Early Draft

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Supplying Compliance: Domestic Sources of Trade Law and Policy

Rachel Brewster & Adam Chilton[1]

November 4, 2012

Questions of compliance with international law focus on the "state's" decision to comply, yet compliance often requires action from different parts of the domestic government. Although the United States – as a nation – is responsible for all violations of international law, who within the state needs to take action to cure a violation depends on the specific measure. This is particularly true with international trade law. Much attention has been given to the "demand side" – that is, how to increase the external pressure on the state to comply with WTO ruling, but less attention has been paid to the "supply side" – who within the state is responsible for the compliance. Yet this aspect is critical to understanding rates of compliance and whether (and when) the trade retaliation is useful. In what we believe is the first attempt to systematically address this question, our study explores how the United States government alters national policy in response to the cases initiated within the WTO dispute settlement procedure. To do so, we have compiled a data set of the policy actions taken in response to other states' requests for DSU consultations. After including variables that control for important characteristics of the state filing the request and the importance of the affected industry, our results go beyond previous research to show that who within the government must supply compliance influences both whether and when the United States government complies with WTO rulings.

[1] Rachel Brewster, Professor of Law, Duke University (brewster@law.duke.edu); Adam Chilton, Ph.D. Candidate in Political Science, Harvard University (adamchilton@fas.harvard.edu).

INTRODUCTION

Consider three examples of American actions to cure WTO violations:

- In 1996, the WTO Dispute Settlement Body finds the U.S. ban on imported shrimp caught without turtle-safe nets to be a violation of the General Agreement on Tariffs and Trade. From 1996 through 1998, the U.S. State Department cures the violation by engaging in extensive negotiations with the affected states and by revising agency regulation regarding the certification of traditional shrimping methods.

- In 2000, the WTO Dispute Settlement Body finds the American tax treatment of domestic exports to be a prohibited subsidy. In 2004, Congress complies with this decision by repealing that part of the tax code.

- In 2003, the WTO Dispute Settlement Body finds the American use of safeguard actions against imported steel to be a violation of the Safeguard Agreement. President George W. Bush complies by withdrawing a tariff through an executive order.

Questions of compliance with international law focus on the "state's" decision to comply, yet (as the examples show) compliance often requires action from different parts of the domestic government. Although the United States – as a nation – is responsible for all violations of international law, *who* within the state needs to take action to cure a violation depends on the specific measure. This is particularly true with international trade law. Different political actors within the United States government can be "sources" of compliance, depending on what trade measures need to be altered. In theorizing about international law, much of the focus has been on "state" compliance. What makes states willing to abide by international obligation? How can the international system increase the pressure on the states to respect their treaty commitments? Less attention has been paid to the supply side – the question of who within the state is responsible for the compliance. This work explores how the question of "who complies?" varies for different trade issues and how it influences patterns of "state" compliance.

This article examines American compliance with legal challenges at the World Trade Organization (WTO). The WTO treaty agreements include a dispute settlement system that provides third party adjudication of trade law violations and has the jurisdiction to authorize retaliation if a respondent state fails to comply with an adverse judgment. The domestic source of compliance for these disputes varies for different policy issues. For some disputes, such as the application of safeguards, the executive has nearly complete discretion in resolving the dispute. Other issues involve amending federal regulations and engaging federal administrative agencies. Finally, other issues, such as agriculture or tax subsidies, are issues the legislature has to initiate and to approve for any actions taken to comply with the ruling.

We posit that the source of compliance is an important factor in predicting whether and when the United States will comply with adverse WTO court decisions. Different government institutions are differently situated in terms of their engagement in foreign affairs, their decision-making procedures, and their constituencies. These factors make the executive branch more likely to comply and act quickly to comply than Congress. First, it is simply easier for the executive branch to act. Complying with an adverse WTO ruling requires an affirmative change of national policy. All else being equal, the executive branch can act faster than Congress because it has fewer procedural hurdles. Second, the executive branch has a greater interest than Congress in maintaining good international relations on a day-to-day basis. The United States government's refusal to comply with an international court decision may harm the executive branch's effectiveness in foreign affairs, but this may not be viewed as a political problem by members of Congress.

