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# The Legitimacy of the Treaty in Law and International Trade

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**ABSTRACT:**

*The study presents the legitimacy of the treaty in law and international trade. The aim of this article is to show how international law, together with its institutions, must explicitly state its ideological assumptions then develop a coherent and consistent institutional framework around this ideology. This article addresses this challenge. It develops a constitutionalist model for assessing the legitimacy of international law that takes seriously the commitments underlying constitutional democracy. At the heart of this model are four distinct concerns, each captured by a distinct principle. These principles are the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable. Such a framework provides a middle ground between national and international constitutionalists. Whereas the former sometimes suggest that any law not sufficiently connected to domestic legal actors is suspect legitimacy-wise, the latter tend to underplay what is lost democracy-wise as decision-making is ratcheted up from the national to the international level.*

**Keywords:** *Fundamental Rights, Legitimacy Theory, International Law, International Legality.*

**INTRODUCTION:**

International law scholarship lacks a satisfactory theory of why and when states comply with international law. Certainly, most legal scholars and practitioners believe that international law matters in the sense that it affects the behavior of states. Furthermore, this belief is consistent with empirical evidence indicating that international law matters. Nevertheless, those theories that have been advanced by legal scholars are generally considered flawed because they are difficult to reconcile with modern international relations theory, rely heavily on axiomatic claims about national behavior, and lack a coherent theory of compliance with international law. The absence of a coherent theory may explain why most conventional international law scholarship does

not ask why there is compliance but rather simply assumes as much.

The failure to understand the compliance decision is troubling because compliance is one of the most central questions in international law. Indeed, the absence of an explanation for why states obey international law in some instances and not in others threatens to undermine the very foundations of international law. If international law matters, it must be the case that it alters state behavior in some circumstances. Without an understanding of this connection between international law and state actions, scholars cannot hope to provide useful policy advice with respect to international law. Without a theory of compliance, we cannot examine the role of treaties, customary international law, or other agreements. Nor can



we consider how to improve the functioning of the international legal system, or develop a workable theory of international legal and regulatory cooperation.

At present, the best source of theory relevant to international law and compliance comes not from legal scholarship, but from international relations. These theories, however, are often skeptical of the role international law has to play in the governance of the international system, and often ignore “international law” altogether [1]. To date, neither conventional international law scholars, nor those adopting an international relations approach, has presented a satisfactory model that is capable of explaining why states comply with international law in some circumstances and violate it in others. International law scholarship assumes a high level of compliance and provides little theoretical framework within which to examine the compliance decision while international relations scholars largely ignore the role of international law in national decision making.

This Article draws on international relations theory to develop a better theory of compliance with international law. Unlike traditional international law scholarship, the theory developed here explains compliance within a model of rational, self-interested states. Compliance exists because states are concerned with both the reputational implications and the direct sanctions of violating the law. The model explains not only why nations comply, but also why and when they violate international law.

That article responds to the argument that international law is merely epiphenomenal by constructing a model of rational, self-interested states in which international law does,

in fact, matter. On the other hand, the model also raises fundamental questions about international law as it is currently studied. By taking the question of compliance seriously, we gain a new perspective on international law, and that new perspective forces us to question some of the central issues in international law. Though the analysis impacts other aspects of international law, four primary implications of the analysis are discussed in the paper.

First, the analysis suggests that the current understanding of customary international law (CIL) is inadequate. To square CIL with a sensible theory of compliance and international law requires a new definition of CIL. The existing definition of CIL has been the subject of a great deal of criticism, and some have gone so far as to suggest that no such law exists. Rather than attempting to salvage the traditional definition, this Article proposes a new one that focuses on whether or not a rule of customary international law affects behavior. It is shown that the requirements of widespread state practice and a sense of legal obligation do not contribute to a useful understanding of CIL. By studying CIL within a reputational model, and with a focus on compliance, it is possible to achieve a deeper understanding of that form of international law.

Second, the Article challenges our understanding of international law itself. When it is considered from the perspective of compliance, it is clear that the classical definition of “international law” is under-inclusive and should be broadened to include not only treaties and customary international law, but also agreements such as ministerial accords, memoranda of understanding, and so on. Like



treaties and customary international law, these instruments affect the incentives of countries and, therefore, should be considered international law. Including them allows us to study the full range of international obligations within a single theoretical framework, and, unlike traditional theories, explains why such agreements exist and why they are so popular. This approach, then, resolves the existing debate regarding “soft law” by pointing out that it should not be considered different in kind from other forms of international law. Rather, it should be recognized as part of a spectrum of commitment along which states choose to locate their promises.

