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Unpacking the State's Reputation

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International law scholars debate when international law matters to states, how it matters, and whether we can improve compliance. One of the few areas of agreement is that fairly robust levels of compliance can be achieved by tapping into states' concerns with their reputation. The logic is intuitively appealing: a state that violates international law develops a bad reputation, which leads other states to exclude the violator from future cooperative opportunities. Anticipating a loss of future gains, states will often comply with international rules that are not in their immediate interests. The level of compliance that reputation can sustain depends, however, on how the government decision makers value the possibility of being excluded from future cooperative agreements. This Article examines how governments internalize reputational costs to the "state" and how audiences evaluate the predictive value of violating governments' actions. The Article concludes that international law's current approach to reputation is counterproductive, because it treats reputation as an error term that makes rationalists' claims invariably correct.

I. Introduction

It is hard to explain why states comply with international law. The defining characteristic of international law is the lack of a centralized enforcement mechanism. International law is enforced (when it is enforced) by states themselves. Given that interested parties are running the legal system, it is not shocking that international law is not always a meaningful constraint on state action. Consequently, international law scholars debate when international law matters to states (if ever), how it matters, and whether we can improve compliance. One of the few areas of agreement among scholars is that fairly robust levels of compliance can be achieved by tapping into states' concerns with their reputation. Rationalist scholars formalize reputational concerns as a repeated prisoner's dilemma game while non-rationalists rely on more intuitive notions of reputation, but both share a causal story.

The story is premised on the benefits of international cooperation. Given a sufficiently long-term view, even purely self-interested states will comply with international law because the benefits of cooperation outweigh the short-term costs of compliance. For this to work, however, states must actually lose the benefits of cooperation if they fail to comply with international law. This is where reputation enters the story. A state that cheats develops a

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bad reputation, which leads other states to exclude that state from future opportunities to cooperate. The costs of such a boycott may lead government leaders to comply with international law, even where the short-term costs of the compliance are high and there are no centralized means of enforcing compliance. In cost-benefit terms, states will comply with international law when the boycott costs outweigh the immediate compliance costs.

This story works well in the abstract. International relations, however, are far more complicated. The level of compliance that reputation can sustain depends on how the government decision makers value the possibility of being excluded from future cooperative agreements. The current international law scholarship advertises reputational costs as being quite large, but does not provide a very specific explanation of why this should be so. When we look at how governments actually make decisions, the reputational costs of violating international rules are likely to be significantly lower than international relations theorists and legal scholars commonly think.

The problem is that states' reputations are not unitary. In popular political discourse, we are used to discussing the reputation of states in very broad and unified terms—good states, bad states, or ideas of "soft power" based on the state's reputation. But the reputation of the state, for the purposes of predicting future compliance, is complex and difficult to determine. Two critical questions that have not been answered by the compliance literature are (1) *whose* reputation; and (2) a reputation for *what?*

The first question goes to the identity and the stability of the government—the domestic decision makers who act, at least for a time, for the state. For example, many scholars and popular commentators have argued that the Bush administration violated international rules on the treatment of detainees.[1] Without engaging the merits of this allegation, what will the costs be to the reputation of the United States of such a violation and how does this feed back into the administration's decision-making process? There are two points here that need to be clearly distinguished. The first is that the Bush administration might not fully internalize the reputational costs to the United States of its decision to violate international law because the administration is in office for a limited period of time. There are factors that may lengthen its time horizons, namely concerns with Bush's political party or the preferences of voters for future generations, and factors that will shorten its time horizons, such as elections. The second is that, even if the Bush administration fully internalized the reputational costs to the state, these costs may not have been particularly high. If the Obama administration can rehabilitate the United States' reputation—because the interna-

1. *See*, *e.g.*, JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 140–44 (2006); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 112–20 (2004); Gwyn Prins, *9/11 and the Raiders of the Lost Ark*, 35 CORNELL INT'L L.J. 611, 617–21 (2002); Nicholas D. Kristof, *Let Them Be P.O.W.'s*, N.Y. TIMES, Jan. 29, 2002, at A21; Anthony Lewis, *Guantánamo's Long Shadow*, N.Y. TIMES, June 21, 2005, at A21.

tional audience expects that the next administration will act differently—then the costs to the United States, not just to the Bush administration, of violating international law might have been small. The point of reputation is to predict future behavior, not punish states for past actions. Of course, the United States may gain a structural reputation for policy change across administrations and thus have more limited opportunities to cooperate. But this structural effect is relatively immutable and thus provides very little incentive for a particular government to comply with international rules.

The second question addresses the informational content of specific violations of international law for predicting future violations. Say that the U.S. administration violates an arms control agreement. The reputational costs to the United States will depend on the inferences the international audience draws from that violation about whether the United States will comply with other international obligations. This turns out to be difficult to predict. For one thing, the arms control violation may not provide very much information about how the United States will behave with respect to international obligations in other areas, such as human rights, trade, or environment, where the domestic political considerations may be very different. It may not even provide much information about future compliance with other arms control agreements, because, again, the domestic political considerations in a future period may be different. Much depends on how the state's reputation is bundled, both topically and temporally. For another, legal compliance with an agreement may not be particularly predictive of how cooperative the state will be in future interactions. States can be poor treaty partners while maintaining strict legal compliance with an agreement by attaching reservations or withdrawing from their commitments, as the United States did with the Anti-Ballistic Missile Treaty ("ABM Treaty"). Other variables, such as the alignment of interests in domestic or international politics, are likely to be better predictors. For instance, the likelihood that the United States will comply with future arms control agreements depends far more on the strategic situation of the moment (for example, the present threat from international terrorist groups) than whether it complied with the ABM Treaty in very different political contexts in the past (for example, during the Cold War). Recognizing that reputational costs are limited to the political conditions of the time, governments are probably not overly concerned about the reputational costs of discrete violations of international rules. For better or worse, bad actions that are not predictive of future behavior, because the regime has changed or because the strategic situation is different, do not lead to reputational costs.

This Article proceeds in four parts. Part II examines how international law scholars use reputation to explain compliance with international law. This Part lays out the standard model of a unitary state interacting with other states in a prisoner's dilemma game. In addition, I suggest some limits to this model. Part III asks whose reputation we are referencing when we

talk about the state's compliance calculus. We commonly think of the country as having a reputation, but the government makes decisions for the state. This Part explores how this gap is important to our understanding of governments' incentives to comply with international law. Part IV then asks what the state has a reputation for. States are often thought to have reputations like individuals, such as being honest or reliable. But the state's reputation is not necessarily so neatly bundled across issues and time. Part V concludes by discussing the limits of reputation on compliance. This Part points out that our current approach to reputation is to treat it as an error term, making any act of compliance with international law potentially consistent with the state's interests. This approach to reputation is a setback to our understanding of international law because it makes rationalists' claims invariably correct.

II. Reputation and Compliance

Compliance with international law is a puzzle, one that political scientists and international lawyers spend a lot of time considering. There are many approaches to explaining compliance, from routine, to persuasion, socialization, and acculturation.[2] This Article primarily addresses how reputation is used in rationalist accounts, where states make compliance decisions based on cost-benefit calculations.[3] The analysis is also relevant to non-rationalist

2. *See generally* Abram Chayes & Antonia Handler Chayes, The New Sovereignty (1995); Thomas M. Franck, Fairness in International Law and Institutions (1995); Louis Henkin, How Nations Behave (2d ed. 1979); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 Int'l Org. 175 (1993) [hereinafter Chayes & Chayes, *On Compliance*]; Martha Finnemore & Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 Int'l Org. 887 (1998); Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705 (1988); Ryan Goodman, *The Difference Law Makes: Research Design, Institutional Design, and Human Rights*, 98 Am. Soc. Int'l L. Proc. 198 (2004); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997); Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1500–01 (2003) [hereinafter Koh, *On American Exceptionalism*]; Harold Hongju Koh, *The Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

3. *See generally* Jack Goldsmith & Eric Posner, The Limits of International Law (2005); Andrew Guzman, How International Law Works: A Rational Choice Theory (2008) [hereinafter Guzman, How International Law Works]; Robert Scott & Paul Stephan, The Limits of Leviathan: Contract Theory and the Enforcement of International Law (2006); David M. Golove, *Leaving Customary International Law Where It Is*, 34 Ga. J. Int'l & Comp. L. 333, 345 (2006); Andrew Guzman, *Reputation and International Law*, 34 Ga. J. Int'l & Comp. L. 379 (2006); Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. Chi. L. Rev. 469 (2005) [hereinafter Hathaway, *Between Power and Principle*]; Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002) [hereinafter Hathaway, *Human Rights Treaties*]; Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1621–28 (2005); Laurence R. Helfer, Response, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 Yale J. Int'l L. 367, 369 (2006); George Norman & Joel Trachtman, *The Customary International Law Game*, 99 Am. J. Int'l L. 541, 567 (2005); Kal Raustiala, *Refining the Limits of International Law*, 34 Ga. J. Int'l & Comp. L. 423 (2006); Kal Raustiala, *Form and Substance in International Agreements*, 99 Am. J. Int'l L. 581 (2005); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. Legal Stud. 179 (2002); Robert Scott & Paul Stephan, *Self-Enforcing International Agreements and the*

accounts to the extent that they see states as desiring cooperative opportunities that require a good reputation.

Under the rationalist account, a state complies with international law not because of the rules' status as *law*, but because complying is in the state's *interests*. Thus a state may comply with international law in some cases but fail to respect legal rules in others, even though the state might acknowledge that all of the rules are *law*. From the rationalist account, there are three interest-based reasons why a state complies with international agreements: (1) the agreements are in the state's immediate interests (there are no benefits to defecting); (2) the other parties to the agreement will retaliate against non-compliance; or (3) the state wishes to preserve its reputation for abiding by agreements.

In the rationalist account, reputation is defined as a belief about the state's future actions based on its past actions.[4] Thus a state's reputation for compliance with international law is formed based on the state's compliance with international law in the past.[5] Reputation is information. It is useful if the state's past actions are a good predictor of the state's future actions.[6] States want to appear to be good treaty partners and this leads government

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Limits of Coercion, 2004 Wis. L. Rev. 551, 590–93 (2004); John K. Setear, *Law in the Service of Politics: Moving Neo-liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define "Iteration,"* 37 Va. J. Int'l L. 641, 647 (1997); Edward Swaine, *Reserving*, 31 Yale J. Int'l L. 307, 340 (2006) [hereinafter Swaine, *Reserving*]; Edward Swaine, *Rational Custom*, 52 Duke L.J. 559 (2002); Joel P. Trachtman, *The WTO Cathedral*, 43 Stan. J. Int'l L. 127, 141–45 (2007).

4. This definition of reputation—that past behavior can be used to predict future behavior—is the one used in the economic and political science literatures. *See* Reinhard Selten, *The Chain Store Paradox*, 9 Theory & Decision 127 (1978) (economics; using reputation as the monopolist's history of driving entrants out of the market as a deterrent for future entrants into the market); Jonathan Mercer, Reputation and International Politics 6 (1996) (political science; defining reputation as "a judgment of someone's character (or disposition) that is then used to predict or explain future behavior"); James Morrow, Game Theory for Political Scientists 241–44 (1994) (political science; noting that states will take costly actions in international relations to establish a reputation for toughness that is later useful to deter future challenges).

