling, *The Strategy of Conflict* 19 (1960). Two-level games are now a standard framework for understanding international negotiations. See, e.g., Keisuke Iida, *When and How Do Domestic Constraints Matter?*, 37 *J. Conflict Resol.* 403, 403–05 (1993); Jongryn Mo, *The Logic of Two-Level Games with Endogenous Domestic Coalitions*, 38 *J. Conflict Resol.* 402, 402–06 (1994); Andrew Moravcsik, *Integrating International and Domestic Theories of International Bargaining*, in *Double-Edged Diplomacy* 3, 4–5, 33 (Peter B. Evans et al. eds., 1993).

²⁹ See Putnam, *supra* note 26, at 433–41. The impasse could be caused by different bargaining problems. First, the legislatures of each state prefer no agreement to an agreement for something less than they are demanding. Here, the win set is empty and negotiations only take place because the governments have incomplete information about the other government's preferences. Second, the bargaining may break down over distributional concerns. Here, the governments leave possible gains on the table in the hope of receiving a larger share of the gains in later negotiations. See James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 *Int'l Org.* 269, 280–93 (1998).

model whereby a government chooses whether to grant veto power over international bargains to a domestic group. The model demonstrates that a government can increase its bargaining power with the foreign state by creating a domestic veto player.³⁰

International constraints can benefit the constrained party in domestic bargaining, just as domestic constraints can aid international bargaining. When bargaining with Congress, the President frequently has international constraints that add credibility to his position. Members of Congress understand that if they do not accept the policy negotiated by the President, then agreement at the international level may not be possible.³¹ If the President did not have an international constraint, then members of Congress could bargain with the President and move the resulting policy closer to their preferred outcome. Consequently, the President is often aided, not hampered, by having an international constraint that makes his bargaining position more credible at the domestic level. For instance, Professor Judith Goldstein demonstrates that the President can use international agreements to limit Congressional oversight of bureaucratic adjudication of trade remedy laws,³² Professor Keisuke Iida discusses how WTO adjudication influences bureaucratic politics in Japan,³³ and Professor James Vreeland pre-

³⁰ See Jongryn Mo, Domestic Institutions and International Bargaining: The Role of Agent Veto in Two-Level Games, 89 *Am. Pol. Sci. Rev.* 914, 914–15 (1995). If the foreign government has complete information over the home government's preferences, Mo predicts that the home government will always want an agent with veto power. If the foreign government has incomplete information, he predicts that the home government will grant the agent veto power if the agent's preferences are close to those of the government. *Id.* at 916–21.

³¹ To aid international bargaining, members of Congress will occasionally promise not to negotiate with the President over international policies by pre-committing to either accepting the President's position wholesale or staying with the status quo. On trade issues, this promise is known as fast-track negotiations.

³² See Judith Goldstein, International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws, 50 *Int'l Org.* 541, 556–60 (1996). Under the Canadian-U.S. Free Trade Agreement (later expanded to the North American Free Trade Agreement), disputes over the application of anti-dumping and countervailing duties laws can be appealed to a bi-national panel. The panel applies national law, not international law, yet is free from Congressional oversight. Goldstein argues that the President accepted this Canadian negotiating demand as a means to gain greater control over his own bureaucracy. *Id.* at 544–46, 556–57.

³³ See Keisuke Iida, Why Does the World Trade Organization Appear Neoliberal? The Puzzle of the High Incidence of Guilty Verdicts in WTO Adjudication, 23 *J. Pub. Pol'y* 1, 8–10 (2003).

sents evidence that executives with strong domestic opposition often turn to the IMF to enact domestic changes.³⁴

But why create an international body to constrain domestic trade policy? The President has different trade preferences than Congress, and the international constraint grants the President greater control over domestic trade policy. In the two-level trade game, the President negotiates with foreign governments and Congress concurrently. The President has different trade preferences than Congress but does not necessarily prefer complete compliance with the free trade agreement. All elected officials support the economic growth that freer trade policies produce, but they are sensitive to adverse effects that trade liberalization can bring: Legislators do not want industries in their district to face increased foreign competition, and the President is similarly concerned with protecting key electoral interests. Consequently, the President and members of Congress will prefer trade policies that mix freer trade and protection, but they will not prefer the same mix of these policies.³⁵

First, the President and members of the Senate represent different constituencies. The President wants to promote economic growth nationally, while senators are re-elected based on the economic growth of their respective states.³⁶ Consequently, the Senate, as a collective body, will give much greater weight to the economic well-being of sparsely populated states than the President will. Cer-

³⁴ See James Raymond Vreeland, *Institutional Determinants of IMF Agreements 1–5* (Feb. 6, 2004) (unpublished manuscript, on file with the Virginia Law Review Association).

³⁵ The political science literature on President and Congressional trade preferences is vast, including: I.M. Destler, *American Trade Politics* (4th ed. 2005); Michael J. Gilligan, *Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy* (1997); David A. Lake, *Power, Protection, and Free Trade: International Sources of U.S. Commercial Strategy, 1887–1939* (1988); Sharyn O'Halloran, *Politics, Process, and American Trade Policy* (1994); Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 *World Politics* 309 (1997); Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 *Int'l Org.* 669 (1999); David Karol, *Divided Government and U.S. Trade Policy: Much Ado About Nothing?*, 54 *Int'l Org.* 825 (2000); Peter J. Katzenstein, *Conclusion: Domestic Structures and Strategies of Foreign Economic Policy*, 31 *Int'l Org.* 879 (1977); Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 *Int'l Org.* 595 (1994).

³⁶ See O'Halloran, *supra* note 35, at 36.

tainly, the economic health of key states will concern the President, but he is best able to maximize his electoral support by producing economic growth in more densely populated states. In addition, the economic base in sparsely populated and densely populated states differs—sparsely populated states are far more dependent on agriculture, an industry in which the United States generally does not have a comparative advantage. The result is that the trade policy that maximizes the President's electoral support will not be the same policy that maximizes electoral support in the Senate.

Second, the process for devising trade policy differs between the President and Congress. The executive branch works as a hierarchy, making it relatively easy for the President to devise a trade policy that maximizes his electoral support by liberalizing trade while offering protection to key constituencies.³⁷ By contrast, members of Congress must devise a trade policy that can garner a legislative majority but protect the districts of senior legislators who have agenda-setting and gatekeeping authority. Again, the President's preferred trade policy may differ substantially from the one Congress would select. The President may be willing to sacrifice industries that are dear to senior legislators, and vice versa.