Third, it is demonstrated that international law is most likely to affect outcomes when there are many repeated interactions and each of those interactions involves relatively small stakes. Although this claim is not new, it leads to the conclusion that the topics which have traditionally held center stage in international law -- such as the laws of war, neutrality, arms control, and so on -- are precisely the topics in which international law is least likely to be relevant. This conclusion has two lessons for international law scholarship. The first is that international law scholarship may be unduly focused on these topics. The fact they are arguably the most important issues in international relations does not imply that they should form the centerpiece of international law because international law will often be unable to affect outcomes. Scholars may have a greater impact on human well-being if they devote more energy to areas in which international law can alter outcomes more reliably. These include a range of important areas including economic issues, environmental issues, labor issues, and so

on. The second, somewhat more subtle, lesson is that the study of these issues, and the design of international institutions should proceed with an understanding of the limits of international law. International law can play a role in encouraging cooperation, but can only do so if obligations are structured in a fashion that reduces the importance of each compliance decision. For example, an arms treaty, by itself may have little success but a treaty that provides for periodic inspections by a neutral third party may stand a much greater chance of achieving the goal of arms control [2].

Fourth, it is shown that sanctions for violations of international law are generally not optimal. Because sanctions consist primarily of weak military or economic punishment and reputational losses, they are often too weak to achieve optimal compliance. Under certain circumstances, however, sanctions can be rationalized and states can be given better incentives. In particular, states can at times be induced to voluntarily submit to dispute resolution procedures and accept sanctions. This is possible where a failure to accept a sanction leads to an even greater loss. The Article discusses the circumstance in which that can occur, and how international interactions can be structured to encourage it.

Understanding how to encourage participation in dispute resolution procedures in turn sheds light on the role of international organizations. These bodies have an important role because they can be used to coordinate international interactions in such a way as to increase the likelihood that states will submit themselves to the authority of dispute resolution bodies. The obvious example of this sort of behavior is seen at the World Trade Organization

(WTO). Although certainly not a flawless process, the WTO is able to resolve disputes among members and impose sanctions closer to the optimal level.

## **LEGITIMACY THEORY**

Thomas Franck has advanced a general theory of international law that has come to be known as legitimacy theory. The theory attempts to explain why nations feel compelled to honor their promises. Unlike consent theory, legitimacy theory attempts to go beyond the statement that treaties are to be obeyed and seeks to explain why nations might obey them. In the end, however, that attempt takes the inquiry no further than does consent theory. The fundamental premise underlying legitimacy theory is that states obey rules that they perceive to have “come into being in accordance with the right process.”

Franck argues that four factors determine whether a state complies with international obligations. These factors are determinacy, symbolic validation, coherence, and adherence. Where these four factors are present, legitimacy theory predicts a strong pressure toward compliance, and where they are absent it predicts a very limited impetus to compliance.

In brief, determinacy refers to the clarity of the rule or norm; symbolic validation refers to the presence of procedural practices or rituals that provide a rule with symbolic importance and legitimacy; coherence refers to the connection between rational principles and the rule; and adherence refers to the connection between the rule and those secondary rules used to interpret and apply the primary rule [3].

Legitimacy theory does not, however, adequately explain why states do or should care

about legitimacy. It leaves too many of the central questions regarding compliance and national behavior in the black box of “legitimacy.” The claim that nations violate international rules because of the “perceived lack of legitimacy of the actual or proposed rules themselves and of the rule-making and rule-applying institutions of the international system” begs the question. Why should we expect nations to honor rules that enjoy legitimacy while ignoring others? In any event, the claim that legitimacy is the driving force behind compliance is an assertion, rather than the result of a theoretical framework or empirical study.

Despite its attempt to identify the reasons for compliance, legitimacy theory fails for the same reason that the consent based theory fails – it does not provide a model of compliance so much as an assertion that nations obey the law. It fails to explain why “legitimacy” leads to compliance, why the four factors discussed by Franck are important, how they interact with other measures of a nation’s self-interest, and why we see states violating laws with which they had previously complied. The concept of legitimacy in this theory, like the bald assertion that treaties are to be obeyed, begs the question of why states comply with international law.