5. Goldsmith & Posner, *supra* note 3, at 101 (stating that reputation "refers to other states' beliefs about the likelihood that the state in question will comply with a treaty"); Guzman, How International Law Works, *supra* note 3, at 73 (defining a reputation for compliance with international law as "judgments about an actor's past response to international legal obligations used to predict future compliance with such obligations"); George Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 J. Legal Stud. S95 (2002) (defining reputation for compliance with international law as the state's past history of compliance and tracing the use of reputational analysis in the economics and political science fields); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 Int'l Org. 495, 508–12 (1991) (discussing that a state's use of legal agreements rather than non-legal agreements is an attempt to indicate the seriousness of the state's commitment by invoking the state's reputation). R R

6. Guzman is explicit that reputation is only useful when there is a lack of other information:

> If an observing state knew everything about the acting state, including the extent to which it preferred gains today over gains tomorrow (i.e., its discount rate) and the value for it of all possible interactions, the observing state would be able to calculate the acting state's payoffs and accurately predict its actions. Because these things are not observable, however, observing states form a judgment about an acting state's 'reputation,' which represents a measure of its willingness to comply with its international legal obligations.

Guzman, How International Law Works, *supra* note 3, at 34. R

leaders to comply with international rules where they would not have otherwise. Here, reputation is purely instrumental. States care about their reputation not for reasons of honor or prestige, but because it is a means of securing gains to the state by entering into more cooperative agreements.[7]

A. Uses of Reputation in International Law

There is a consensus among scholars that reputation is a motive for compliance with international law.[8] From scholars who are optimistic about compliance with international law to those who are skeptical, from those who study human rights to those who study military and trade agreements, everyone acknowledges the potential importance of reputation.[9] Accordingly, references to reputation as a cause of compliance are found widely in the international law literature.[10]

The importance of reputation is particularly strong with rationalist scholars who view states as acting based on an explicit cost-benefit basis. Andrew Guzman argues that reputation can explain why countries do and do not comply with international commitments.[11] Guzman posits that states comply with international agreements because they are concerned with (1) direct sanctions and (2) reputation.[12] Reputation is particularly important in the international system because of the relative lack of direct sanctions.[13] Reputational concerns can make cooperative activity sustainable even without a centralized sanctioning system. Guzman notes: "In the absence of other enforcement mechanisms, then, a state's commitment is only as strong as its reputation. When entering into an international commitment, a country offers its reputation for living up to its commitments as a form of collateral."[14] Reputation is a causal mechanism because it influences the future range of cooperative activities available to the state. Without a good reputation, other states will not want to enter into cooperative agreements that

7. Downs & Jones, *supra* note 5, at S99 (noting that discussion on reputation in international law is important because reputation "determines their attractiveness as a treaty partner both now and in the future"); GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 35 (stating that his approach "assumes that states have no particular taste or preference for a good reputation, but rather are concerned with maintaining good standing within the international community only to the extent that changing one's standing or reputation affects payoffs"). R R

8. *See* GOLDSMITH & POSNER, *supra* note 3, at 100–06; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 71–118; Chayes & Chayes, *On Compliance*, *supra* note 2, at 177; Downs & Jones, *supra* note 5, at S113; Hathaway, *Between Power and Principle, supra* note 3, at 506–07; Helfer, *supra* note 3, at 369; Lipson, *supra* note 5, at 508–12; Norman & Trachtman, *supra* note 3, at 567; Swaine, *Reserving*, *supra* note 3, at 340. R R R R R R

9. *See* sources cited *supra* note 8. R

10. *See* sources cited *supra* note 8. R

11. Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1849 (2002) [hereinafter Guzman, *A Compliance-Based Theory*].

12. *Id.*

13. GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 33–48. For an analysis of the potential benefits of sanctioning, see Alexander Thompson, *The Sanctioner's Dilemma*, INT'L THEORY (forthcoming 2009). R

14. Guzman, *A Compliance-Based Theory*, *supra* note 11, at 1849. R

provide joint gains because of the possibility of opportunistic defection. Guzman notes that reputational concerns do not always lead a state to comply with international law, but rather represent an important cost to noncompliance.[15]

Oona Hathaway also uses reputation to explain compliance. She argues that states comply with international agreements because of (1) domestic enforcement of treaty agreements, (2) international enforcement of treaty agreements, and (3) collateral consequences, which include reputation as well as other benefits (such as foreign aid) that can be conditioned on treaty compliance. She notes that collateral consequences can lead a state to comply with international law that is adverse to the state's immediate interests to demonstrate that the state can be trusted in international negotiations.[16]

Even Jack Goldsmith and Eric Posner, who claim to be skeptical of the influence of international law, include reputation as a causal mechanism in explaining compliance with international law, although they are wary of relying on reputation too much because of its definitional problems.[17] Goldsmith and Posner argue that compliance with international agreements is driven by domestic factors, such as the state's institutions, traditions, and interests in foreign policy. These factors are not easily observable, however, so the other states develop beliefs about the likelihood of the state's compliance, which become its reputation.[18] Goldsmith and Posner rely on reputational sanctions in explaining why states can maintain cooperative relationships, although this logic applies regardless of the legal status of the agreement. They note that "[s]tates refrain from violating treaties (when they do) for the same basic reason they refrain from violating non-legal agreements: because they fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination."[19]

The use of reputation as a source of compliance has been applied to customary law as well as to treaty regimes. This is done in one of two ways. George Norman and Joel Trachtman link reputation for compliance with customary law with the ability of the state to form treaties.[20] Alternatively, David Golove looks to the fact that customary law involves all states, a much broader audience than most treaty regimes.[21] Golove maintains that reputation can increase compliance because even states not hurt by the defection may alter their behavior toward the violating state.[22]

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15. *Id.* at 1848. Guzman finds that international law "works" because states act to preserve their reputations. *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 71–118. R

16. Hathaway, *Between Power and Principle*, *supra* note 3, at 506–07. R

17. *See* GOLDSMITH & POSNER, *supra* note 3. R

18. *Id.* at 101.

19. *Id.* at 90.

20. Norman & Trachtman, *supra* note 3, at 567. R

21. David M. Golove, *Leaving Customary International Law Where It Is*, 34 GA. J. INT'L & COMP. L. 333, 345 (2006).

22. *Id.*

The only major critique of this use of reputation in international law has been made by George Downs and Michael Jones in their discussion of multiple reputations.[23] Downs and Jones maintain that states do not have just one reputation, but many reputations over a host of issue areas.[24] Reputations across issue areas are connected only to the extent that the costs of compliance with international obligations are similar.[25] For instance, a recession might raise the costs of complying with a trade treaty but not an arms control treaty. Thus a violation of a trade treaty is only damaging to a state's reputation in other issue areas to the extent that a recession is likely to increase non-compliance in that issue area as well. Downs and Jones conclude that reputation is still an important source of compliance with international law, but the effects are limited to issue areas.[26] Consequently, reputation can support significant cooperation in international law in narrow areas but is unable to act as a general source of compliance for the corpus of international law obligations.[27]

B. Differences Between the "Global Standing" and the "Reputation for Compliance"

It is important to differentiate between what we popularly think of as the global standing of the state (or global public opinion) and the state's reputation for compliance with international law. Compliance with international law is only one of the many dimensions along which states and governments are judged. The refusal to take on legal obligations—rather than the violation of international law—might do much more to influence the popular perception of the state than violations of legal obligations do. For instance, the United States' refusal to join the Kyoto Protocol on Global Climate Change or resistance to the Convention Banning Landmines is widely believed to have hurt the reputation of the United States.[28] An American president looking to improve the popular image of the United States abroad might do better by committing to an environmental regime, even if compliance is likely to be less than perfect, than to refuse the legal obligations altogether.[29] By refusing to take on legal obligations, the United States is

23. Downs & Jones, *supra* note 5. R

24. *Id.* at S109–12.

25. *Id.* at S102–09.

26. *Id.* at S113–14. International law scholars generally acknowledge this critique in their work but then continue with a unitary model of reputation. The most extended discussion of Downs and Jones's argument is in Andrew Guzman's book, *How International Law Works*. Guzman acknowledges that the effect of reputation will decline across issue areas but maintains that violations of any agreement have an impact for all agreements to a greater or lesser degree. *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 100–06. R

27. Downs & Jones, *supra* note 5, at S113. R

28. *See*, *e.g.*, Clair Gough & Simon Shackley, *The Respectable Politics of Climate Change: The Epistemic Communities and NGOs*, 77 INT'L AFF. 329, 335 (2001).

29. *See* Daniel W. Drezner, *The New New World Order*, FOREIGN AFF., Mar.–Apr. 2007, at 34 (discussing the United States' reputation for unilateralism in many areas, including climate change); Richard

arguably aiding its reputation for compliance with international law by declining to sign treaties with which the government does not plan to fully comply.[30] Yet when we discuss the global views of the United States, there is little doubt that this reputation is harmed rather than enhanced by resistance to global solutions for policy problems such as climate change and landmines.

Even when a state's acts are necessary for compliance with international law, these actions may negatively impact its popular image. For instance, the United States' announcement that it would not ratify the 1998 Rome Statute creating the International Criminal Court ("ICC treaty") was legally required but arguably hurt the United States' image.[31] In the last days of his administration, President Bill Clinton signed the ICC treaty. Signature is the first step in a state's acceptance of a treaty obligation. The act of signature only commits the state to consider ratification of the treaty and to avoid actions that would undermine the purpose of the treaty.[32] When George W. Bush became the president, he announced that he planned to "unsign" the treaty.[33] Under international law, the concept of unsigning a treaty does not exist, but states can announce that they have no plans to ratify a treaty that they have signed.[34] Under the Vienna Convention on the Law of Treaties, states that decide not to ratify a treaty actually have a legal obligation to announce this intention to the other signatories to the treaty.[35] The decision of the Bush administration to publicize its determination not to submit the ICC treaty for Senate ratification, once that determination was made, was the legally correct action.[36] Nonetheless, the Bush administration's announcement was generally viewed as not improving the United States' image,[37] even though a failure to announce its decision would have been legally insufficient.

Holbrook, *The Next President: Mastering a Daunting Agenda*, Foreign Aff., Sept.–Oct. 2008, at 2; James P. Rubin, *Building a New Atlantic Alliance: Restoring America's Partnership with Europe*, Foreign Aff., July–Aug. 2008, at 99; Strobe Talbott, *How the US Can Fix Its Damaged Reputation Abroad*, Spiegel Online (Oct. 13, 2008), *available at* http://www.spiegel.de/international/0,1518,583723,00.html.

30. Edward Swaine argues that a state's reputation for compliance might be enhanced if the state attaches reservations to treaties—even though the state is refusing to take on the full legal obligations of the treaty—because the state is indicating that it will not sign onto provisions it does not expect to obey. *See* Swaine, *Reserving*, *supra* note 3, at 340. This Article addresses reservations in the fourth part of the Article. *See infra* Part IV.B. R

31. Todd S. Purdam, *Diplomatic Memo; A Wider Atlantic: Europe Sees a Grotesque U.S.*, N.Y. Times, May 16, 2002, at A3.

32. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

33. Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. Times, May 5, 2002, § 1, at 18.

34. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 Harv. Int'l L.J. 307, 334–35 (2007).

35. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

36. Bradley, *supra* note 34, at 335. R

37. David J. Scheffer, *A Treaty Bush Shouldn't 'Unsign'*, N.Y. Times, Apr. 6, 2002, at A15; *see also* Lewis, *supra* note 33.