Between the President and Congress there will be a range of trade policies that are acceptable, meaning that both the President and a majority of Congress will prefer the new policy to the status quo. Which policy is selected depends on who has agenda-setting power. The President has this power when bargaining internationally, but loses it in the statutory lawmaking process. The WTO aids the President in keeping trade policy closer to his preferences by making Congressional deviations from the trade agreement more costly.

The WTO permits the President and Congress to temporarily provide protection to favored industries, but it makes permanent defections more costly. This system increases the President's control over trade policy in two ways. First, the system allows the President to provide temporary protection to key groups more easily than members of Congress. The President can provide protec-

³⁷ See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. Rev.* (forthcoming June 2006) (manuscript at 23–24, on file with author).

tion, in the form of administrative safeguard actions, through executive order, while Congress has to pass a statute. Consequently, the President can target specific groups quickly, while members of Congress have to build majority support for trade protection (making it difficult to keep the number of groups provided with protection small) and find space on the legislative agenda.

Second, the WTO system helps the President's trade preferences stick in domestic politics. The President negotiates international agreements, allowing him to move trade policy closer to his preferred mix of trade protection and liberalization. Members of Congress can violate the trade agreement *ex post*, through ordinary statutory lawmaking, just as they could under the GATT system. Under the WTO system, however, legislative rollback of the international agreement is more costly.

The WTO system also makes permanent violations of the trade agreement more costly for the President. The President can mitigate these increased costs, however, because he has access to ongoing multilateral trade negotiations. The WTO dispute resolution system simply enforces the terms negotiated by the parties.³⁸ Consequently, the President can address adverse panel rulings during trade negotiations while members of Congress cannot.

If Congress loses bargaining power over trade policy relative to the President under this system, the question then is why Congress would approve the Uruguay Round Agreement that ushered in the WTO. The President's motives for gaining bargaining power seem clear, but Congress's motives in approving the WTO system are less obvious. The answer lies in the President's power over the content of international deals. The WTO's dispute resolution procedures were part of a package of trade negotiations included in the Uruguay Round. Congress had to accept the entire package to gain the benefits of the trade agreement, including intellectual property protections. As Part IV of this Essay will demonstrate in more detail, members of Congress did object to the WTO dispute resolu-

³⁸ Even principles fundamental to the international trade system, such as non-discrimination of goods based on national origin, can be violated if approved by the contracting parties. For example, regional trade agreements lead to discrimination of goods based on national origin. Yet this violation of a fundamental rule of the WTO is permitted because the contracting parties included an exception for such agreements in the trade agreement.

tion procedures during ratification and attempted to limit the procedures' effects, but they were ultimately unsuccessful.

B. Negotiating Compliance with Congress

1. U.S. Violations of Trade Agreements

The WTO is most useful when the President negotiates with Congress over domestic law, so developing a clear conception of how the United States violates trade agreements is critical. The United States can defect from an agreement in one of three ways: the President can act unilaterally; Congress can pass a statute that the President does not veto; or existing domestic law can be found to be in violation. This Essay addresses the latter two situations, but it is worthwhile to briefly discuss the implications of unilateral action on the part of the President.

The President can decide, on his own, to violate the terms of trade agreements because administrative decisions regarding either tariff levels or the application of trade remedy law are both within his discretion.³⁹ Because the President has different trade preferences than Congress, he may choose to violate a trade agreement when members of Congress would not.

When the President violates trade agreements, he most often uses safeguard actions granting temporary protection for industries injured by unforeseen surges in imports.⁴⁰ The WTO explicitly permits such protection on a temporary basis when safeguard requirements⁴¹ are met, but it also permits, albeit de facto, temporary safeguard protection even when the requirements are not met. Because damages are only assessed *after* the DSU finds a government in violation of trade law, the President can temporarily impose safeguard protection without penalty until the issuance of the DSU ruling. Consequently, the WTO system curtails the President's power to grant permanent protection, but permits temporary protection to key constituencies.

³⁹ See Trade Act of 1974 §§ 201, 301, 19 U.S.C. §§ 2251, 2411 (2000).

⁴⁰ Trade Act of 1974 § 201, 19 U.S.C. § 2251 (2000).

⁴¹ See General Agreement on Tariffs and Trade art. XIX, Oct. 30, 1947, 61 Stat. A-11, A-58-59, 55 U.N.T.S. 194, 258-60 (requiring unforeseen developments that cause or threaten serious injury to domestic producers as prerequisites for protection).

President Bush's decision in 2002 to raise the duties on steel imports is one example. Higher tariffs on steel benefited key electoral constituencies in Pennsylvania and West Virginia. The steel tariffs were temporary: President Bush maintained the tariffs for twenty months and then removed them once the WTO found the action to be a violation of trade law.⁴² Under the WTO, the President is more likely to face sanctions for longer-term violations of trade law. But the President controls negotiations over the content of trade agreements and can attempt, during negotiations, to include protection in the terms of an agreement.

The second way the United States can violate a trade agreement is when Congress passes legislation knowing it conflicts with existing trade agreement terms. The President can veto or sign such legislation, but often, the offending part of the bill is a relatively minor part of the overall legislative package. For instance, the bill may address multiple domestic environmental issues, only one of which creates international trade problems. Or the bill may contain an amendment, unrelated to the rest of the legislative package, that violates the terms of a trade agreement. In both situations, the President may choose not to veto the legislation despite the violation of trade law. The President's veto power is limited because he cannot apply it delicately. The President must reject the entire legislative package, which may otherwise bring him significant domestic benefits, to eliminate a single provision that will cause an international problem. Because Congress understands this dilemma, the President's threats to veto trade legislation are often viewed as not credible.⁴³

⁴² Rossella Brevetti & Christopher S. Rugaber, *Bush Ends Steel Safeguard Tariffs in Face of Threat by EU to Retaliate*, *WTO Rep. (BNA)* Dec. 5, 2003 (on file with author).