This article provides a framework that supplements our understanding of compliance with international trade law by focusing on the supply-side of government action. We present empirical evidence that supports our contention that the neglected question of who complies is critical to understanding American rates of compliance with WTO decisions. In what we believe is the first attempt to systematically address this question, we examine how the United States government alters national policy in response to the cases initiated within the WTO dispute settlement procedure. To do so, we have compiled a data set of the policy actions taken in response to other states' requests for DSU consultations. Even after controlling for important characteristics of the state filing the request and the importance of the affected domestic industry, our results demonstrate that who within the government supplies compliance influences both whether and when the United States government complies with WTO rulings.

Our analysis finds that the domestic source of compliance is the *best predictor* of American compliance with WTO law. This work has important implication for international economic law and international law more generally because it suggests that there may not be a unitary logic to explain states' responses to international law. Instead, this work suggests that the United States compliance with trade obligations works on different logics depending on which domestic political actors are engaged in the policy process. It also suggests that theoretical approaches that treat states as unitary actors, even when responding to international court judgments against the state, obscure important variances in policy responses that are critical to understanding compliance outcomes.

The discussion proceeds in five parts. Section 1 provides background on the American policy process with regards to trade policy and discusses dispute resolution procedures at the WTO. Section 2 reviews different theoretical approaches to studying compliance and sets out expectations about how the United States government should respond to adverse WTO decisions. Section 3 describes our data collection process, and Section 4 presents our empirical results. Section 5 discusses the implications of these results to compliance studies and WTO dispute resolutions specifically.

I. BACKGROUND

A. The U.S. Compliance Process

Discussions of compliance with international trade law (or international law in general) often focus on the state as a unitary actor. Yet the question of who complies with international trade law is an important one for compliance studies because it engages the question of who within this state makes the relevant policy decision. This inquiry is important if the level of compliance varies systematically with the policy actor. When we look at American domestic politics, who within the state has the policy power to comply with the WTO ruling varies depending on the challenged policy. Within the United States, there are several actors who, for different types of policies, will have the power to comply with WTO law. Two actors are discussed below, although more can be relevant.[2]

The Executive Branch. The president alone – that is, not acting through an administrative agency – has the power to comply with some rulings against the United States. Where the president has the independent authority to act, either because it falls within the executive branch's constitutional powers or because of delegated power from Congress, the president can act unilaterally to supply compliance. For instance, the president acting alone can cure disputes regarding safeguard action. A safeguard is a domestic trade remedy that allows a state to raise tariffs on imports when there is an unexpected surge in imports that threatens to injure a domestic industry.[3] In previous trade legislation, Congress has delegated to the president the exclusive power to apply safeguard measures and to withdraw them.[4] For instance, President George W. Bush provided the steel industry with safeguard protection in 2002, and President Barak Obama similarly raised tariffs on imported tires in 2009. In both instances, the International Trade Commission – a bi-partisan six member independent agency – had

[2] Congress and the executive branch are two leading actors in compliance with international trade law, but other governmental entities can have supporting roles. The United States federal court's interpretation of statutory language or rulings on the limits of agency rule-making can either put the United States in violation of the WTO agreements or can be a source of compliance. For instance, in the United States shrimp case, the U.S. Court of International Trade found the State Department's implementation of the legislative ban on certain shrimp to be inadequate and required the State Department to adopt a stricter ban. This ruling required the State Department to implement some rules that the WTO dispute settlement system found to be trade violations. In overruling the lower court, the Court of Appeals for the Federal Circuit gave the State Department the discretion to revise these rules to comply with the WTO ruling.[2] Sub-national state governments' tax or subsidy programs can also cause and resolve trade complaints. For instance, Brazil filed a complaint against the United States regarding the State of Florida's excise tax on orange or grapefruit juice processed outside the United States in March 2002. The State of Florida amended its tax law by May 2004 and Brazil agreed to pursue the case no further.

[3] Domestic trade remedies are trade actions imposed by the national authorities of the state. Three major actions are safeguard actions, anti-dumping duties, and countervailing duties. States are not required by the WTO to adopt domestic trade remedy rules, but WTO rules govern the application of these remedies if a state chooses to adopt them.