In fact, violations of international law might *improve* the popular perception of the state with a global audience. For instance, the North Atlantic Treaty Organization ("NATO") bombing of Serbia to stop the ethnic cleansing in the Former Yugoslavia was a violation of international law on the use of force.[38] The U.N. Charter requires that any use of force against another state (other than self-defense) be authorized by a resolution of the Security Council.[39] NATO members sought U.N. Security Council approval of their actions but the resolution was never pushed forward because of the threatened veto by the Russian government.[40] Yet the bombing of Serbia improved the reputation of the NATO members as it demonstrated that NATO was willing to take action to stop genocide.[41] The failure of the U.N. Security Council to approve actions in the Former Yugoslavia and the NATO military actions without U.N. authorization set off a debate in international law circles about what a state's responsibilities should be in such a situation.[42] An independent report on the legal issues implicated by the NATO actions coined the term "illegal but legitimate" to describe the bombing of Serbia.[43] This term makes explicit the gap between the content of international law and what is widely believed to be good policy.

One prominent international law scholar made a similar argument for the invasion of Iraq.[44] Anne-Marie Slaughter wrote an editorial for the New York Times stating that the U.S. invasion of Iraq could be an illegal but legitimate means of reforming the Iraqi government, although other members of the U.N. Security Council objected that the invasion was a violation of international law without a Security Council resolution authorizing the military action.[45] The invasion of Iraq has subsequently probably hurt the United States' reputation with global audiences, but Slaughter's commentary is revealing. According to her, the American reputation is damaged because the invasion has not been viewed as a policy success: American forces did not find weapons of mass destruction and the new Iraqi government has not proven effective in establishing order; the violation of international law is not the factor that damaged the United States' reputation.[46] In

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38. Jacob Katz Cogan, *Non-Compliance and the International Rule of Law*, 31 Yale J. Int'l Law 189 (2006); Eric A. Posner, *International Law: A Welfare Approach*, 73 U. Chi. L. Rev. 487, 488 (2006).

39. U.N. Charter, arts. 42, 51, 2, para. 4.

40. *See* Paul Lewis, *Conflict in the Balkans; Russia a Barrier to NATO Air Strike*, N.Y. Times, Feb. 9, 1994, at A12.

41. Peter van Ham, *The Rise of the Brand State: The Postmodern Politics of Image and Reputation*, Foreign Aff. Sept.–Oct. 2001, at 2.

42. *See, e.g.*, Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 Am. J. Int'l L. 834 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 Am. J. Int'l L. 847 (1999).

43. Independent International Commission on Kosovo, The Kosovo Report 4 (2000).

44. Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. Times, Mar. 18, 2003, at A33.

45. *Id.*

46. *Id.* Slaughter later argued that the invasion was neither legal nor legitimate because it failed on policy grounds. Anne-Marie Slaughter, *The Use of Force in Iraq: Illegal and Illegitimate*, 98 Am. Soc'y Int'l

fact, Slaughter suggests that this violation would be acceptable if the invasion were successful on a policy level.[47]

This concept of reputation as global standing—that the government is supportive of policies favored by a global audience or that the state has supported such policies in the past—is independent of a reputation for compliance with international law. Thus it is not enough to say that a government cares about the reputation of its state and this will lead to greater compliance with international law. A state can be concerned with its popular image, but this does not necessarily lead to the conclusion that the state will then comply with international law more than it would otherwise. A government may provide foreign aid, extend emergency assistance, support human rights groups, or promote green technologies, but this is reputation on a different axis than the concept of the state's reputation for compliance with international law.

This Article defines reputation—as the international law compliance literature does—to mean the state's reputation for compliance with international law.[48] This is different from global standing and a necessary distinction if we are interested in the causal link between compliance and reputation. International law scholars can (and do) discuss reputation as similar to global standing, but the link between reputation as global standing and compliance is attenuated. For instance, when Harold Koh describes the United States as possessing "soft power" because of its reputation, he appears to be thinking about reputation as a broader conception of reputation than simply that of compliance with international law.[49] The global standing definition of reputation severs the causal link between reputation and compliance because a government can "pay" for acts of non-compliance by improving the state's reputation in other areas. For instance, the United States can potentially repair any reputational loss associated with violations of the Geneva Conventions by providing higher levels of foreign aid or joining the International Criminal Court.

L. Proc. 262 (2004) [hereinafter Slaughter, *The Use of Force in Iraq*]. In the later article, Slaughter argues that the invasion of Iraq was illegitimate because (1) no weapons of mass destruction were found, (2) the Iraqi people viewed the American invasion as an occupation rather than a liberation, and (3) the United States turned to the United Nations for political support only after it was unable to broker a successful peace settlement on its own. *Id.*

47. Slaughter, *supra* note 44; Slaughter, *The Use of Force in Iraq*, *supra* note 46. R

48. This is the norm in studies of the relationship between reputation and compliance with international law. *See* Downs & Jones, *supra* note 5, at S98 (defining an actor's reputation as "a summary of its opponents' current beliefs about the player's compliance strategy or set of strategies in connection with various commitments"); Goldsmith & Posner, *supra* note 3, at 101 (defining reputation as "other states" beliefs about the likelihood that the state in question will comply with a treaty"); Guzman, How International Law Works, *supra* note 3, at 73 (defining states' reputations as "judgments about an actor's past response to international legal obligations used to predict future compliance with such obligations"). R R R

49. Koh, *On American Exceptionalism*, *supra* note 2, at 1500. R

C. The Rationalist Model of Reputation

The logic of how reputation matters to state decision making, under the rationalist approach, proceeds along the following lines. States have reputations that extend into the indefinite future and potentially apply across issue areas. States care about their reputations because they are engaged in cooperative activities with other states and continued interaction depends, at least in part, on having a good reputation for cooperation. As a consequence, states count reputational loss due to non-compliance with international law as a cost that is balanced against the possible benefits of such actions. Reputational concerns make state compliance with international law more likely because a bad reputation leads to less cooperative opportunities in the future.[50]

The idea that states will comply with international law because of their interest in future cooperative opportunities comes out of international relations theory and its focus on prisoner's dilemma situations. In a prisoner's dilemma game, the player has the option of cooperating or defecting from an agreement. The game is a dilemma because the dominant strategy, in a one-play game, is to defect, but mutual defection leaves money on the table—both players would be better off if they could cooperate. Once one player decides to cooperate, however, that player is vulnerable to defection by the other player. This can be overcome if the game is indefinitely repeated, if each player has a sufficiently high value for future gains, and if each player believes that the other player will cooperate as well.

Prisoner's Dilemma Game (P1, P2)	P2 Cooperate	P2 Defect
P1 Cooperate	3, 3	0, 5
P1 Defect	5, 0	1, 1

Reputation in a prisoner's dilemma becomes important because it is an indicator of what the player is likely to do in future rounds of the game. Will the state cooperate when others cooperate or will it take advantage of others' cooperation and defect? It is also a means of requiring repeated play. Even if this particular agreement is coming to an end, the states anticipate that they will have to deal with one another (or other states) again in the

50. The prisoner's dilemma is frequently used in international relations theory to represent cooperative games. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); James Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994). The potential importance of reputation to the cooperative games has long been recognized by international relations scholars. International law scholars have also adopted the prisoner's dilemma to describe many situations in international law. Some have explicitly included reputation in the model. *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 73–78; Guzman, *A Compliance-Based Theory*, *supra* note 11; Norman & Trachtman, *supra* note 3. R R

future. Thus defecting at the end of an agreement will signal to the partner state and other members of the international audience that the state will violate its promises. Alternatively, abiding by the agreement adds to the state's reputation for compliance.

Reputational concerns change the payoffs for the game. Here R(c) is the benefit to the state's reputation for complying with the agreement and R(v) is the loss to the state's reputation from violating the agreement.

Prisoner's Dilemma Game (P1, P2)	P2 Cooperate	P2 Defect
P1 Cooperate	3 + R(c), 3 + R(c)	0 + R(c), 5 − R(v)
P1 Defect	5 − R(v), 0 + R(c)	1 − R(v), 1 − R(v)

Reputation enhances the benefit of compliance and reduces the benefit of defection. If R(c) + R(v) is greater than 2 for both players, the game is transformed into a coincidence of interest game where neither party has an incentive to defect. For instance, if R(c) is 1 and R(v) is 1.5, then the payoffs change to those below.

Coincidence of Interest Game (P1, P2)	P2 Cooperate	P2 Defect
P1 Cooperate	4, 4	1, 3.5
P1 Defect	3.5, 1	-0.5, -0.5

Reputation is not a silver bullet for compliance. Rationalists predict that the states will violate the agreement if the reputational costs are not high enough to eliminate the gains from defection (that is, R(c) + R(v) $<$ 2), although the gains from defecting will be lower than they would be if there were no reputational consequences.[51] Thus reputational concerns are a factor in favor of compliance but do not overwhelm all other considerations. States may rationally decide to defect from agreements even if they are concerned about their reputation.

Although we do not always know the value of reputational gains or losses, reputational concerns are often advertised as potentially being very high. This is because reputational losses are not necessarily limited to the players in the immediate game. Instead, any member of the international audience that can observe the action can alter its understanding of the state's reputa-

51. *See* Goldsmith & Posner, *supra* note 3, at 29–32; Guzman, How International Law Works, *supra* note 3, at 25–41. R R

tion and act on the change. And reputational concerns can extend to any issue area. Because defection from one agreement potentially affects many agreements and many partners, the value of reputation is thought to be high. For instance, if a state is excluded from a multilateral treaty because of its poor reputation for compliance, then it effectively is shut out of the higher gains from cooperation and relegated to the non-cooperative payoff (defect, defect).

In international relations, reputation is argued to be particularly important because there is no global enforcement system and states have a choice of whom to cooperate with. If one state is thought to have a reputation for defection, other states will observe this and that state will have fewer opportunities for cooperation in future periods. As Robert Keohane argued to international relations scholars, the possible exclusion from international regimes provides states with an incentive to abide by existing international agreements that can overwhelm the immediate benefits of defection.[52] Under Keohane's view, those regimes do not have to be legal obligations.[53] Nevertheless, this idea has been carried over to international law to explain why a set of rules without a centralized enforcement mechanism can influence states' decision making.

For reputation to be an effective enforcement mechanism, *other governments must actually draw the informational inferences that the state is a desirable or an undesirable treaty partner and this must then motivate the acting government*. Observing a state's violation of a treaty or customary law must make other governments believe that this is good information about that state's likely actions in the future. Many of the rationalist views that reputation is a major cause of compliance are based on assumptions that reputation is tightly bundled over time and over issue areas. But if the informational inferences drawn from state actions are narrower or non-existent, then the deterrent effects of reputation on non-compliance are less or zero.

D. The Limits of the Reputation Model

Reputational losses are also not equally effective for all states and in all strategic situations, although international law scholars generally rely on reputational losses to promote compliance across strategic situations.[54] First, reputational sanctions are not necessarily effective against states with significant power in certain issue areas. Indeed, it is not even clear that a good reputation for compliance is welfare-maximizing for states in these situations. This is particularly relevant when we are discussing customary international law because states often make new law by violating the previous

52. Keohane, *supra* note 50, at 105–06. R

53. *Id.* at 76–77.