⁴³ Before the passage of the Reciprocal Trade Agreements Act in 1934, the President only explicitly threatened to veto tariff schedules in 1894, 1909, and 1930, but Congress ignored these threats. See Lake, *supra* note 35, at 84–85 (1988). When Congress defects from a trade agreement through legislative amendment, there is a difference between a state's decision to defect in the prisoner's dilemma game—the standard framework for understanding defection from trade agreements—and the reality of American non-compliance. The prisoner's dilemma game assumes that the decision to defect is made under the same process as the decision to create the agreement. But in the complexity of domestic politics, a different dynamic takes place. When forming the agreement, the President has agenda control and the Congress has a veto. When Congress violates the treaty through statute, however, Congress determines the con-

President Clinton's refusal to veto the bill that contained the Byrd Amendment—creating a change to anti-dumping law that violates international law—is one such instance. The bill submitted to the President for signature concerned agriculture appropriations. Senator Byrd attached an amendment knowing it would violate international trade law, but also knowing that the bill was too politically important for the president to veto. The senator calculated correctly. President Clinton openly opposed the Byrd Amendment on international law grounds but was unwilling to take the political heat that would come from blocking the entire bill.⁴⁴

Rather than vetoing a multiple-issue legislative package, the President can choose to slice off the single offending issue at a later date. In this situation, the President is left to negotiate with Congress over existing legislation. The President pays a cost for this choice; he loses any veto power because the legislation already exists, and he must get a majority of Congress to reverse the earlier rule.

The President gains greater agenda control of trade policy because the international agreement is harder to violate, not because he actively controls the domestic compliance process *ex post*. Through the WTO, the President keeps agenda control of trade policy by making violations of the trade agreement more costly. This power is not formal: Legislators must balance the costs of WTO sanctions with the benefits of keeping provisions of domestic law that deviate from the trade agreement without any active participation by the executive. The President can be politically passive through this process, allowing the threat of sanctions to do the coercive work. For example, the President did not have to use political capital to motivate legislators to repeal the Byrd Amendment.

To members of Congress, the primary difference between the two regimes is the certainty of sanctions. Under the GATT system,

tent of the law and the President has only a veto. This shift in power between the political branches means that the government may defect from more agreements than it would if the President had agenda control, as he does when negotiating the trade agreement.

⁴⁴ See Rossella Brevetti, *EU, Canada, and Japan Weigh In Against Dumping Measures in Ag Bill*, *WTO Rep. (BNA)* Oct. 27, 2000 (on file with author); Corbett B. Daly, *Japan Foreign Minister Urges Clinton Veto Of Bill Sending Duty Revenue to Industry*, *WTO Rep. (BNA)* Oct. 20, 2000 (on file with author).

legislators could violate trade rules but be relatively confident that the costs of such actions were low. If another member of the GATT threatened to sanction the United States, legislators knew that the United States could threaten counter-retaliation in response.⁴⁵ The threat of counter-retaliation, particularly from the United States, could deter most retaliation, insulating legislators from the costs of their decisions. Under the WTO system, legislators cannot threaten counter-retaliation because the WTO system bars unilateral action, by either plaintiff or defendant governments. Without the threat of counter-retaliation, WTO-authorized sanctions are far more likely to be applied, and legislators bear more of the costs of trade violations.

Finally, a state may not “decide” to violate a trade agreement, but rather discover that domestic laws that pre-date the international agreement are not consistent with international trade rules. When trade agreements dealt primarily with tariff levels, compliance with the trade agreement was relatively transparent. States could disagree about whether some goods fit into product classifications, but it was easy to observe whether national tariff schedules matched the internationally negotiated schedules.

As trade agreements expand to non-tariff barriers to trade, determining whether the state is complying becomes more complex.⁴⁶ International rules apply to a wide range of domestic laws, not just tariff schedules. Some of these laws may violate the trade agreement on their face, but others may violate the agreement only in application. In addition, whether the domestic statute violates trade law is often a point of disagreement. The state might have understood its own law to be in compliance in earlier periods, but later might accept that a violation exists.⁴⁷ A state can thus be said

⁴⁵ Although unilateral sanctions were technically a violation of GATT rules, the inability of GATT institutions to authorize sanctions made unilateral threats to sanction the only viable means of enforcing trade law. By contrast, WTO institutions are capable of reaching multilateral decisions on when trade law has been violated and can also authorize sanctions. Member governments can no longer justify unilateral sanctions as a necessary element of enforcing trade law. See *supra* Part I.

⁴⁶ See Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 *Wis. L. Rev.* 551, 598.

⁴⁷ If the government actors are boundedly rational, they may also not exhaustively search current law to look for inconsistencies and thus be genuinely surprised by the violation.

to defect from an agreement due to long-standing domestic laws or domestic initiatives not primarily aimed at trade. Although the President had veto power when the statute was passed, by the time he negotiates with Congress to comply with trade agreements, he no longer has veto power over the offending legislation.

The consequence is that the President often bargains with Congress to change *existing* domestic law in the latter two situations. Without the WTO, compliance in this scenario is difficult to achieve domestically. The President has the exclusive constitutional authority to negotiate trade agreements (or any other international agreement) on behalf of the nation,⁴⁸ while Congress has jurisdiction to set tariff levels and pass domestic regulations that influence international trade.⁴⁹ Without international bargaining over trade policy issues, the President's role in determining trade law is restricted to the veto. The President does not even have the veto threat when negotiating with Congress over existing statutes that violate trade law. The WTO shifts trade policy power towards the President by making such deviations from the trade agreement more costly to legislators.

2. *Examples of the WTO's Effect on Domestic Law*

In the time since the passage of the WTO agreement, the United States has changed its domestic law to comply with international rulings. Most notably, the United States altered its tax system regarding export subsidies. The European Union ("EU")⁵⁰ had long claimed that the United States gave its exporters special breaks by exempting from income tax large portions of overseas sales.⁵¹ The United States maintained that it was simply leveling the playing field between exporters because European nations used a territorial tax system that had a similar effect.⁵²

⁴⁸ See U.S. Const. art. II, § 2, cl. 2.

⁴⁹ See U.S. Const. art. I, § 8.

⁵⁰ During different periods of GATT and WTO history, the common market of European States has developed from the European Coal and Steel Community to the European Economic Community to the European Community to the European Union. To simplify the exposition, I use the common market's current name, the European Union, to refer to all of these organizations.

⁵¹ See Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 59–65 (1993).

⁵² *Id.* at 63.