[4] Section 201 of the 1974 Trade Act.

recommended that safeguards be imposed, but the president has the final decision of whether and how (the level of protection) to impose the safeguard action.[5] The decision to withdraw the safeguard is also vested exclusively in the president's discretion. When President Bush withdrew the steel safeguard measure in 2003, he could do so without the consent of Congress and without an agency determination that economic protection of the industry was no longer warranted.

Other trade issues are handled primarily by administrative agencies. Most important among these are anti-dumping actions. Over twenty percent of the complaints filed against the United States through the WTO dispute settlement system concern American anti-dumping actions.[6] Anti-dumping actions are authorized jointly by the International Trade Administration (ITA) (an agency within the Commerce Department) and the International Trade Commission (ITC) (an independent agency).[7] The ITA determines whether an import is dumped, while the ITC determines whether the dumping poses a threat of material injury to a domestic industry. The vast majority of the WTO complaints address the ITA's "zeroing" methodology for determining whether a good has been dumped (sold below cost or sold below the exporter's home market price). This methodology is not required by statute but has been adopted by the Commerce Department as a rule that implements the anti-dumping statute. Here, the most immediate source of compliance is the Commerce Department, which could alter its dumping methodology through its internal rule-making procedures.

Other administrative agencies can also be the source of violation and compliance. As discussed in the introduction, the U.S. Department of State altered its internal rules for implementing a ban on imports of shrimp caught without turtle-exclusion devises. The relevant policy – the ban on the import of certain shrimp – was mandated by statute, but the State Department's regulations implementing the statute were the source of the trade violation (as well as the source of compliance).[8]

Finally, the line between agency action and sole executive action can sometimes be blurred. Increasingly, the executive is entering into international agreements with other states to alter administrative agency behavior. For instance, the executive has

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[5] A majority or tie vote of the International Trade Commission is required before the president can impose a safeguard action. Once the safeguard is authorized, the president has the sole authority to decide whether to impose the safeguard, how high the tariff should be, and what markets to exclude from the safeguard. The president can unilaterally alter the safeguard action (including eliminating it altogether) at any time. Section 204 of the 1974 Trade Act.

[6] We include a dummy variable for trade remedy cases to make sure that domestic trade remedy issues are not driving our results. This issue is discussed more in Section V.

[7] Anti-dumping duty determinations may be appealed to the US Court of International Trade and then to the Court of Appeals for the Federal Circuit. The procedure is different if the anti-dumping duty is assessed against a Canadian or Mexican firm/industry. Under the terms of the North American Free Trade Agreement, these parties can appeal to a bi-national review panel. See NAFTA, Ch. 19.

[8] Other agencies may be in a similar position. For instance, in drafting rules to implement greenhouse gas restrictions following *Massachusetts v. EPA*, the EPA may create a trade violation by regulating some industries but not others. Such a program could be viewed as a subsidy to the excluded industries. The subsidy would be considered actionable by the WTO if it provided subsidies to specific groups, (i.e. agriculture) or if the financial benefit of the subsidy was sufficiently large.

entered into agreements regarding the long-standing Softwood Lumber dispute (addressing countervailing duty issues) and controversies involving the methodology for calculating anti-dumping duties (resolving the "zeroing" disputes). These international agreements are sole executive agreements, but they effectively change agency regulations. These agreements blur the line between executive action and agency action because they involve issues within the agency's policy scope but are addressed in executive agreements. As a result, we group the administrative agencies and sole executive policies into one category of executive branch action.

Congress. When the challenged policy is set by the text of a statute, then compliance requires engaging the domestic statutory process. Here, the answer to the question of "who complies?" is several actors: bicameral majorities when there is presidential support of the legislation or veto-proof bicameral majorities when there is not presidential support. What issues require Congressional attention is defined by the nature of the trade law allegation and the domestic governance system. If Congress has previously delegated policy power to an administrative agency and the agency has issued a ruling that is creating the violation, then congressional action is not necessary to cure the violation. By contrast, if the violation requires a change to the statute, then Congress must act directly. Trade issues that tend to need direct Congressional action include intellectual property rules, tax law, and agriculture subsidies.