54. *See* Goldsmith & Posner, *supra* note 3, at 100–06; Guzman, How International Law Works, *supra* note 3, at 71–118; Lipson, *supra* note 5, at 508–12; Hathaway, *Between Power and Principle, supra* note 3, at 506–07; Norman & Trachtman, *supra* note 3, at 567. R R R

rule. Second, reputational sanctions are unlikely to be effective in international agreements designed to provide public goods, such as those addressing climate change or nuclear non-proliferation. The ultimate threat for reputational losses is exclusion from future cooperative agreements, but this is not a realistic option when collective action is necessary to address the problem. These points cut against the conventional wisdom in international law. For instance, Andrew Guzman argues that reputational losses are particularly important where governments are contracting over public goods because retaliatory sanctions are unlikely to be effective.[55] While Guzman might be correct that reputational sanctions are *more* effective than retaliatory sanctions in the public goods context, that does not lead to the conclusion, which Guzman draws, that the threat of reputational losses are *effective*.

1. *Reputation Where There Are Power Disparities*

Reputation is unlikely to be an effective mechanism for encouraging compliance when a state has significant power in an issue area. Reputation works through exclusion: the state with a poor reputation is either excluded from deals or it is charged a high price of admission (for instance, its concessions are worth less than other states' concessions because the expected compliance with the agreement is lower). In the prisoner's dilemma game, each state is modeled as being equally powerful, but in the international system, there are significant power disparities. Thus exclusion or a higher price of admission will not be an effective strategy against every state. For states with the capacity to be a bully—that is, states that cannot effectively be excluded because of their importance to the cooperative activity—reputational sanctions may simply not work particularly well.

A state with significant power in some issue area—say, trade—can be next to impossible to exclude from an agreement even if its record of compliance is less than sterling. For instance, the United States and the European Union are necessary partners for any global trade deal. Even if the United States and the European Union have less than stellar records for compliance with the World Trade Organization ("WTO") rules, the possibility of excluding them is simply unrealistic. In fact, these are the governments that set the most important terms of the agreement, rather than taking worse terms because of their poorer reputation.

Furthermore, it is not obvious that a good reputation for compliance is best for such a state here. The rationalist international law literature assumes that states want a cooperative reputation because this maximizes the states' gains. But does a good reputation always lead to the greatest future gains? In the prisoner's dilemma, states are able to maximize their gains by agreeing to cooperate. But in many situations, a reputation for being a bully can be beneficial because it may allow a government to demand (credibly) a

55. Guzman, How International Law Works, *supra* note 3, at 68–69. R

larger share of the joint gains. Wealth-maximizing states may not always want a good reputation either for compliance with international law or for cooperativeness. As Robert Keohane has noted, states might just as well prefer to have a reputation as a bully or being willing to violate international rules.[56]

In the prisoner's dilemma model, the payoffs of the game are set. Yet in international relations, states can change the payoffs of cooperative activity. For instance, if there are possible gains from cooperation for anything from arms control agreements to environmental preservation, the content of the agreement will have distributional implications. States divide the gains from cooperation, and each will want the largest share of the gains possible.

When negotiating a treaty, it is generally accepted that a state can negotiate a larger share of the gains from an agreement if it has a reputation for not backing down. Treaty negotiations can resemble a coordination game where the players want to coordinate their action, but often have opposing preferences for which action to pick. In a coordination game, the state's share of the joint gains can depend on how credibly it can insist on getting its preferred outcome. Both states are better off acting in concert, but it could be very advantageous to have a reputation for insisting on "my way or the highway" here.[57]

Coordination Game (P1, P2)	P2 Proposal A	P2 Proposal B
P1 Proposal A	4, 2	0, 0
P1 Proposal B	0, 0	2, 4

This might appear to be a difference in timing. That is, states might want a tough reputation when bargaining for an agreement but then a cooperative reputation when the agreement is sealed. But having a tough reputation even after an agreement is struck can produce gains for the state. Treaties are always susceptible to renegotiation. If one party can credibly threaten to exit from a treaty regime unless the changes it desires are made, even if this involves short-term losses to both parties, then that party is more likely to have its demands met.

For instance, in 1965, the French government wanted to stop the implementation of super-majority voting in the European Economic Community ("EEC"). The members of the EEC had agreed in 1958 to transition to

56. Robert O. Keohane, *International Law and International Relations: Two Optics*, 38 Harv. Int'l L.J. 487, 496–99 (1997).

57. Robert Putnam discusses how having a credible domestic constraint can improve the state's bargaining position. *See* Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, *in* Double-Edged Diplomacy: International Bargaining and Domestic Politics 431 (Peter B. Evans et al. eds., 1993).

super-majority voting in eight years, but at year seven, the French government was not ready to accept this treaty provision. The French government threatened to not participate in EEC decision making (the "empty chair" crisis), effectively withdrawing from the agreement, unless its demand that each nation retain a veto over community decisions was met.[58] If France carried through with its threat, it would have hurt itself as well as other EEC states.[59] The other members of the EEC backed down in the Luxembourg Compromise, which extended the national veto of community decisions for the next seventeen years.[60] Similarly, in 1953, the United States used the threat of withdrawal from the General Agreement on Tariffs and Trade ("GATT") as a bargaining chip.[61] The United States requested a waiver on agricultural goods, and the other parties to the GATT refused.[62] It was only after the United States threatened to withdraw from the organization that the waiver was approved.[63]

Having a tough reputation can be particularly effective in improving a state's gains in *customary* international law. Unlike treaty law, customary international law is the result of state practice rather than negotiations. The primary means of changing customary international law is for a state to violate the existing rule and try to change other states' practices to conform to the violating state's practice. In the short-term, the violating state might suffer a loss. But the state might achieve greater gains if it has a reputation for sticking with its violation of customary law until other states adopt its proposed change to the rule. Here again, having a good reputation for compliance with international law does not necessarily maximize the state's future gains.

In short, states might be rewarded—not punished—for non-compliance with current agreements. Governments are not locked into the payoffs of any one game. When engaging with other states, the government can consider the gains to changing the distribution of the benefits (through threatened or actual defection) as well as the gains of continuing to cooperate within the current treaty or customary international law structure. These competing considerations indicate that a simple strategy of always wanting to be viewed as law-abiding is not necessarily the way to maximize a state's gains.

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58. Andrew Moravcsik, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy,1958–1970*, 2 J.Cold War Stud. 117 (2000); Jeffrey Vanke, *Reconstructing De Gaulle*, 2 J. Cold War Stud. 87 (2000); Joseph H.H. Weiler, *The European Community in Change: Exit, Voice and Loyalty*, 3 Irish Stud. Int'l Aff. 15, 18 (1990).

59. Leon N. Lindberg, *Decision Making and Integration in the European Community*, 19 Int'l Org. 55, 61–62 (1965).

60. Simon J. Bulmer, *The European Council and the Council of the European Union: Shapers of a European Confederation*, 26 Publius 17, 25 (1996).

61. *See* John H. Jackson, World Trade and the Law of GATT 548 (1969).

62. Kenneth Dam, The GATT-Law and International Economic Organization 260 (1970); Charles Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, 36 Int'l Org. 417, 435 n.59 (1982).

63. *See* Jackson, *supra* note 61, at 548. R

2. *Reputation in the Provision of Public Goods*

In areas where the global good is a true public good, reputational sanctions of exclusion or a higher price of admission will be ineffective. For example, the problem of global climate change is a true public good. All states share the environment, and pollution from one state affects the global level of carbon dioxide. So far governments have negotiated two multilateral treaties addressing climate change. The first, the Framework Convention on Climate Change, was a treaty with wide membership but few obligations to reduce greenhouse gas emissions.[64] The successor treaty, the Kyoto Protocol, imposed more emissions requirements on developed member states (the Annex I states), namely to reduce emissions to 1990 levels of greenhouse gases.[65] Developing countries (the Annex II states) did not have to meet any specific levels of emissions. The higher costs of compliance with the Kyoto Protocol, compared to the Framework Convention on Climate Change, led some states, most notably the United States, to decline to sign onto the Kyoto Protocol.[66] This lack of participation by one of the world's most polluting nations is widely viewed as a serious problem in addressing climate change. In a public good scenario, state participation is of the utmost importance. Reputation concerns about compliance with international law cannot solve this problem because the government in question has not taken on any legal obligation.

In addition, reputational sanctions are not an effective means of enforcing the agreement among the member states. Threatening to exclude or attaching harsher terms for entry to states that have signed onto the Kyoto Protocol is not a realistic option for solving climate change issues. The "commitment period" of the Kyoto Protocol begins in 2008 and runs through 2012.[67] Thus, there has not been time for a state to violate the agreement. But given current emissions levels, it is easy to imagine that some states will fail to meet their emissions goals. Yet we do not expect that complying members of the Kyoto Protocol are likely to exclude defecting members from joining other environmental treaties or make it more costly for defecting states to join. Excluding non-complying states from future en-

64. *See* U.N. Conference on Environment and Development, Apr. 30-May 9, 1992, *Framework Convention on Climate Change*, *reprinted in* 31 I.L.M. 849 (1992).

65. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3.1, Dec. 10, 1997, 37 I.L.M. 22.

66. Heather Timmons, *Britain Warns of High Costs of Global Warming*, N.Y. Times, Oct. 31, 2006, at A8. In 1997, the Senate also unanimously passed a resolution that stated that the United States should not sign onto the Kyoto Protocol or any international climate change agreement that did not also bind developing countries (which arguably increases the costs to the United States because it decreases the competitiveness of American industries relative to developing country producers) or would result in serious harm to the U.S. economy. *See* A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, S. Res. 98, 105th Cong. (1997).

67. Kyoto Protocol, *supra* note 65, art. 3.1. **R**

vironmental agreements would be worse for the environment than the violation of the Kyoto Protocol. Such a strategy is self-defeating when wide participation is necessary to address a public good problem. The same applies to threats of excluding states from the Nuclear Non-Proliferation Treaty.

For reputational sanctions to work in either of these situations, reputation would have to apply across issue areas. A state's violation of the Kyoto Protocol would have to lead the international audience to believe that a violation here means that the state is more likely to violate an agreement in another issue area. But, as discussed in the last section, analysts need to justify why violations are informative across issue areas. States can choose to link issue areas for political reasons (rather than a belief about the state's likely future actions), but then the sanctions are costly in the ways that other forms of retaliation are costly. Once sanctions are costly, the sanctioning states (not just the target state) suffer and are, thus, less likely to apply the sanctions.

The next two parts begin to unpack the concept of reputation by examining the micro-foundations of using reputation as a cause of compliance with international law. Part III addresses the disjunction between the reputation of the state and the government as the decision maker for the state. Part IV examines the scope of reputational inferences.

III. Whose Reputation?

The question of whose reputation is implicated by violations of international law has two aspects. The first is what the costs to the *government* are. Governments might not fully internalize the reputational costs to the state. That is, the reputational hit to the government might be significantly less than the reputational hit to the state. Yet when we are discussing the government's incentive to comply with international law, it is the government's hit that is relevant to the compliance calculus. The second is what the reputational costs to the *state* are. Even if the current government does internalize the reputational costs to the state, these costs might be low if the audience expects the behavior of the state to change with a new government. Reputation is information about the state's future actions, so the violations of the last government might not be particularly good indicators of the new government's behavior.