Resolution of the issue had a long and largely unsuccessful history under the GATT. A GATT panel found that the United States violated trade law, but also found that certain European tax systems violated trade rules as well. After many years of negotiation, the contracting parties adopted a compromise interpretation of GATT law that permitted territorial tax systems. The United States used this interpretation to defend its tax code against the objections of the GATT membership.⁵³ The trade dispute dragged on for twelve years (the panel process took four years to complete and the contracting parties did not achieve a compromise for another eight years) and produced no significant changes. The United States ultimately passed new tax legislation but the legislation primarily changed the form, not the substance, of the export subsidy.⁵⁴

After the WTO system was in place, the European Union decided to bring the case again. In 2000, the appellate body affirmed a panel judgment for the EU, and a panel later authorized the Europeans to impose \$4 billion in sanctions.⁵⁵ This time the U.S. bargaining position was different because the United States could neither block the panel report nor threaten counter-retaliation. Exporters, who were likely to be hit by the sanctions, viewed the threat of sanctions as credible and responded accordingly.⁵⁶ Companies as diverse as Motorola, International Paper, General Elec-

⁵³ Id. at 86–95.

⁵⁴ Id. at 95–97.

⁵⁵ Appellate Body Report, United States—Tax Treatment for “Foreign Sales Corporations,” WT/DS108/AB/R (Feb. 24, 2000); see also Alison Bennett et al., WTO Gives EU Green Light for \$4 Billion in Sanctions Against United States Over FSCs, WTO Rep. (BNA) Sept. 3, 2002 (on file with author).

⁵⁶ See, e.g., Mark L. Movsesian, Enforcement of WTO Rulings: An Interest Group Analysis, 32 Hofstra L. Rev. 1, 10–15 (2003) (explaining why exporters, and subsequently the EU, responded to sanctions in the Bananas case); Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism, 6 Theoretical Inquiries in L. 215, 223–26 (2005) (discussing the effectiveness of retaliation in motivating exporters to pressure their own government to abandon the offending trade policy). For a formal discussion of how export groups can maintain a freer trade equilibrium, see Michael J. Gilligan, Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy 13–14 (1997).

tric, and Pepsi started lobbying campaigns in response to the threat.⁵⁷

The Treasury Department put forward a proposal to change the tax code, but Congress was slow to act until the EU began applying sanctions in March 2004. The EU started gradually, applying five percent tariffs on several goods at first and then raising tariffs an additional one percent each month.⁵⁸ Legislators acted relatively quickly after the sanctions were applied, passing the new exporter tax bill in October 2004.⁵⁹ The EU lifted the sanctions in January 2005, although they continue to contest aspects of the new legislation, which provide temporary tax breaks for certain exporters.⁶⁰

In response to the WTO's ruling, legislators also have recently repealed the Byrd Amendment, which awarded cash to domestic firms that brought complaints against importers.⁶¹ Congress was reluctant to alter the measure, but the recent threat of sanctions spurred action. The WTO panel authorized several contracting parties, including the EU and Japan, to impose \$150 million in sanctions. The EU and Canada started applying sanctions in May 2005, while Japan and Mexico did likewise in August 2005.⁶² In

⁵⁷ See Gary G. Yerkey, U.S. Companies Plan All-Out Effort Seeking to Remove Products from EU Retaliation List, *WTO Rep. (BNA)* Sept. 16, 2002 (on file with author).

⁵⁸ See Alison Bennett, Grassley Planning 'Full-Court Press' in Fall As Export Tax Repeal Faces Big Challenges, *WTO Rep. (BNA)* Aug. 26, 2004 (on file with author); Alison Bennett et al., Senate Passes Export Tax Conference Report; Still Unclear When President Will Sign Bill, *WTO Rep. (BNA)* Oct. 13, 2004 (on file with author).

⁵⁹ See American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418.

⁶⁰ Joe Kirwin et al., EU to End Sanctions in Wake of Export Bill But Plans Appeal of Grandfather Provisions, *WTO Rep. (BNA)* Oct. 26, 2004 (on file with author). A DSU panel recently issued a ruling in favor of the European Union on these exceptions.

⁶¹ Under American trade law, domestic firms can bring claims against foreign firms for dumping (selling goods below cost) or for receiving certain foreign subsidies. If an administrative agency finds that the foreign firm has either dumped its goods or received certain subsidies, then the United States raises the tariffs on these goods. Higher tariffs protect domestic industry and generate revenue for the Treasury. The Byrd Amendment now gives this revenue to the domestic firm that brought the complaint—providing the industry with both protection and a cash reward. See Daniel Pruzin & Gary Yerkey, Appellate Panel Upholds WTO Decision Against Byrd Amendment; EU Seeks Repeal, *WTO Rep. (BNA)* Jan. 17, 2003 (on file with author).

⁶² Michael O'Boyle, Mexico Slaps Punitive Duties on U.S. Goods Due to Noncompliance With WTO Byrd Ruling, *22 Int'l Trade Rep. (BNA)*, No. 34, at 1386 (Aug. 25, 2005). The remaining four complaining states—South Korea, Chile, Brazil and In-

February 2006, Congress repealed the measure in a budget reconciliation bill but phased out the Byrd Amendment's awards to importers over two years.⁶³

Even when complaining states have the right to sanction, we should expect that parties will often settle for something less than full compliance with the expected legal ruling. As Professor Andrew Guzman notes, enforcement of the decision can be difficult and costly.⁶⁴ Sanctions are a "double-edged sword," injuring businesses in both the sanctioned and sanctioning states.⁶⁵ Thus, governments generally want to reach a settlement rather than impose sanctions for non-compliance with panel decisions. Furthermore, the level of sanctions authorized by the WTO may be insufficient to convince legislators to repeal the offending provision entirely. The WTO system will not keep members of Congress from violat-

dia—have reserved the right to impose sanctions. *Id.* Mexico aimed its punitive duties at the U.S. dairy industry. The Mexican government has applied a thirty percent tariff on dairy products, which the U.S. Dairy Council suggested would cost the United States \$160 million in business with Mexico. See *id.*

⁶³ See Rossella Brevetti, House Approves Budget Measure Containing Byrd Amendment Repeal, 23 *Int'l Trade Rep.* (BNA), No. 5, at 184 (Feb. 2, 2006). The two-year transition period has left the sanctioning governments unsatisfied with American action and it is currently uncertain whether these governments will continue implementing sanctions against the United States. Daniel Pruzin, Trading Partners Reject U.S. Claims of WTO Compliance in Byrd Act Dispute, 23 *Int'l Trade Rep.* (BNA), No. 8, at 260 (Feb. 23, 2006).