## **4. Transnational Legal Process**

Professor Harold Koh has advanced another theory of international law, termed transnational legal process. The theory focuses on how public and private actors interact in various fora at both the domestic and international level to make, interpret, enforce, and internalize rules of transnational law.



Professor Koh criticizes rational actor models of international law for their failure to incorporate the role of non-state actors. Rather than treating states as unitary actors, transnational legal process looks to a wider set of decision makers to explain conduct, including multinational corporations, non-governmental organizations, international organizations, private individuals, and others. Professor Koh argues that as transnational actors – including both state and non-state actors – interact, patterns of behavior and norms emerge which are internalized by the actors. The internalization of these norms leads to their incorporation within the domestic legal institutions of states which, in turn, leads to compliance [4].

The transnational legal process claim can be divided into two components. The first is the claim that domestic legal institutions play a critical role. This claim is certainly correct. There is no doubt that the actual decision of whether or not to comply with or violate international law is made by domestic institutions. Nor is there any doubt that domestic politics matter to the compliance question. The extent to which a state complies with international law is influenced by domestic interest groups, the power of the executive relative to the legislature, the electoral cycle, the state of the domestic economy, and so on.

The second claim of the transnational legal process theory is that domestic institutions somehow internalize transnational legal norms and that this leads to compliance. It is here that the theory becomes problematic. It has no explanation of why certain legal norms are internalized or how this internalization takes place. Even if one assumes, like Professor Koh,

that international legal norms are internalized, one would expect domestic legal norms – in particular the norm of pursuing the interests of domestic decision makers – to be internalized more readily. When international legal norms are at odds with the self-interest of the state, it is difficult to explain why the international norms would triumph. If domestic concerns triumph, however, the internalization of legal norms has no impact on outcomes.

In addition, it appears to be assumed that repeated interaction leads to the internalization of norms that are consistent with international law, but this assumption is not explained. It seems equally plausible that the internalized norms are unrelated to international law. For example, rather than internalize norms of international law, transnational actors might internalize the norm that powerful nations triumph over weaker nations, or that economic influence resolves international disputes.

Without an understanding of why domestic actors internalize norms of compliance in the international arena, and a theory of why this internalization tends toward compliance, the theory lacks force. Like the consent based approach and legitimacy theory, the transnational legal process approach is ultimately founded on an unsupported assumption that the law is followed. It differs from the prior theories in that it considers the relevant unit of analysis to be individuals and interest groups rather than the state, but then simply asserts that these actors follow international law. Without a more complete theory of why these actors follow the law, the theory remains unsatisfactory. Attempts to rescue the theory by arguing that law-abiding behavior is internalized because domestic





institutions and actors observe the compliance of foreign states and foreign transnational actors is simply to assume the existence of compliance rather than explain it [5].

Perhaps the most serious problem with the theory is that it does not provide any real theoretical structure. Ultimately, it is simply an assertion that internalization takes place and leads to compliance. Without a proper theoretical apparatus, the theory cannot explain why a particular legal norm may be respected in one context and ignored in another. Nor does it provide a model of decision making by the state. Without such a model, the theory cannot be applied to produce predictions about when states will comply with the law and when they will not, nor can it offer strategies to increase the level of compliance. Finally, because the theory boils down to a simple assertion about national behavior, it cannot explain why some states are considered law-abiding while others are considered pariahs. In fact, the theory suggests just the opposite – it suggests that states will move inexorably toward greater compliance.

#### LITERATURE REVIEW:

According to Jackson, J. H., & Davey, W. J. (1986), study is a summary of the 2nd edition of the authors' textbook which is concerned with international economic regulation. The objective of the book is to look at the legal principles and processes as they affect decisions regarding international economic relations, whether the decisions are those of private citizens or enterprises, or government officials.

According to Sykes, A. O. (1999), A wide array of policy instruments can protect domestic firms against foreign competition. Regulatory measures that raise the costs of

foreign firms relative to domestic firms are exceptionally wasteful protectionist devices, however, with deadweight costs that can greatly exceed those of traditional protectionist instruments such as tariffs and quotas. This Article develops the welfare economics of regulatory protectionism and a related political economy analysis of the national and international legal systems that must confront it, including the WTO, the NAFTA, the European Union, and the United States federal system. It explains why regulatory measures that serve no purpose other than to protect domestic firms against foreign competition will generally be prohibited in politically sophisticated trade agreements, even when other instruments of protection are to a degree permissible. It further suggests why regulatory measures that serve honest, non-protectionist objectives will be permissible in sophisticated trade agreements even though their regulatory benefits may be small and their adverse effect on trade may be great--that is, it explains why trade agreements generally do not authorize "balancing analysis" akin to that undertaken in certain dormant commerce clause cases under U.S. law.