A. *Government's Consideration of Reputational Costs*

It is hard to narrow the state's reputation into one discrete box. The state is a collection of people, traditions, government processes, political parties as well as individual leaders. International law scholarship has tended to view the state as a territorial entity, and thus the "country" has a reputation,

much like an individual, for being trustworthy or not. This view is misleading because it does not recognize how governments often fail to internalize the costs to the state's reputation in the government's decision-making process.

Treating the state as a single, ongoing entity has two aspects. First, the state is the same "person" over time; the state is thought to continue in its present form for the indefinite future. Even though we know that the governments of states change along many dimensions and practically all the time, the state is an entity that will exist as a stable body. This aspect of reputation is most apparent when we speak of a nation having a reputation, such as the United States' reputation. Not only are we talking about the United States as a unitary government, but we have a concept of the United States as having a reputation that endures beyond any given presidential or congressional election. Second, the state can control its reputation by its actions. For instance, an individual can develop a reputation for honoring contracts by choosing to adhere to her agreements. Governments are thought to control the state's reputation in the same way.

Both of these concepts are problematic when we consider the government's motivation to comply with international law. States act differently than the idealized version of a rational, calculating individual. First, governments do not fully or consistently internalize the costs of an action to the state. Second, governments do not always have the capacity to control the state's reputation.

Of course, it is useful (even desirable) to model the state as an individual when doing so simplifies the analysis without affecting the predictions or prescriptions of the model. Using a unitary view of the state is a good strategy if the underlying assumption holds: if the territorial state model predicts how states will act even when we acknowledge that states are much more complicated. But when dealing with reputation, treating the state as a unit existing into the indefinite future does affect the predictions and prescriptions of reputation-based models. We would expect reputation to have systematically different influences on state decision making if the reputation belongs to the country or the current government.

1. *The State's Existence into the Indefinite Future*

Reputation is thought to be a cause of compliance because reputation provides states with more cooperative opportunities in the future. While the state as the country will last into the indefinite future, the government making the decisions will almost always have *shorter and varying* time horizons. Reputation therefore will not have an equal influence on all states and will have a lesser influence than if we conceive of the state as the country.

Where an individual will internalize future costs to him or her from reputational (or other) sources, governments do not necessarily internalize all future costs to the state. If the government's term expires in two years (or

say in the next two rounds in the prisoner's dilemma game context), then government decision making is based on the value of the next two years, not all the costs that the state will bear in the future. This shortened time horizon lessens the impact of reputational costs. Where we might predict that a rational individual would cooperate, a rational government will not necessarily choose the same course of action.

For instance, the Bolivian government's decision in 2006 to expropriate foreign investment in the country's oil and gas industries is arguably damaging to Bolivia's reputation in the long run. In May 2006, President Evo Morales ordered the Bolivian army to occupy foreign-owned oil and gas fields.[68] Foreign producers in Bolivia include British Gas, Total (French), Repsol (Spanish), and Petrobras (Brazil). Morales declared that "[t]he looting by the foreign oil companies has ended" and demanded that each company relinquish control of the fields to the state-owned energy company.[69] Although the Bolivian government's expropriation brings short-term benefits, both in terms of the windfall economic gain and greater political support among the government's domestic constituency, the state faces much higher risk premiums on future foreign investment in the Bolivian energy section (if capital is available at all). And Bolivia's energy sector may very well need foreign investment. Unlike other states, Bolivia's energy sector does not have domestic access to the technology needed to efficiently extract and process oil and gas resources.[70]

If we were to treat the state as an individual, we would probably conclude that the reputational costs outweigh the benefits, and thus we would predict that the state would not expropriate. There are significant short-term benefits to President Morales; he campaigned on the platform of nationalizing and expropriating natural resources while world oil prices are high, providing the state with significant financial resources. But there are significant long-term costs. The expropriation of foreign assets discourages future foreign investment in the energy sector—investment that Bolivia needs to maximize its long-term revenue from oil and gas deposits. In addition, President Morales's actions may dry up foreign investment in all Bolivian sectors, depending on how broadly the international audience views the Bolivian government's action. Thus when we view Bolivia as a state with long-term interests, the benefits of seizing foreign assets appear to be less than the costs. Yet when we view the government as the relevant actor of the state (and acknowledge that there is a gap between the interests of the government and the state), then the government will have shorter time horizons and may rationally undertake actions that the idealized state would not.

68. Carter Dougherty, *Oil Companies Not Entitled to Payment, Bolivian Says*, N.Y. Times, May 12, 2006, at C4.

69. Paulo Prada, *Bolivian Nationalizes the Oil and Gas Sector*, N.Y. Times, May 2, 2006, at A9.

70. *Bolivia: Nationalised*, Bus. Latin Am., May 8, 2006, at 1, 1–2.

In addition, governments will not have *consistent* concerns about the future as an individual would. For instance, a U.S. president in the first year in office may care more about the state's reputation internationally than he or she will in a re-election year. So even if we acknowledge that government leaders have shorter time horizons than the state, we still cannot treat reputational concerns as a constant that will have the same influence on a government throughout its time in power. In this light, George W. Bush's decision to violate international trade rules in the run up to the 2004 presidential election is not surprising. In an effort to cement political support in the key electoral states of Pennsylvania, Ohio, and West Virginia, Bush imposed tariffs on imported steel in violation of international trade rules.[71] Although the Bush administration claimed that this action was consistent with the nation's treaty obligations,[72] international and domestic audiences almost unanimously viewed the tariff hikes as a violation of international law.[73] Bush decided to withdraw the tariffs only after facing trade retaliation from steel exporting governments.[74] The long-term costs to the nation in terms of the loss of reputation might very well have been greater than the immediate gains to the nation from the violation, but it was not the overall welfare of the state that the president was trying to maximize.

Even if governments do not know when the next election will be, the government faces electoral pressure that shortens its time horizons. For instance, in many parliamentary systems elections are called by the prime minister or the legislature, if the current government receives a vote of no confidence. Thus the current government does not know when the elections will take place but knows that they will before too long. This can either shorten or lengthen the government's time horizons. If the government has a large majority such that it anticipates staying in power for a longer period of time, it might act more like a president in the first year of his or her term. But if the government has a narrow majority, then it might anticipate that elections will come soon and have much shorter time horizons. Again, the importance of reputation to the government can be large or nil.

Along the same lines, we cannot assume that reputational concerns matter more for leaders that have managed to stay in power for a long time. From

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71. *See* David E. Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports*, N.Y. Times, Mar. 6, 2002, at A1.

72. *See* Elizabeth Olson, *Europeans Press Fight in W.T.O. Against American Tariffs on Steel*, N.Y. Times, May 28, 2002, at C4.

73. *See* Edmund L. Andrews, *Angry Europeans to Challenge U.S. Steel Tariffs at W.T.O.*, N.Y. Times, Mar. 6, 2002, at C12; Youngjin Jung & Ellen Jooyeon Kang, *Toward an Ideal WTO Safeguards Regime—Lessons from U.S.-Steel*, 38 Int'l law. 919, 919–21 (2004); Stephan Richter, *Is This Europe's Hour to Lead on Free Trade*, N.Y. Times, Apr. 1, 2002, at A19.

74. *See* Paul Meller, *Europe Lists U.S. Imports It Plans to Tax*, N.Y.Times, Mar. 23, 2002, at C1; Richard W. Stevenson & Elizabeth Becker, *After 21 Months, Bush Lifts Tariff on Steel Imports*, N.Y. Times, Dec. 5, 2003, at A1. The WTO dispute settlement system worked quickly because the legal issues in this case were relatively clear. The WTO found against the United States, and the Bush administration had to withdraw the steel tariff before the 2004 election to avoid retaliation. *See id.*

the perspective of history, we know how long a political leader has maintained control of the government but this does not mean that the leader acted as if he or she would be in power for that long. For instance, although Gerhard Schroeder managed to remain Chancellor of Germany for eight years, from 1998 to 2005, this should not lead us to think of Schroeder's time horizons on an eight year calendar. When making decisions, Schroeder did not know when his term in office would end and had to win elections in that period. Indeed, most commentators believed (and Schroeder might as well have thought) that he was unlikely to win re-election in 2002.[75] Consequently, Schroeder's value on the future of German reputation was probably low in 2002 even though we now know that Schroeder held onto power until 2005.

The same is true of governments that do not face electoral constraints. Even with dictatorships, the influence of reputation is uncertain. Dictators do not have an electoral constraint, but still face domestic opposition. A dictator with a strong domestic support base may expect that he or she will remain in power indefinitely and thus care about the state's reputation. However, a dictator that faces a crisis of domestic opposition may (truly) face a quick end date and have very short time horizons. Without knowing more about the internal workings of the state, we cannot know whether reputation is likely to have any effect on a dictator's decision making.

Including political parties in the model of the government does not mitigate the time horizon problem. A leader's concern for the fate of the party in future elections might extend the leader's time horizons beyond his or her time in office (and political parties can exist longer on the nation's stage than any individual leader), but parties must also win elections. Like individual leaders, the desire to remain in power also gives political parties shorter time horizons than an idealized state. For instance, in the steel tariffs example, we would expect that the Republican Party, not just President Bush, valued re-election and thus might have made the same decision to violate the international agreement for the short-term benefits. Focusing on the political party rather than an individual government leader might help explain why the president might not "waste" the state's reputation in his or her second term in office (an end game problem), but it does not eliminate the short time horizon effect. In fact, a focus on political parties might even further shorten government leaders' time horizons. If the political party faces elections more often than any one government leader (that is, elections for the House of Representatives every two years compared to four years for the executive and six for the Senate), then concern for the fate of the party might make government leaders even more shortsighted.

75. *See generally* Steven Erlanger, *Germany's Leader Retains His Power After Tight Vote*, N.Y. TIMES, Sept. 23, 2002, at A1.

Alternatively, we might think that governments treat the state's reputation as special. With regards to the state's international reputation, government leaders have a longer term view. Here, we can think of the state's reputation as being in the trust of the executive, who will undertake costly actions to preserve it for future governments. But it is hard to explain why this legacy concern is so uniquely strong with reputation. Government leaders often adopt actions with long-term costs and short-term gains in spite of the possible wrath of history. A look at the current state of American non-cyclical debt levels demonstrates that government leaders certainly have been willing to push off tax obligations to future governments. Deficit spending is both more transparent and perhaps more salient to voters than losses to the state's reputation and yet government leaders obviously have made the decision to put current gains over future costs to the nation in this context. While it is possible that government leaders are more concerned with reputation than other issues, and are willing to take costly actions to preserve it for future governments, it is unclear why this would be the case here but not in other policy areas.

In sum, reputation is not a constant that we can add or subtract from a state's payoffs when conducting a cost-benefit analysis. The state may very well have a reputation but this does not mean that the government fully internalizes the costs (or benefits) of an action to the state's reputation or that the government will have a consistent value on the state's reputation throughout its term in power. Rather, reputational analysis is highly contingent on domestic politics. Consequently, treating the state as a rational individual systematically exaggerates the importance of reputation in state decision making.

2. *The Government's Control over Reputation*

Reputational concerns might be relevant to the audience and yet not be a *cause* of compliance at all. Unlike an individual's choice to cooperate or defect, there may be aspects of the state's reputation that current government leaders cannot alter, such as the history of the state, characteristics of the electorate, or the structure of the government. When discussing the state's reputation, analysts are often ambiguous about what constitutes the state: the current government, the state's history, its institutions, the preferences of the population, or something else. Yet how we define the state is extremely important if reputation is a *cause*, rather than simply an indicator, of compliance. Governments must be able to change the state's reputation for reputation to be a motivating factor for state action. Like an individual who has been blacklisted and cannot undo this label by acting well in the future, a government that is unable to change its reputation will not be influenced by reputational concerns in an instrumental way.