⁶⁴ See Andrew T. Guzman, The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms, 31 *J. Legal Stud.* 303, 306, 323–24 (2002) [hereinafter Guzman, *The Cost of Credibility*]; Andrew T. Guzman, The Design of International Agreements, 16 *Eur. J. Int'l L.* 579, 580 (2005).

⁶⁵ Yerkey, *supra* note 57 (quoting spokesman for United States Trade Representative Robert B. Zoellick). Sanctions can be both beneficial and costly for the sanctioning state to apply. Steve Charnovitz, Should the Teeth be Pulled? An Analysis of WTO Sanctions, in *The Political Economy of International Trade Law* 602, 621–22 (Daniel L.M. Kennedy & James D. Southwick eds., 2002). Sanctions impose a dead-weight loss on the sanctioning state's economy. From a political economy perspective, the sanctioning government may gain some domestic political support if the sanctions can provide protection (rents) to some domestic producer groups. The likely political benefits of the sanctions will be small, however, because the sanctions that are most effective against the defendant state (that is, the sanctions that will lead to the greatest political pain for the defendant state's policymakers) are often not the same sanctions that bring the most benefits to the sanctioning state's government (that is, the sanctions do not provide rents to the domestic constituents that offer the greatest political benefits to the sanctioning government).

ing multilateral trade agreements, but it increases the costs of such violations.

C. Restricting the Offensive Use of Trade Sanctions

As much as international trade law favors exporters, the WTO dispute settlement system cannot be viewed as simply the tool of export interest groups. Exporters may generally prefer freer trade policies, but at least some exporters also want the United States to use sanctions unilaterally to open foreign markets. The President has a statutory obligation under Section 301 trade law to examine exporters' claims of a foreign government's unfair trade practices and to address violations.⁶⁶ Congress "authorizes" the President to adjust tariff levels to enforce compliance by other governments with international trade agreements, but often the President does not want this authority.⁶⁷ Congressional intrusion into trade relations has the potential to upset ongoing economic negotiations or other diplomatic endeavors. Accordingly, the executive can be reluctant to use the trade policy tools included in the statute, which has led Congress to limit the executive's discretion to refuse retaliatory measures.⁶⁸

But the WTO system limits the ability of the United States to act offensively: The United States can apply sanctions only when authorized to do so through the dispute resolution system. The result is that the international rules curtail the power of exporters to lobby the government into taking measures to open up foreign markets. This international restriction further expands the President's domestic bargaining power by giving him a means to deflect exporter pressure where the legal claim is weak, while still permitting the President to sanction foreign nations for true violations of trade law.

⁶⁶ 19 U.S.C. § 2411(a) (2000).

⁶⁷ See Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301, in Aggressive Unilateralism*, supra note 7, at 49, 57–65.

⁶⁸ In 1988, Section 301 was amended to require that the executive take action when other governments violated international trade law. Retaliation was made "mandatory" to spur a recalcitrant executive into international action, but the statute retained loopholes that permitted a limited level of executive discretion. See 19 U.S.C. §§ 2411(a), 2414(a)(1) (2000); Bello & Holmer, supra note 67, at 64.

An example is Kodak's complaint against Japan. For years, Kodak had lobbied Presidents George H.W. Bush and Clinton over alleged Japanese unfair trade practices. Kodak maintained that the Japanese structured their film market to prevent Kodak from competing with Fuji film and that this market structure was a violation of international trade law. With the support of prominent New York Senators Daniel Patrick Moynihan and Alfonse D'Amato, Kodak pushed for the application of unilateral sanctions by the United States.⁶⁹ The Clinton Administration recognized that the claim did not fall within traditional areas of international trade law: Kodak was effectively making an antitrust claim and the WTO did not require nations to adopt antitrust laws.⁷⁰ In addition, sanctions would have seriously complicated relations with one of the United States' largest trading partners.

Once the WTO system was up and running, President Clinton decided to take Kodak's claim to the new dispute resolution system. Kodak initially resisted this move but changed its mind once it was clear that the President would not adopt unilateral sanctions.⁷¹ The panel ultimately found that Japan had not violated the trade agreement, and the President opted not to appeal the loss.⁷² The WTO remedied the domestic pressure to act by adjudicating Kodak's claim without throwing trade relations with Japan into tur-

⁶⁹ See Iida, *supra* note 33, at 10–13; Keith Bradsher, *Kodak is Loser in Trade Ruling on Fuji Dispute*, N.Y. Times, Dec. 6, 1997, at A1.

⁷⁰ See Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 72 S. Cal. L. Rev. 1601, 1606, 1618–20 (1999); Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 Chi. J. Int'l L. 49, 57–58 (2000).

⁷¹ See *Trade Group Will Decide Kodak Case*, N.Y. Times, June 14, 1996, at D4; see also Hamilton Loeb & Benham Dayanium, *Unilateralism in International Trade Relations: The Recent United States-Japan Experience and Privatization of Unilateralism?*, 16 Ariz. J. Int'l & Comp. L. 77, 88 (1999) (noting that "the handling of the Kodak case by the USTR [United States Trade Representative] shows some reasons for hope that the unilateral approach is falling into disfavor. Kodak made no secret that it wanted the USTR to keep the case as a unilateral Section 301 action, rather than refer it to the WTO. Its chief executive and outside counsel both have long histories of successful pleading at the USTR. They did not prevail on this point.").

⁷² Report of the Panel, *supra* note 18, at 488–89. See also John Maggs, *US May Buck Tide, Take on the WTO*, J. Com., Apr. 9, 1998, at A1 (noting U.S. Trade Representative Charlene Barshefsky's announcement that the Kodak decision would not be appealed).

moil.⁷³ The President was able to appear receptive to domestic trade complaints, as demanded by domestic law, while legitimately refusing to apply sanctions because of the WTO ruling.⁷⁴

The Kodak example illustrates that the President can satisfy an exporter's demand for redress by taking the case to the WTO. If the panel is faithful to the texts of the agreements, it will authorize sanctions in meritorious cases and reject claims with less merit. When sanctions are applied under WTO authority the dispute is less likely to escalate than when sanctions are leveled unilaterally by a complaining state based on its own interpretation of trade law.