#### The Problem of Large Stakes

All else equal, it is reasonable to expect that the compliance pull of international law will be the weakest when the stakes at issue are large. This is so because reputational effects have limited power. The likelihood that reputational effects are sufficient to ensure compliance grows smaller as the stakes grow larger. For example, the decision to use military force against another state is a serious one for any nation. Both the costs and benefits from such an action are typically very large. Because the stakes are so high, a country is unlikely to take an action that is otherwise contrary to its interests in order to



preserve its reputation. The value of a reputation for compliance with international commitments is rarely large enough to affect the outcome when decisions are of such great magnitude.

Imagine, for example, that a country must decide whether or not to invade a neighbor's territory in violation of international law. Invading promises to provide benefits in the form of greater territory, resources, and a reduction in the strategic threat from that neighbor. Label these benefits  $B$ . The cost of entering into the war includes loss of life, economic costs, social costs, and so on. Label these costs  $C$ . In addition, a decision to go to war would bring about a reputational loss in the international community. Label this cost  $R$ . The reputational consequences of going to war will only affect the decision if  $0 < B - C < R$ . That is, reputation is enough to prevent a war only if the country would otherwise have gone to war, but the decision to do so was sufficiently close that the reputational cost tips the balance in favor of peace. When the costs and benefits of a particular action are small, there is a good chance that the reputational consequences will tip the balance in favor of compliance with international law. Where the costs and benefits other than reputation are relatively large, however, it is less likely that reputational costs will be enough to alter the outcome.

The above discussion implicitly assumes that the reputational cost of violating an international obligation is fixed. Under this assumption, international law has less effect as the magnitudes at stake increase. Although convenient to demonstrate the point that the most important issues are less likely to be affected by international law, the assumption of a constant reputational cost for violations of such law is unrealistic. That being said, it remains true that

reputation plays a more important role when the costs and benefits of a particular action are small. This is so for at least two reasons. First, there is an upper bound to the reputational cost that a country can suffer as a result of a decision. Even a complete loss of reputation has a limited cost for a country, and the reputation can be rebuilt over time. Furthermore, a single decision to violate international law is unlikely to cause a complete loss of reputational capital. Faced with a matter of great importance to a country, therefore, even the most severe reputational sanction is unlikely to affect national behavior [6].

Second, although the reputational cost of a violation of international law can vary based on the circumstances, it does not necessarily increase with the importance of the issue. For example, a country's decision to violate an arms control agreement may impose reputational costs only in the area of arms control. Other states may recognize that military and national security issues are central to a country's identity, and that treaties in that area are not particularly reliable. As a result, the violation of this sort of treaty may not call into question the willingness of the state to honor a treaty in another area, such as economic matters. Remember that violations of international law impose a reputational cost because they have a negative impact on other countries' perception of a state's willingness to accept short term costs in order to protect long term relationships and trust. When compliance with international law would impose extreme losses on a country, violation of that law may not have much impact on reputation. Such a violation sheds little light on the willingness of a state to violate agreements when the costs of compliance are smaller. That international law cannot easily impact outcomes in high stakes



explains why analysis of international law during the Cold War leads to a pessimistic set of conclusions – many issues were perceived to involve high stakes.

These implications are significant for the study of international law. Most obviously, the theory predicts that international law will have the smallest impact in those areas of greatest importance to countries. This observation suggests that many of the most central topics in traditional international law scholarship are the most resistant to influence. Thus, for example, the laws of war, territorial limits (including territorial seas), neutrality, arms agreements, and military alliances are among the areas least likely to be affected by international law. Although agreements with large stakes can be stable, this will rarely be the result of the obligations imposed by international law. Adherence to such agreements is more likely to be the result of a game in which international law plays a small part, if any. The existence of an international legal obligation may be consistent with the outcome, but it is unlikely to alter behavior.