In many circumstances, the reputation of the state is unconnected with the actions of government leaders. If the reputation of the state is based on

the structure of the governmental system, characteristics of the population, or the history of the state, then government leaders will be hard-pressed to alter the state's reputation. The current literature on reputation flips uncomfortably between notions of the state as an institution and as a government. Often analysts discuss the state as an ongoing institution (that is, traditions, constitutional rules, or the quality of the bureaucracy) that is separate from the current government in power. But choice of a definition is critically important to theories of compliance: if a state has a good reputation because it has a history of obedience to international law, then reputation is an indicator of compliance but not a cause.

The fact that this information is relevant to the audience will not necessarily mean that reputational concerns will influence current government decision making. For example, when deciding whether to engage with the target state—whether to form an environmental agreement, make a capital investment, or establish a military alliance—the audience might find the broader characteristics of the state relevant. The history of popular support for military operations might be relevant to a government considering a military alliance with the target state. The current government, however, cannot alter history. The state's reputation, whether positive or negative, will not lead to different government policies. Indicators of compliance are not necessarily causes of compliance.

Returning to the steel tariffs example, other governments know that the United States has presidential elections every four years. They also understand that first-term presidents are going to have shorter time horizons, particularly in the second two years of their term. Consequently, the United States might have a reputation for violating international agreements more as the election approaches, and other governments may not put much stock in American treaty promises during this time. But it is not necessarily something that will motivate current government leaders. No individual president will be able to alter this reputation. Even if the current president does not violate international law, the audience knows that the institution of the presidency still has a short time horizon approaching re-election. The reputation is an assessment of the incentives of a four-year election cycle as an institution, not of any one president.

This is relevant to Goldsmith and Posner's analysis of reputation in state decision making. They describe reputation as characteristics of the entire state, particularly its history and institutions—attributes that the current leaders of the state cannot change.[76] Here, other states might rationally consider these traits, but they should almost never be a motivation for government leaders to comply with international law. So Goldsmith and Posner might be right: states can develop a reputation based on history and institu-

76. Goldsmith & Posner, *supra* note 3, at 101. R

tions. But it does not follow that the state will base compliance decisions on this reputation.

B. The Reputational Costs to the State

From the audience's perspective, the reputation of the state may be highly dependent on the current government or current political conditions. The actions of a past government are only relevant to the extent that those actions are predictive of what the state will do in the future. If the expectations of the audience change when a new administration comes to power or when political conditions change, then the reputational costs of violating international law to the state, as well as the current government, may not be very high.

States are not static. Even though the state may continue to exist in the same legal status for years, the state's goals or its preferred means of achieving those goals can change radically.[77] The Bush administration obviously believed that the preferences of the government in power are critically important to the actions of the state. The American interventions in Afghanistan and Iraq were premised on the idea that changing the regime in power would result in radically different policy preferences for the state.[78] Similarly, U.S. support for General Pervez Musharraf in Pakistan is based on concern about the policy preferences of a regime that would replace him.[79] When a new government comes to power in the state, the audience will discount the predictive value of the last government's actions. The differences in successive governments can be relatively minor—such as the transition from Tony Blair to Gordon Brown in the United Kingdom—or large—such as the transition from the Shah to Ayatollah Khomeini in Iran. These are differences of degree, not category. There will always be *some* discount of the state's past actions when a new government comes to power.

This point is relevant not only for determining the expected costs of a reputational loss, but also for analyzing a government's decision to *improve* its reputation. For instance, many commentators have argued that the Bush administration damaged the United States' reputation for compliance with international law by violating the Geneva Conventions with regards to detainees.[80] Accepting this statement as true, how much will the Obama ad-

77. Scott & Stephan, The Limits of Leviathan, *supra* note 3, at 68–89, 118–119.

78. James A. Baker III, *The Right Way to Change a Regime*, N.Y. Times, Aug. 25, 2002, at C9 (discussing the need for military force to achieve regime change in Iraq); David Sanger & James Dao, *U.S. to Press Afghan Rebels Not to Form Government*, N.Y. Times, Nov. 18, 2001, at A1 (discussing the American plan to establish a new government in Afghanistan with a broad base of support); *see also* Roger Morris, *A Tyrant 40 Years in the Making*, N.Y. Times, Mar. 14, 2003, at A29 (comparing present and past attempts at regime change in Iraq).

79. Carlotta Gall, *Meeting Bush May Lift Pakistani Leader's Prestige*, N.Y. Times, June 24, 2003, at A6; Editorial, *General Musharraf's Visit*, N.Y. Times, Nov. 6, 2001, at A20.

80. *See* Margulies, *supra* note 1, at 140–44; Editorial, *A Sudden Sense of Urgency*, N.Y. Times, Sept. 7, 2006, at A28; Editorial, *A Bad Bargain*, N.Y. Times, Sept. 22, 2006, at A20; Bob Herbert, Op-Ed, R

ministration have to invest in foreign relations to restore the United States' good reputation?

If the loss of reputation is due to policy choices specific to the Bush administration, then the loss to the United States' reputation is due to the audience's assessment of what policy options current government officials consider reasonable (such as detaining suspected terrorists at Guantanamo Bay). In this case, the United States' reputation should be relatively easy to fix if a new executive, who holds different views of what are reasonable policy options, is voted into office. The Obama administration might only have to make a small investment to demonstrate that its policy preferences are different from those of the past administration, such as closing a detainee detention center.

If the loss is due to an assessment of the range of policies that the American electorate will support, then the United States' reputation should be harder to fix, but repairable over time if voters consistently elect presidents with more moderate policy views. Here, a new president might or might not be able to change the state's reputation, but it will certainly be more difficult. At a minimum, a new president would have to devote substantial political capital to demonstrating that the electorate's views have changed, an investment he or she might not make if the benefits of improving the state's reputation for him or her, rather than the nation, are not equally large.

Of course, the loss of reputation could be due to an assessment of the structure of the United States' government, namely that the executive has a tremendous amount of discretion in international affairs. Here, the reputational loss might be impossible to repair in the short-term. The American reputation might only be altered by a change to the structure of the constitutional system or a long history of consistent executive practice. A new president could invest a lot in improving the state's reputation without undoing most of the consequences of the last administration. If this is the situation, then a new president is unlikely to invest in improving the state's reputation because his or her investment is not effective. Where the reputation truly belongs to the state rather than the government, reputational concerns have *less* influence on the decision maker because the state's reputation is relatively immutable.

C. The Reputation of the State and Sovereign Debt

This focus on governments is consistent with political science studies of the effect of reputation on sovereign lending. In one of the only examples of an empirical study that uses reputation as a quantifiable variable rather than an error term, Michael Tomz has examined the effect of reputation on the

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Madness and Shame, N.Y. Times, July 22, 2008, at A19; Kate Zernike, *Administration Prods Congress to Curb the Rights of Detainees*, N.Y. Times, July 13, 2006, at A1.

investors' willingness to lend to sovereign nations and on what terms.[81] Sovereign debt is an interesting area to study because sovereign states' decision to pay their outstanding debts is a matter of political will.[82] The government is almost always in a position to pay the debt; the issue is whether the government wants to take the domestic measures necessary, such as decreasing public spending or selling state assets, to meet the debt payments.[83] Sovereign debt is also intriguing because interest rates provide for a continuum to assess the effect of the debtor's reputation. An investor might find the sovereign to be creditworthy but still uncertain enough for the investor to charge a risk premium. Tomz argues that sovereigns earn reputations as stalwarts (always pays debt), fair weathers (pays debts in good times), or lemons (never pays debt).[84] Tomz demonstrates that sovereigns receive either low rates of interest, high rates of interest, or no credit at all based on this reputation, which Tomz uses as an independent variable in his quantitative analysis.[85]

Crucial to Tomz's analysis is his theory of how reputation attaches to the sovereign. Unlike traditional models where the state is considered as the same person across governments, Tomz's model includes the possibility for political change *within* the state.[86] His model has investors realizing that governments change and each successive government can have different preferences for repaying the state's debt.[87] As Tomz discusses, if the state is treated as a stable political entity, then the state can develop a reputation as a stalwart or a lemon that, over time, is very hard to alter.[88] Thus the stalwart can default on debt to little reputational effect and the lemon has no incentive to invest in improving its reputation.[89] Building governments into the model changes this. A government inherits its predecessor's reputation but can quickly alter the state's reputation by acting against the state's perceived type.[90] When a stalwart defaults, investors then understand that a new government with different policy preferences has come to power and downgrades its reputation.[91] Similarly, a new government of a lemon can repair the state's reputation by settling past debts.[92]

The conclusion from Tomz's empirical work is that investors are highly responsive to governments in determining the "state's reputation." As he

81. Michael Tomz, Reputation and International Cooperation: Sovereign Debt Across Three Centuries (2007).
82. *Id.* at 15.
83. *Id.*
84. *Id.* at 17.
85. *Id.* at 39–113.
86. *Id.* at 18–28.
87. *Id.* at 11–12, 20–22.
88. *Id.* at 21–22.
89. *Id.*
90. *Id.* at 18–28.
91. *Id.* at 22.
92. *Id.*

notes, "[t]he possibility of political change makes reputations fragile."[93] Rather than treating the state as an on-going stable entity with a long-lived reputation, investors are interested in the reputation of the government currently controlling the state. Thus one government can change the reputation of the state notwithstanding the state's history. A focus on governments is not irrelevant, but rather necessary, to explain patterns of sovereign debt lending.[94]

IV. A Reputation for What?

A. *The Scope of Reputation: The Implications of a Violation*

Reputation is useful to an audience because it helps predict future action. A reputation forms when a state's actions are viewed by the audience as applying to its disposition rather than the particulars of the situation.[95] States might be trustworthy or untrustworthy, but this disposition is not easily observable. The audience draws inferences on the state's trustworthiness based on whether it complies with international rules. The question is how useful information about non-compliance in one situation is to predicting non-compliance in other situations. Reputation might be limited to one issue area or might apply across issue areas. It can also be partner specific or apply to all states.

In their article on multiple reputations, George Downs and Michael Jones argue that states maintain several separate reputations because information in one area is not necessarily useful in predicting state action in others.[96] They argue that a state's defection signals to other states that the compliance costs to the state have surpassed the state's benefits from the treaty.[97] This information should lead other states to expect similar defections only if the source of higher compliance costs impacts other agreements and if other agreements are of equal or lesser value to the defecting state.[98] For instance, in the 1980s, the United States experienced a recession that raised the political costs of complying with trade agreements. The Reagan administration insisted that the Japanese government limit exports of automobiles (a so-called voluntary export restraint) to the United States.[99] Assume that the international audience views this as a violation of international law (al-

93. *Id.* at 14.
94. *Id.* at 18–28.
95. Mercer, *supra* note 4, at 6. R
96. Downs & Jones, *supra* note 5, at S95. R
97. *Id.* at S108.
98. *Id.* at S97 ("While states have reason to revise their estimate of a state's reputation, following a defection or pattern of defections, they have reason to do so only in connection with agreements that they believe (1) are affected by the same or similar sources of fluctuating compliance costs (or benefits) and (2) are valued the same or less by the defecting state.").
99. *See* John Jackson et al., *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 Mich. L. Rev. 267, 313 (1982).

though whether such measures were illegal is questionable). What does this information relay about the United States' likely compliance with other agreements? A recession might not make the United States any more likely to violate a military alliance or environmental agreement if it does not similarly raise the costs of complying with the agreement. Moreover, the costs of compliance might not be high enough to make the United States violate a trade agreement with the European Union. Because different treaties create varying benefits and implicate different compliance costs, states can maintain multiple reputations, which cabin the costs of defection in any one area.