IV. CONGRESSIONAL CONSENT TO DISPUTE RESOLUTION

Although American negotiators consistently pushed for rule-based dispute resolution in international negotiations, the President had no easy task getting Congress to approve the new WTO dispute resolution system after negotiations concluded. As an observer of the Uruguay Round negotiations noted:

[T]here was also a long and sometimes anxious wait for governments to obtain the approval of national legislatures for the Uruguay Round package. Anxiety was greatest over approval by the US Congress, where some legislators argued that national sovereignty might be infringed by the new dispute settlement procedures for which American negotiators had fought so long.⁷⁵

When Uruguay Round negotiations began, the EU was blocking the panel process or delaying the implementation of panel decisions in five cases in which the United States was a plaintiff.⁷⁶ Consequently, members of Congress were initially supportive of stronger international rules for dispute settlement. When Congress authorized the President to negotiate the Uruguay Round under

⁷³ See Stephan, *supra* note 70, at 72.

⁷⁴ See Charles A. Brill & Brian A. Carlson, U.S. and Japanese Antimonopoly Policy and the Extraterritorial Enforcement of Competition Laws, 33 *Int'l Law* 75, 115 (1999) (arguing that "transferring the [Kodak] dispute to the WTO allowed the [Clinton] administration to avoid the potential fallout from adjudicating the dispute while simultaneously showing support for the WTO").

⁷⁵ See Croome, *supra* note 1, at 380.

⁷⁶ The United States filed complaints concerning wheat flour, pasta products, canned fruit products, citrus products, and the European value-added tax. See Hudec, *supra* note 51, at 200–24.

“fast-track” procedures in the Omnibus Trade and Competitiveness Act of 1988, legislators included negotiation instructions. On the topic of dispute resolution, Congress instructed that:

The principal negotiating objectives of the United States with respect to dispute settlement are (A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and (B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.⁷⁷

Note that Congress’ focus was on the “better enforcement of *United States* rights”—that is, multilateral acceptance of the United States’ unilateral actions (through Section 301 sanctions), rather than a commitment to multilateral dispute resolution. Congressional support for the dispute resolution procedures fell as legislators contemplated having to change domestic law to comply with international rules. Presidential support for strong dispute resolution procedures did not decrease, however, and American trade negotiators continued to demand that the contracting parties submit all trade claims to third-party adjudication. The final negotiated agreement included stronger dispute settlement provisions even though the President anticipated congressional opposition to these procedures.

The Uruguay Round package received a mixed reception in Congress. Although legislators were happy with the General Agreement on Trade in Services (“GATS”), the agreement to open up foreign markets in services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), the agreement to provide greater intellectual property protections, they argued that the new WTO dispute resolution procedures would lead to a loss of legislative sovereignty.⁷⁸ Despite this concern, the “fast-track” process prevented members of Congress

⁷⁷ Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901(b)(1) (2000).

⁷⁸ See Hudec, *supra* note 51, at 14–15, 193–94; Gary N. Horlick, WTO Dispute Settlement and the Dole Commission, 29 *J. of World Trade* 45, 46 (1995); Gary R. Saxonhouse, Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success, *in* *Issues and Options for U.S.-Japan Trade Policies* 363, 363 (Robert M. Stern ed., 2002).

from changing the result of the international negotiations. They agreed to vote on the Uruguay Round as a package because rejecting the negotiations wholesale would result in the loss of the benefits in services and intellectual property. Of course, if Congress had rejected the package, the Uruguay Round agreement would have been renegotiated. As negotiations had already gone on for seven years, demands to renegotiate would mean that the benefits of the trade agreement would not be realized for several more years.

Why did legislators agree to a dispute resolution system that limited its own bargaining power in the international trade system? The President prefers such a system because the international constraint increases his bargaining power domestically. But why would Congress approve this system? Not only do legislators lose bargaining power with other nations, they also lose bargaining power relative to the President.

Legislators agreed to the Uruguay Round because it was bundled with other substantive agreements that they wanted. Under these circumstances, we should expect legislators to attempt to unbundle these agreements—accepting the agreement they prefer and rejecting the dispute resolution agreement. This is exactly what we observe when the Uruguay Round Agreement was submitted to Congress for approval. Legislators attempted to unbundle the agreements, accepting the TRIPS, GATS, and GATT agreements, but rejecting the DSU agreement. But the attempt to unbundle the Uruguay Round agreements failed. Trade negotiations depend on governments committing themselves *ex ante* to accept or reject the terms of the agreements wholesale. Without such fast-track negotiating authority, other governments will not engage in free trade negotiations.

Senate Minority Leader Robert Dole, who supported the substance of the agreement, attempted to separate the dispute resolution system from the rest of the trade package by agreeing to support the Uruguay Round agreement if the President promised to support subsequent legislation aimed at limiting the dispute resolution system. Dole's legislation proposed an "escape-hatch" from adverse WTO decisions. An independent commission of federal judges would review the WTO panel and appellate body reports and determine whether the bodies had exceeded the treaty's au-

thority.⁷⁹ If the commission found that the bodies were acting inappropriately, then any legislator could propose a joint resolution of Congress seeking the United States' withdrawal from the WTO.⁸⁰

President Clinton agreed to support the bill, conditioned on Republican support of the Uruguay Round implementing legislation, but the Dole legislation was never enacted. Amendments to the legislation that placed private actors, including trade lawyers and labor leaders, on the review body poisoned legislative support for the proposal.⁸¹ Even if the legislation had passed, withdrawal from the WTO was an extreme strategy that legislators were unlikely to adopt.⁸²

The limited response by Congress is, in part, a result of the President's agenda-setting powers when negotiating trade agreements. International trade agreements are package deals—other nations will not negotiate trade agreements with the United States unless Congress commits to accepting or rejecting the entire package negotiated by the President (known as “fast-track” negotiating authority).⁸³ Congress can always reject the agreement, expecting

⁷⁹ Saxonhouse, *supra* note 78, at 364.

⁸⁰ See John H. Jackson, *The World Trade Organization*, 89 *Am. Soc'y Int'l L. Proc.* 317, 322 (1995); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *Nw. J. Int'l L. & Bus.* 398, 418 (1996/1997). If the Commission found that the bodies had acted outside of their authority, then any member of Congress could introduce a resolution calling on the President to renegotiate the dispute resolution system. If the Commission found three or more instances of such actions, then any legislator could introduce a call for withdrawal from the WTO. If the President signed the legislation, the United States would begin exiting from the treaty. Saxonhouse, *supra* note 78, at 364.