The discussion of the supply of compliance raises two issues that can usefully be addressed here. First, compliance with international trade rules can almost always be achieved through a statutory enactment. Except for rare constitutional cases, such as individual rights issues or federalism issues (which rarely arise in international trade), Congress – with presidential approval – has plenary power of foreign commerce. Thus any government act that violates international trade law can be corrected through statutory means. To some extent, the supply of compliance from the domestic government can simply be seen as the statutory process. For instance, Congress could amend American anti-dumping rules to prohibit the use of certain methodologies (or anti-dumping duties entirely) even if the Commerce Department refused to amend its internal rules. While this is true, collapsing the existing domestic political system of compliance into the statutory process ignores sources of compliance that may be far easier to achieve than changes to federal legislation. The federal legislative process represents a very high bar in terms of the difficulty in achieving policy change. The number of persons who can obstruct the process is great, and significant political capital is necessary to get an issue on the legislative agenda. It will rarely be the case that it is easier to build the necessary congressional support to pass a statute than it is to persuade an agency head to alter an internal rule. To view all compliance as a matter of legislation ignores the facts on the ground. In practice, – long standing practice – different actors have been delegated power to control various policy levers. Depending on which lever is implicated in the international trade dispute, different actors will be necessary to achieve compliance. We return to this question of delegated powers in the discussion of our results.

Second, we do not mean to argue that the United States – or any other state – should be *less* responsible for its violations of international law (trade or otherwise)

because of national policy-making processes. This is not an attempt to create a domestic policy excuse for non-compliance. Rather, this is an analysis of how compliance decisions are achieved in domestic politics. The fact that some trade issues are procedurally harder to remedy at the domestic level is not relevant to the merits of the legal challenge, but it is relevant to predicting compliance, the likelihood of settlement, and the efficacy of various reform proposals.

B. Litigation at the WTO

The WTO has one of the most well-known systems of state-to-state adjudication. In the Dispute Settlement Understanding (the agreement creating the WTO dispute resolution process), the member states of the WTO created a quasi-judicial system that granted the compulsory jurisdiction over member states' disputes to the Dispute Settlement Body (DSB).[9] If one member state alleges that another member state is violating its trade obligations under the WTO Agreements, the injured state can bring its complaint to the DSB.[10] If a complaining state files a formal complaint, the parties are required to engage in consultations to attempt to settle the dispute for at least sixty days. If consultations fail, the DSB begins the adjudicative process. The process has two stages and the parties can mutually agree to suspend or end the case at any point in the process.

The first stage includes a "trial" phase where a panel of ad hoc arbitrators, who are chosen by the parties, receives evidence from both parties and issues a ruling. One or both of the parties can appeal the arbitrator's decision on issues of law to the Appellate Body. If the panel decision is not appealed, then the panel's decision is considered by the DSB. The DSB adopts reports based on a "reverse consensus" rule. That is, unless there is a consensus in the DSB to reject the panel's report, the report is adopted. As of this writing, the DSB has never failed to adopt a report using the reverse consensus rule and DSB adoption of reports is generally considered to be a near "automatic" process.[11]

If the panel decision is appealed, then the case is referred to the Appellate Body, a standing body of seven judges selected by the WTO membership.[12] The Appellate Body hears appeals only on questions of law and will amend the reasoning of the panel if it

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[9] The DSB consists of all of the member states of the WTO. The DSB grants requests for a panel hearing and adopts the decision of the arbitrators or the Appellate Body by reverse consensus. Reverse consensus means that the panel is authorized and the report is adopted unless no state – including the state that is requesting the panel or has won the legal case – supports the motion.

[10] Technically, there can be either a violation of the WTO agreements or a "nullification or impairment" of the complaining member's benefits under the agreement. I use the term violation to refer to both for ease of exposition. The DSU gives the DSB compulsory jurisdiction for all disputes concerning the WTO Agreements included in Annex 1. There are some WTO Agreements over which the DSB does not have jurisdiction.

[11] Judith Goldstein & Richard Steinberg, *Negotiate or Litigate? Effects of the WTO Judicial Delegation on U.S. Trade Politics*, LAW AND CONTEMPORARY PROBLEMS (2008) (discussing how the adoption of panel and Appellate Body reports at the WTO are near automatic).