More broadly, *compliance with international rules is a function of domestic support for the goals of the treaty regimes as well as respect for international legal obligations*. Changes within the state, such as a change in the coalition supporting the government in power, can lead to different policy preferences. Treaties are policy outcomes as well as legal agreements. Non-compliance might not signal a general lack of respect for legal rules but a shift in the policy goals of the state. In these cases, the likelihood of compliance might increase for some agreements and decrease for others. Greater compliance with one regime might actually be an indicator of more defections in other policy areas.

For instance, in the 1980s, the Green Party made significant electoral gains in West German elections. Although the Green Party was not made part of the ruling coalition, they had enough votes to be a policymaking force in the German Parliament.[100] Let us assume that West German compliance with environmental treaties increased after the election.[101] Does this signal that West Germany will have an equally good record with trade agreements and military agreements? It might if the cause of the improved compliance with environmental agreements was the Green Party's greater respect for international agreements. Alternatively, the Green Party might simply care more about environmental policy and have no greater respect for international law than any other party. What implications do members of the audience draw from observing West Germany's increase in compliance? Under the standard reputational model, we would posit that West Germany experiences a reputational gain. If increased compliance in any area signals greater compliance in other areas, then increased compliance with environmental law signals a higher likelihood of compliance with trade and military agreements. But members of the audience might draw the opposite conclu-

100. James M. Markham, *Bonn Voting: Second Look*, N.Y. Times, Mar. 8, 1983, at A1. The Green Party became a part of the ruling coalition in 1998 when Gerhard Schroeder (leader of the Social Democrats) came to power and formed the first "Red-Green" coalition. The Green Party leader, Joschka Fischer, became the foreign minister. *See* Roger Cohen, *German Green Evolves from Revolutionary to Pragmatist*, N.Y. Times, Oct. 9, 1998, at A10; Richard Bernstein, *The German Question*, N.Y. Times, May 2, 2004, § 6, at 52.

101. Governments do not normally advertise "increased compliance" with treaties, just as they do not advertise non-compliance, because it implies that the government was not fully complying with the treaty in earlier periods.

sion: the influence of the Green Party in the governing coalition might actually make West Germany less likely to comply with trade agreements (for example, Green Party objection to a trade agreement that requires the importation of hormone-treated beef or genetically modified foods) and military agreements (for example, Green Party objections to the storage of nuclear weapons on German soil). The policy goals of the government do not always lead to similar actions with regards to international law. For non-compliance in one agreement to be indicative of actions in other treaties, governments (and their constituencies) must care about the status of the agreement as a legal obligation, not just the policy it represents.

Understanding how the audience views a violation of international law is particularly important when we are discussing the enforcement of agreements where there is not significant intra-issue enforcement. For instance, let us say that a government that violates a human rights treaty *only* suffers a reputational loss in the human rights issue area. This is not much of a deterrent, because the government would continue to be invited to join trade agreements, security treaties, and other cooperative ventures—just not human rights treaties.[102] Reputation *must* be bundled across issue areas if we think that reputation is an important cause of compliance with a wide range of agreements. If non-compliance in one area or with one partner is not predictive of other situations, then the costs to the state of possible future gains is lessened or eliminated. Without broad effects, reputation cannot sustain compliance with international law generally because it does not necessarily create collateral for other agreements or partners.[103] Governments might still wish to link issues—such as human rights and trade—but this is a strategic decision to connect the issues politically. Governments restrict the access to their markets of governments with poor human rights records, but this is done to create an incentive for better human rights, not because the sanctioning nations are concerned about violations of the trade agreement.

The transferable quality of reputation is also relevant to theories of why states join treaties (rather than why they comply with treaties). For instance, Oona Hathaway argues that states join international treaties for the reputational benefit of being a member of the treaty regime (as distinct from a reputation for compliance with international law).[104] But what are states getting from joining human rights treaties? It is certainly possible that states have an internal sense of honor.[105] Governments can wish to have good human rights practices and sign onto treaties for non-instrumental reasons. But these reasons should exist regardless of whether the state's reputation on

102. Even this is unlikely to occur as governments with the worst human rights records are still regularly invited to join new human rights treaties. Gabriela Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 Harv. Int'l L.J. 323, 340 (2008).

103. Downs & Jones, *supra* note 5, at S97. R

104. Hathaway, *Human Rights Treaties*, *supra* note 3, at 2002. R

105. *See* Adriaan Lanni, *The Laws of War in Ancient Greece*, 26 L. & Hist. Rev. 469, 474–76 (2008).

human rights is good or bad. If a state's decision to join a treaty is based on the marginal effect on its reputation, then the state's decision is instrumental, and we need to know what the state is getting from an improved reputation. The key question is whether a good reputation for human rights translates into improved prospects in other areas, such as trade agreements or military alliances. If an improved reputation for human rights is restricted to the human rights context, then the reputational gains to a country that has poor human rights practices (particularly one that does not plan to improve its human rights practices) are, at best, small.

B. A Reputation for Legality and a Reputation for Cooperativeness

Discussions of reputation in international law seem to be in universal agreement that states want a "cooperative" reputation. Such a reputation means that the state will be able to engage in more cooperative activities in the future, which is the incentive for compliance today. But even the very concept of a good reputation is more complicated when taken out of the prisoner's dilemma model of state interaction and applied to international relations. Work in international law often confuses legal exactness with commitment to the regime even though these two definitions lead to divergent predictions for state behavior. Reputation works as a causal mechanism only if the signal that the state sends is understood by the audience as cooperative or uncooperative. If the definition of cooperative is uncertain, then the state's reputation becomes more ambiguous.

States are said to want a good reputation for cooperativeness, but defining this concept is more difficult than it immediately appears. In international relations, states do not face a dichotomous choice between cooperation and defection. For instance, the United States withdrew from the ABM Treaty in 2001.[106] The withdrawal from the treaty was completely legal. The ABM Treaty specifies that either party can withdraw from the treaty with six months notice,[107] and the United States gave the requisite notice.[108] No state argued that the United States did not live up to its legal obligations, but many criticized the United States for renouncing the arms control agreement and not upholding international goals of arms limits.[109] This goes to the definition of a "good reputation" for cooperation: is it complying with the terms of the treaty or demonstrating a commitment to a course of action?

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106. David Sanger & Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. Times, Dec. 12, 2001, at A1.

107. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV(2), May 26, 1972, 23 U.S.T. 3435.

108. Sanger & Bumiller, *supra* note 106. R

109. *See* Patrick E. Tyler, *Global Reaction to Missile Plan Is Cautious*, N.Y. Times, May 3, 2001, at A10. *See generally* Patricia Hewitson, *Nonproliferation and Reduction in Nuclear Weapons: Risks of Weakening the Nuclear Nonproliferation Norm*, 21 Berkeley J. Int'l L. 405, 410–35 (2003) (discussing international response to the ABM withdrawal announcement).

In the political science literature, a reputation for "cooperativeness" is viewed as a reputation for reliability in commitment to the goals of the regime ("reliability reputation").[110] International law scholars are less clear. Often they switch between an idea of reliability and one of strict compliance with *legal* commitments ("legality reputation").[111] Yet a reputation for reliability and a reputation for legal exactness do not go hand in glove: a state can completely fulfill its legal obligations and yet develop a reputation for being unreliable.[112] Failing to differentiate between a reputation for reliability and one for legality leads to confused causal statements about an action's consequences on the state's reputation. Similarly, the two types of reputations will have different effects on states' decision making.

The dialogue between Edward Swaine and Larry Helfer over treaty reservations displays how differently scholars view reputation and whether formal compliance aids or subtracts from a cooperative reputation. Treaty reservations allow a state to exempt itself from some of the terms of a treaty. Reservations may decrease the likelihood that a state will breach the treaty but also show that the state is unwilling to accept the full obligations of the agreement. How a reservation affects reputation depends on what defines a good reputation. Swaine and Helfer talk past each other because they adopt different definitions. Swaine implicitly views reputation as related to formal compliance with the treaty, and views reservations as improving the state's reputation:

> These two types of information [produced when a state adds a reservation]—about prospects for deviance, and a state's regard for its reputation—clearly relate to each other. States may be reluctant to reveal any information, and disclosing how they deviate from a treaty they cared to ratify may be singularly unappealing. Disclosure might, conceivably, merely be the price for the defense that reservations provide against claims of treaty breach. But reservations also bolster a state's reputation by showing that they take treaty commitments seriously enough to broadcast when they cannot comply, benefiting them by avoiding unwanted inferences from subsequent conduct about their trustworthiness.[113]

By contrast, Helfer conceives of reputation as concerning the state's general willingness to cooperate with other states, and views reservations as detracting from the state's reputation:

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110. *See* KEOHANE, *supra* note 50, at 26; BETH YARBROUGH & ROBERT YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE 38 (1992). R

111. *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 3, at 36–40; Helfer, *supra* note 3, at 369. R

112. For instance, Helfer discusses the differing effects of exiting versus violating a treaty on the state's reputation. Helfer, *Exiting Treaties*, *supra* note 3, at 1621–28.

113. Swaine, *Reserving*, *supra* note 3, at 340. R

> An early reserver [a state that adds a reservation at the end of treaty negotiations] signals that it is willing to cooperate, but only on its own terms. The same message arguably attaches to any reservation. But early reservations are likely to be especially strong indicia of non-cooperation, inasmuch as they deviate from the final text that the parties have only just finished negotiating. The reputational costs to reserving early may therefore be considerable.[114]

Here, Swaine views a good reputation as one for reliability with the specific terms of the treaty, where Helfer views reputation as a signal of cooperativeness with international ventures. Reservations clarify what a state is signing up for, by explicitly stating the part of the treaty regime to which the state will not be bound. Thus reservations may improve a state's "good" reputation for legal compliance but also give the state a "bad" reputation for being unwilling to accept cooperative agreements fully.

Either view is perfectly acceptable and defensible as a definition of a good reputation, but the two views provide different signals to other states. A reputation for legal compliance with the terms of an agreement signals that the state will abide by whatever deal it strikes, but does not signal that the state will be cooperative in negotiations or willing to accept the result of multilateral negotiations. Indeed, a reputation for legal compliance could be maintained even if the state renounced treaty agreements frequently, so long as the state withdrew in accordance with the treaty's terms. A reputation for cooperativeness, by contrast, might permit some violations of the agreement but signal a willingness to commit to treaty regimes.