⁸¹ See Saxonhouse, *supra* note 78, at 364–66. Later versions of the legislation (as amended by Senator Byrd) attempted to set up two commissions. The first would be made up of senators who would review the WTO procedures. The second would be composed of private actors—trade lawyers, labor leaders, or others—who would review the panels' findings. See *id.* at 365; see also Horlick, *supra* note 78, at 48.

⁸² The implementing legislation of the Uruguay Round allows for joint resolutions of Congress to withdraw from the WTO. Such a resolution was introduced in the House of Representatives in 2000 but was defeated by a vote of 363–56. Several members of the House announced their intention to introduce a similar resolution in 2005. These detractors were concerned about the loss of American jobs and the increased tendency of the WTO panel to rule against the United States. See Gary G. Yerkey, *USTR Defends U.S. Membership in WTO as House Disapproval Resolution Takes Shape*, 22 *Int'l Trade Rep. (BNA)*, No. 9, at 326 (Mar. 3, 2005).

⁸³ Fast-track effectively alters Congressional rules for considering legislation by promising that the agreement, *without amendment*, would be presented on the floor of each house within a specified period of time. The system includes “anti-bottling.”

that other states would then agree to renegotiate, but this strategy is costly to legislators who want the benefits of the trade agreement because it delays the implementation and reopens negotiations in other areas. But legislators should have rejected the agreement—with renegotiation in mind—if the costs of dispute resolution were high enough.

Congress can always eliminate the President's agenda-setting power by engaging in unilateral trade policies. The Constitution allocates to Congress the power to set international commercial policy. The President only has significant trade-policy power (beyond his veto power) because the United States has chosen to engage in multilateral trade negotiations.⁸⁴ If Congress wished to undertake unilateral free trade policies, then the President's bargaining leverage would be reduced to threatening a veto, the same as in the realm of domestic legislation. Congress is unlikely to take such steps, however, because reciprocal agreements are valuable political commodities.⁸⁵ International agreements offer domestic exporters greater access to foreign markets, which could be lost if Congress were to pursue the unilateral route.

V. BROADER IMPLICATIONS: INTERNATIONAL LAW AND STATE INTERESTS

This Essay provides a causal mechanism for how international institutions can “change” state interests and why domestic actors may create international institutions for exactly that purpose.

“anti-Christmas Tree,” and “anti-filibuster” elements—trade agreements cannot be stuck in committee, amended, or filibustered. The committee and filibuster additions prevent Congress from effectively killing trade agreements by not allowing the agreements to reach the floor or not permitting a vote. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *Brook. J. Int'l L.* 143, 145–52 (1992); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 *Geo. Wash. Int'l L. Rev.* 1, 7–10 (2003).

⁸⁴ See discussion *supra* Section III.B.

⁸⁵ If the government simply wanted to maximize aggregate wealth, it would undertake unilateral trade liberalization policies. See Bhagwati, *Aggressive Unilateralism*, *supra* note 7, at 16–17. Reciprocal trade agreements are a second-best solution in a world of interest group politics, where consumers do not organize for lower prices but import-competing industries lobby for protection. Reciprocal trade agreements are a valuable political commodity because they balance interest group pressures—exporters organize to lobby for greater access to foreign markets.

A. State Interests

We think of states as having interests even though we know that various policymakers within the government have differing policy preferences. For instance, it is common to discuss the United States' interests in some area of international relations, while at the same time recognizing that within the government there is intense disagreement about what the United States should do internationally. The President and members of Congress often loudly disagree over foreign policy, and legislators fight among themselves. In democratic governments, our concept of unified national interests comes from elected officials acting through set procedures to reach policy outcomes. These outcomes are what we think of as "state interests." By changing domestic procedures—for instance, effectively increasing the President's lawmaking powers—state interests change as well.

International bodies can shift power within domestic politics and thereby change the results of the domestic political process. In addition, the domestic actors who are advantaged by the shift in power may move policymaking to the international level in the hope of achieving greater domestic standing. The WTO effectively shifts greater bargaining power in the trade context to the President when he negotiates with Congress. The President supported a rule-based dispute resolution system for exactly this purpose, despite the relative loss of bargaining power it involved for the U.S. in international politics.

Interestingly, international law and international courts can effectively change domestic politics, yet not have particularly high rates of compliance. There is no guarantee that domestic policy outcomes will match those demanded by international law. In fact, we expect that states will frequently settle. Given the distribution of preferences among elected officials, a range of trade policies will be supportable. By shifting agenda-setting power, the trade policy selected from the range of supportable policies may also change, and the President might select a different trade policy than legislative leaders would.

Under the WTO, we should expect the United States to adopt policies more consistent with international trade agreements, but not fully consistent with the demands of international law. The new WTO system gives the President greater bargaining power, but the

President cannot impose, and might not prefer, the policy required by international law. Indeed, the President acts out of his own self-interest, not because of the persuasive influence of a legal decision. The international system thus gives the President the opportunity to move trade policy closer to his policy preferences.

B. Implications for Views of International Law

The view presented in this Essay contrasts with other international law approaches that seek to understand states' desires for and compliance with international law and judicial institutions. Disagreement about how we determine states' interests motivates much of the debate within international law scholarship, fueling the differing expressions of optimism or skepticism about compliance with international agreements and the future of international adjudication. International law studies currently take two opposing views of why states abide by international rules: Either states regularly abide by the rules because of international law's "compliance pull," or states abide by the rules only when it is in their self-interest.

The compliance-pull view has several variants, but all share the understanding that states comply with international law because a state comes to believe that international law is in its interest—either because the rules are fair or because domestic actors come to prefer the international rule. Dean Harold Koh maintains that state interests are altered through the transnational legal process, where domestic-level actors—from judges to legislators to individual activists—bring international law home.⁸⁶ For instance, private litigants go to courts and have judges accept the international rule as federal common law or they lobby legislators to pass domestic law that reflects the international norm.⁸⁷ Through this transnational legal process, the government's understanding of its interests changes—the government incorporates the international norm into its concept of its national identity. Here, the state obeys interna-

⁸⁶ See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *Hous. L. Rev.* 623, 626, 643 (1998) [hereinafter Koh, *Bringing International Law Home*]; Harold Hongju Koh, *Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 183 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2602 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*].