The message for scholars is twofold. First, international law scholars may be focusing their efforts in the wrong place. Rather than concentrating on those topics that are of greatest importance to states, they may be better off to devote more attention to those areas in which international law can yield the greatest benefits. The most promising fields of study, therefore, are those in which reputational effects are likely to affect behavior. Some international law scholars may be disheartened by this message. After all, international law is an interesting subject in part because it concerns itself with great questions of war, peace, alliances, human rights, and so on. To focus on more mundane questions may be perceived as a diminution of the grandeur of the

field of study. On the other hand, there is also an optimistic side to this conclusion. International law is often criticized for being irrelevant. By turning the attention of scholars to areas in which international law matters most, the importance of the subject can be demonstrated. Furthermore, those areas in which international law matters are themselves of great importance. These include, for example, the entire range of international economic issues, from trade to the international regulation of competition law to environmental regulation. The livelihood and sometimes the lives of millions of people depend on the effective resolution of international economic issues. Surely this is a worthwhile subject for international law scholars [7].

This discussion is not intended to imply that international law scholars must or should completely abandon the field when it comes to the sort of large stakes questions that have occupied so much of the discipline in the past. They have a role to play in important international agreements because they are uniquely qualified to evaluate the structure of the institutions that are relevant to those questions and the manner in which agreements are struck. International law can be used to strengthen national commitments, but its value depends on the context. Scholars must focus not only on the legality of state actions, they must study the way in which international law can be structured to improve compliance. For example, issues involving large stakes can sometimes be influenced by international law, but this is most likely to be achieved through an indirect use of international commitments. For example, an agreement not to develop nuclear weapons is, by itself, unlikely to have much relevance. If it is combined with obligations whose stakes are lower but that cumulatively achieve the desired





goal, success is more likely. For example, if it is possible to monitor compliance through regular inspections, countries are less likely to violate their obligation. Monitoring allows violations to be detected early, which both reduces the benefits of violation – a nuclear weapons program that is detected early provides fewer benefits to the violating state – and increases the costs – early detection might cause other countries to withdraw their own promises, denying the violating country the benefit of compliance by others. The point here is that when large stakes issues are studied, they should be approached with compliance in the front of one's mind, and scholars should be searching for institutions and agreements that achieve the desired objectives through a series of discrete, low stakes compliance decisions rather than through a single large stake decision.

Second, there is also a message for critics of international law. Following the lead of international law scholars, critics point to the failure of international law in areas where it is unrealistic to expect success. The use of the easiest cases to criticize international law, makes attacks on the subject unpersuasive. These attacks should be aimed at those areas in which international law plays a larger role [8].

Although a discussion of all the ways in which international agreements can be designed to improve compliance is beyond the scope of this Article, one example provides a flavor of how international law scholars can improve the level of compliance with such agreements. To the extent possible, international obligations should take the form of many small, low cost, and observable steps toward compliance rather than a single major obligation. This, combined with thorough monitoring and verification of compliance, can make international promises

more binding. A reliable verification mechanism will bring violations to light early in the relationship, giving the counter-party a justification for abandoning its own commitment, thereby undermining the benefit of cheating [9]. The reaction of a treaty partner need not, of course, rely on international law but if detection takes place early, it will also impose a reputational cost and perhaps a cost in the form of a direct sanction. These costs will result from the violation of the law itself. Where a relatively minor violation is likely to be caught and can hurt a country's reputation and its future negotiations, international law can help to prevent such minor violations. The presence of a monitoring mechanism helps countries to identify violations while they are still minor and while reputational costs can serve to deter them [10].

## CONCLUSION

This Article seeks to achieve several goals. First, it lays out a theory of international law and compliance in which national behavior is influenced by law. It does so within the framework of a rational actor model in which states value a reputation for compliance with international obligations. Along with the possibility of direct sanctions, it is reputation that provides an incentive for states to comply with their obligations. By developing and preserving a good reputation, states are able to extract greater concessions for their promises in the future.

Because reputational sanctions are limited in their magnitude, the Article points out that they will not always provide sufficient incentive for nations to comply with the law. This observation explains why one sees violations of international law in some instances. It also suggests that scholars of international law should keep the

limits of the law in mind. In particular, when individual states decisions are made regarding issues of fundamental importance to the state, it is unlikely that international law can influence behavior with any frequency. Where individual decisions are of more modest impact however – a situation that arises frequently in, for example, the world of international economic and regulatory cooperation – international law may be able to alter outcomes more frequently.

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