Which definition makes a state a good treaty partner? Reputation theories of compliance posit that states care about their reputations as a means of having more opportunities to engage in international relationships, so states should try to improve whatever reputation makes them the best treaty partner. But it is far from obvious which reputation is better, and it might be context specific. If the treaty is very specific, then a reputation for strict legal compliance may be better. In international law, however, the strict legal definition is problematic because there is generally not a third-party institution to determine what is inside the letter of the agreement and what is out. For instance, whether a missile system violates an arms control agreement is an issue where there can be good faith disagreement and thus the reputational effects under the legality definition are uncertain. In addition, actions that are formally in compliance with a treaty regime might nonetheless signal that a state is unreliable. For instance, Helfer also uses reputation to explain why states are unlikely to try to add reservations later in time by denouncing a treaty and then re-acceding with a reservation, an act that is

114. Helfer, *supra* note 3, at 369. **R**

formally permissible under the treaty but may be viewed by other states as a change in the terms of the agreement:

> Reputational concerns also led Tony Blair to withdraw his proposal to denounce and re-ratify [with additional reservations] the European Convention on Human Rights. Australia's Joint Standing Committee on Treaties reached a similar conclusion after holding hearings on the Convention on the Rights of the Child (CROC). A majority of submissions favored denouncing the CROC to allow Australia to re-accede with reservations covering the "concept of the autonomous child." The Committee rejected this approach on the grounds that it "would do significant harm to Australia's international reputation."[115]

Concern for a good reputation for reliability can even lead states to *violate* international law. For instance, if a government thinks that it is likely to violate a treaty in the near future, should the state withdraw from the treaty regime or remain a member? Sometimes reputational concerns may push a government toward remaining in a treaty regime, even if in violation of some provisions, rather than withdrawing from the regime to prevent a breach of the state's legal obligations. Here, a state would be more likely to violate international law to maintain a good reputation for being committed to the treaty regime. Different conceptions of reputation can lead to opposing recommendations, as in the case of attaching reservations. Reputational concerns can be said to inform either action. Without a clearer definition of what constitutes a good reputation, we cannot say in which direction reputational concerns will push states.

This distinction between commitment to the regime and strict observance of an agreement's legal obligations is even more apparent when we discuss international agreements that are not legally binding.[116] In addition to treaties, states can form non-binding agreements, exchange letters of understanding, extend verbal assurances, or even reach tacit agreements. Some of the most important international agreements are non-binding. For instance, the Helsinki Accords are viewed as one of the most important human rights agreements. In 1975, the Soviet Union agreed to respect the human rights of its citizens, particularly political dissidents and religious minorities, in return for Western nations' acceptance of post-WWII borders in Europe, including the Soviet annexation of the Baltic states.[117] The Soviet Union refused to accept the Helsinki Accords as *legal obligations*, so the

115. *Id.* at 374 (footnotes omitted).

116. International relations theorists tend to be uninterested in the legal status of an agreement, with the notable exception of Charles Lipson. *See* Lipson, *supra* note 5. Attempts by political scientists to categorize "legalization" have also included "obligation" as one of three characteristics of legalization. JUDITH GOLDSTEIN ET AL., LEGALIZATION AND WORLD POLITICS 17–28 (2001). R

117. Dante B. Fascell, *The Helsinki Accord: A Case Study*, 442 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 69, 71–72 (1979).

agreement was announced as a declaration rather than a treaty.[118] When the Soviet Union violated the Helsinki Accords, did this have an effect on its reputation? If such a violation is going to have an effect on a state's reputation as a good treaty partner, then it has to be through a reliability view of reputation rather than a strict legality view.

The divergence between these two views of a cooperative reputation is a problem for using reputational theories of compliance because it creates ambiguity in interpreting the informational signal. To return to the ABM Treaty example, should other states change their views of the United States' reputation when they observe the United States' withdrawal from the agreement? Arguably the audience could either make no change to the United States' reputation (because withdrawal is allowed by the terms of the treaty) or lower its assessment of the United States' cooperativeness (because the United States did not maintain its support for the regime). Knowing what information the audience will draw from the signal is critical if reputational concerns are supposed to lead governments to choose one course of action over another. It is difficult to say that the United States will want to avoid the reputational losses that follow from exiting the ABM Treaty if the informational consequences of the action might be zero. There might be some cost but we do not know what it will be. Moreover, if the United States can sell its action as cooperative (because there are multiple views of what qualifies as cooperative), then the perceived reputational costs are lower.

V. Conclusion: Where to Go from Here?

In international law scholarship, reputational analysis has taken on a central role in explaining compliance with international law. The logic is intuitively appealing: a state needs a good reputation to enjoy the benefits of international cooperation because the international system lacks a centralized mechanism of enforcing agreements and violations of international law are difficult to deter in the current decentralized system. Consequently, the state's reputation for compliance with international law determines whether the state is considered a useful treaty partner. Without a good reputation, the international community will cut the state out of international agreements. The state will be isolated when it needs the cooperation of other states to achieve its goals. In short, a state that ignores its reputation in the short run will face greater costs in the long run.

This logic of how reputational concerns play out between nations has become critically important to rationalist views of international law. Reputation can pull states toward compliance when the *realpolitik* tool of retaliation is insufficient. Viewing reputation as an important cause of compliance is

118. *See* Anthony D'Amato, International Law Studies: Collected Papers 136–38 (1997) (discussing views on the legal status of the agreements); *see also* Lipson, *supra* note 5, at 533–34. R

appealing because it allows authors in the rationalist vein to bridge the divide between international law skeptics, who argue that states act in their own interests, and international law advocates, who are optimistic about the potential for high levels of compliance in spite of states' incentives to defect. If strong enough, reputational concerns can make any state's compliance with a wide range of international agreements pass a cost-benefit analysis. This Article has analyzed how the state's reputation works as a causal mechanism in explaining compliance with international law. The logic is intuitive but how "the state's reputation" influences government decision making is not, in fact, straightforward.

Reputation is a source of compliance with international law but there are important limits. Knowing how the audience views the state's reputation and how the government internalizes the state's reputation is critical to assessing the effect of reputational concerns on compliance. Consequently, when we analyze how reputation affects the government's decision-making process, we need to know what our model of reputation is. There are three distinct issues here.

First, governments will not fully internalize the state's reputation. It is the norm in international law studies to attribute reputation to the "state."[119] This traditional model fits with models of international relations where the state is a "black box" and, thus, the audience cannot (or does not) look inside the state to domestic politics.[120] By definition, we expect the audience to see the state as unitary, but we do not assume that the state itself is unitary. Under this formulation of the reputation model, there is a gap between the assignment of reputation and the decision-making process: the reputation belongs to the state, but the government makes decisions for the state. As reviewed in Part III, governments have shorter and more varying time horizons than states, and thus the government will take actions that are not optimal from the perspective of the state. How the government values the state's reputation in international politics will be highly contingent on domestic politics, such as the timing of elections and the government's expectations of its tenure in power. Assuming that the government acts like a state systematically exaggerates the importance of reputation in government decision making, *even if the audience assigns the reputation to the state*.

Second, if the audience observes the state's domestic politics, then the audience may not view the actions of past governments to be very good predictors for the actions of the new government. Understanding how the

119. *See generally* Goldsmith & Posner, *supra* note 3; Guzman, How International Law Works, *supra* note 3; Keohane, *supra* note 50; Guzman, *A Compliance-Based Theory*, *supra* note 11; Hathaway, *Between Power and Principle*, *supra* note 3; Lipson, *supra* note 5; Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 Am. Pol. Sci. Rev. 819 (2000). R R R

120. *See generally* Kenneth Waltz, Theory of International Politics (1979); John J. Mearsheimer, *The False Promise of International Institutions*, 19 Int'l Security 5 (1994).

audience assesses changes in governments is a conceptual issue that the reputation literature has largely ignored but is important to understanding the costs of violations of international law (as well as a new government's incentives to rehabilitate the state's reputation). If the audience expects that successive governments will act differently from past governments, then the reputational cost of a violation of international law to the state, not just the government, will be lower. The state will have some reputational loss but the informational value of this action will be low when a new government comes to power. Thus the reputational cost to the state will be lower than if the audience did not expect a new government to act differently.

Switching our focus to the incentives of governments to repair the state's reputation, when the audience views past governments' actions as poor predictors of the new government's actions, the incentives for a new government to try to rehabilitate the state's reputation are greater because it is easier to do. The new government has to spend fewer resources to rehabilitate the state's reputation and thus is more likely to do so. Consequently, these two factors—the reputational costs of the violation and the incentives for new governments to invest in the state's reputation—pull in opposite directions for scholars interested in promoting compliance with international law through reputational concerns. The higher reputational costs of a violation, the greater the deterrence function that reputation can serve. But the more costly the state's reputation is to improve, the less likely a new government is to invest in rehabilitating the state's reputation by complying with more international obligations.

Third, we have to know how broadly the audience views a government's decision to abide by or violate an international law obligation to assess reputational costs. As Downs and Jones note, a government's decision to comply or not to comply with one treaty regime is not necessarily good information for other treaty regimes.[121] Downs and Jones focus on the exogenous costs of compliance with a treaty regime,[122] but we can expand their analysis to domestic support for the underlying policy. International rules are not value neutral; they represent policy choices. Defection in one agreement may be a signal of the new government's policy values, not a denigration of the state's value of international law. Consequently, we do not know the reputational costs of a government's decision to violate or comply with an international law obligation without understanding how reputation bleeds across issue areas. If a violation in one policy realm reverberates through many issue areas, then the costs of a violation are much higher and wider. But if the audience views violations of international law as isolated to a specific policy realm, then the costs are lower and reputation is not an effective means to deter the violation of rules in other issue areas.[123]

121. Downs & Jones, *supra* note 5, at S102–09. **R**

122. *Id.*

123. *See id.* at S113.

It is fair to ask whether, even with all of its conceptual problems, the idea of the state's reputation is nonetheless promoting compliance with international law. Even if we do not know the extent of reputational costs or how these costs factor into a government's compliance calculus, perhaps we can still say with some confidence that reputation has some influence. And this is certainly true. Reputational concerns obviously can promote compliance but this argument has to be used with far more care. If we are going to discuss reputation in an effective way, we need to specify *whose* reputation is at stake and *what* the reputation is for. In the current state of the international law literature, reputation is not well defined, even as a conceptual matter. Instead of being a useful (and testable) variable, reputation is an unfortunately flexible concept whose effects can be so large or so small as to justify almost any outcome.

In effect, our current approach to reputation is to treat it as a potentially huge error term that allows us to explain almost any action as "consistent with the state's interests." Unlike Tomz's book on reputation and sovereign debt,[124] work on reputation in the international law field does not specify to whom the reputation belongs, how reputations change, or how reputational concerns affect the audience's willingness to engage with the state. Without a clear definition of reputation, we are not able to say *ex ante* whether reputation will influence the state's decision making and by how much. As such, reputation does not contribute to our knowledge of why states comply or do not comply with international law. Rather, reputation makes rationalist claims invariably correct.

This approach to reputation is a setback to efforts to understand better the sources of compliance with international law. Having a source of compliance like reputation that is intuitive but vague and underspecified distracts us from other sources of potential compliance with international law. There may be sources of compliance or non-compliance, such as domestic political structures, shared beliefs, or imitation behavior that have a real effect on governments' decisions of whether to comply with international law. But if we accept a broad definition of reputation then we are able to explain all acts of compliance with a combination of retaliation and reputational concerns, and this overbroad view of reputation can cause us to overlook those instances where alternative causes are important. Only by making reputational claims falsifiable can we determine when reputational concerns are important to compliance and where other (rational or non-rational) approaches to international law are needed.

124. *See* Tomz, *supra* note 81, at 14–36. R