⁸⁷ See Koh, *Bringing International Law Home*, *supra* note 86, at 642–43.

tional law not just to obtain benefits from the international system but because national views have changed.⁸⁸ Similarly, Professor Thomas Franck argues that the legitimacy and fairness of international law exerts a compliance pull on states, leading governments to change their conception of their interests in accepting international law.⁸⁹ The compliance-pull framework would predict a high level of compliance with international law over a wide range of issues.

More importantly for the project advanced in this Essay, the compliance-pull approach would predict that international law changes state interests. But we do not know *how*. Neither conception of the compliance-pull approach specifies the causal mechanism that leads states to abide by international obligations. Koh provides examples where international law has influenced national policies through lobbying or court decisions, but he does not present a theory for how international laws are integrated into domestic law.⁹⁰ The transnational legal process does not predict when courts will choose to enforce international rules over domestic rules, nor when lobbying efforts will be successful. Franck also does not explain why domestic actors would choose international rules, simply because they perceive them as fair, over domestic rules. If policymakers are responsive to interest groups and voters, then it is far from clear why they would incur domestic wrath for the sake of international fairness. Moreover, Franck cannot predict when fairness will lead governments to comply with international law and when it will not.

By contrast, the unitary-rational state approach argues that a state will comply with international law only when it is in the state's interests.⁹¹ Professors Jack Goldsmith and Eric Posner argue

⁸⁸ See Koh, *Why Do Nations Obey International Law?*, *supra* note 86, at 2651.

⁸⁹ See Thomas M. Franck, *Fairness in International Law and Institutions* 7–8 (1995).

⁹⁰ Others have also made this observation. See Robert O. Keohane, *When Does International Law Come Home?*, 35 *Hous. L. Rev.* 699, 700–01 (1998); Eric A. Posner, *International Law and the Disaggregated State*, 32 *Fla. St. U. L. Rev.* 797, 800–01, 812 (2005).

⁹¹ See Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 9 (2005) [hereinafter Goldsmith & Posner, *Limits of International Law*]; Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 *Va. J. Int'l L.* 113, 134–40 (2003) (arguing that states form customary international law and comply with it only when doing so is in their interests) [hereinafter Goldsmith & Posner, *Rational Treaties*]; Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary*

that international law does not change state interests, although a state's action may change because the state engages in strategic games with other nations. In strategic games, a state's action will depend on what it expects other states will do.⁹² For instance, a state might face a prisoner's dilemma, where cooperation is beneficial only if other states also adopt cooperative strategies. A treaty is helpful because it sets out the expected pattern of cooperation by defining the terms of cooperation and monitoring state action.⁹³ The treaty might thereby make the state more likely to take the cooperative action, rather than the defecting action, because it expects that other states will do the same.⁹⁴

Compared to the compliance-pull approach, the unitary-rational state approach is more skeptical of the importance of international law. It predicts that there will be a non-trivial amount of non-compliance with international law because states will often find that defection maximizes their expected gains. Goldsmith and Posner expect that states often will not comply when their short-term gains from defections will outweigh future losses.⁹⁵ International law simply makes cooperative action easier to monitor, thereby

International Law, 66 U. Chi. L. Rev. 1113, 1115 (1999) (arguing the same regarding treaty formation and compliance) [hereinafter Goldsmith & Posner, Customary International Law]. Other international law scholars also adopt a rationalist view, including Andrew Guzman. See, e.g., Guzman, *The Cost of Credibility*, supra note 64, at 306–07.

⁹² See Duncan Snidal, *The Game Theory of International Politics*, 38 World Pol. 25, 38–40 (1985).

⁹³ Professor Robert Keohane made the seminal statement of this argument. See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 244–45 (1984); see also Robert Axelrod, *The Evolution of Cooperation* 125–41 (1984).

⁹⁴ Goldsmith and Posner argue such cooperative activity could arise through informal, non-legal agreements. Treaties would not always be necessary but are often used instead of informal agreements because they provide information about domestic support and indicate the seriousness of the state's commitment. See Goldsmith & Posner, *Rational Treaties*, supra note 91, at 122–34; see also John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 Harv. Int'l L.J. 139, 140 (1996) (explaining the “iterative perspective” on treaties, which points to treaties as encouraging “repeated interactions among nations” and international cooperation).

⁹⁵ See Goldsmith & Posner, *Limits of International Law*, supra note 91, at 9. Rational approaches to international law from political science predict that states simply will not enter into “deep” agreements because the states are unwilling or unable to pay the costs of enforcement. See George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 Int'l Org. 379, 387 (1996).

making cooperative behavior more likely.⁹⁶ In addition, the unitary-rational actor approach expects that international law will have little or no effect on state behavior when states heavily discount future gains in favor of present gains.

This Essay adds to the debate in international law by adopting a rationalist framework while arguing that international law can change state interests. My approach does not, however, view the state as unitary. Instead, different policymakers within the government have different views of what is in the state's interest. In democracies, the state arrives at its interests by aggregating these different views through set decision-making procedures. I argue that international law can influence state interests: By shifting the bargaining power in national decision-making, the outcome of domestic politics changes, and state interests change along with it.

Moreover, my approach yields *ex ante* predictions of how international law will change state interests, while current compliance-pull approaches do not. Where the President and Congress share policy jurisdiction but have different preferences over policy, the President may try to move policymaking to the international level as a means of changing domestic policy processes. In these circumstances, international law changes state interests by altering how national politics works. The claim here is not that international law always changes state interests. Quite the contrary, this two-level game approach only views international law as changing state interests when it affects the process of domestic policymaking.

CONCLUSION

Why does the United States want a rule-based system to settle international disputes? The WTO court decreases the nation's bargaining power in international politics, so why would the nation not only sign on, but also champion the creation of the court? To answer this question, we have to understand domestic politics as well as international politics. International constraints, particularly international courts, can influence bargaining at the national level by reallocating bargaining power among members of the government. Domestic actors, even in powerful states, support international

⁹⁶ See Goldsmith & Posner, *Customary International Law*, *supra* note 91, at 1120–23.

courts when doing so improves their standing in national politics. The President supported a strong WTO court as a means to increase his control of trade policy on the domestic level, even though the court limits the nation's bargaining power in international politics.