[12] A three-judge panel of Appellate Body members hears the appeal. The WTO agreements have no provision for the Appellate Body to sit en banc. Appellate Body members serve for a four-year term that may be renewed by the membership once.

finds that the panel erred in its interpretation of the WTO Agreements. The Appellate Body's report is also adopted by the DSB on a reverse consensus basis. If the adopted report finds that the respondent state is in breach of its WTO obligations, than the DSB will recommend that the respondent state brings its measures into compliance with the WTO Agreements and will provide the responding government with a reasonable period of time with which to comply with the decision – typically 12 to 15 months.

The adoption of the panel or Appellate Body report is often not the end of litigation process for specific trade disputes. More and more states are engaging in "compliance proceedings" after the initial adjudication. These proceedings address the question of whether the respondent state's changes to the challenged policy are sufficient to cure the violation. If the complaining government believes that the violation has not been cured, then it can request a compliance panel (an Article 21.5 in WTO parlance) to evaluate the sufficiency of the respondent state's actions. Like the merits panel report, either party of a compliance panel can be appealed to the Appellate Body. The DSB adopts these reports on a reverse consensus basis. If the adopted report finds that the violation is on-going, then the DSB will recommend that the respondent state bring its measures into conformity with WTO law.

The second stage of the litigation process is the remedy stage. If a respondent state fails to cure violations of WTO rules within the reasonable period of time set out by the DSB, then the complaining government can request that the DSB authorize it to suspend trade benefits to the respondent state. The authorization is specific to the complaining state (or states, if there is more than one complaining party). Third parties to the litigation (or other states that are injured by the respondent's violation) are not permitted to suspend trade benefits. The respondent state can request a panel to arbitrate the maximum extent and the possible forms of the suspension.[13] The parties cannot appeal this ruling. The DSB implements the panel's ruling by authorizing the complaining government to suspend concession up to the level determined by the panel.

The retaliation does not make the complaining party whole. The ability to suspend benefits is often economically costly to the state (i.e. raising tariff levels can be expected to harm the economies of the complaining and the respondent state although some political benefits may accrue). In addition, the remedy offered by the WTO is only prospective. The retaliation authorized by the DSB (and determined by the panel) is based on the complaining state's *current level* of injury from the respondent state's policy. That means that the complaining state cannot retaliate for any loss of benefits from the violating policy that occurred before the remedy panel's hearing. This is true even if the respondent state maintained the policy well after the DSB's reasonable period of time to comply with the rule expired. This system creates an incentive for respondent states to drag their feet and extend the litigation process for as long as possible.

[13] Article 22.3 discusses when different forms of retaliation are permitted. Sectoral retaliation refers to the sectors in the GATS and TRIPS agreements (all goods are considered to be in the same sector under the GATT agreement). Across agreement retaliation refers to complaining state actions that withdraw benefits in agreement (GATT, GATS, or TRIPS) other than the one the violation was in.

The nature of litigation at the WTO thus creates two different measures regarding compliance with the WTO process. The first measure is whether the member state formally comes into compliance at all. This is the more straightforward inquiry of whether the state ultimately decides to alter the policy to conform to WTO legal obligations. The second measure is how long it takes the state to comply. Even if the state ultimately decides to amend its measure, how long the respondent state maintains the illegal policy after the adverse DSB decision (the initial decision on the merits) is important in determining the quality of the state's compliance. Because the WTO system only permits a prospective remedy at the end of the litigation process, the timing of compliance is particularly important in trade law.

Our study focuses on the United States government's compliance with adverse decisions by the WTO's DSB. This approach has advantages and limitation in terms of data collection. An advantage of studying compliance in the WTO setting includes the existence of a dispute resolution system with compulsory jurisdiction. Having a dispute resolution system resolves the problem of auto-interpretation in international law: governments will frequently dispute whether a violation of international law exists and, without a third party adjudicator, it is hard to collect an objective sample of "violations." The compulsory jurisdiction of the WTO also solves a selection bias issue. If dispute resolution is ad hoc and the parties only agree to adjudicate "politically easy" cases, then the sample of decisions may be biased (because the "politically hard" cases are never heard). The results of these studies may be overly optimistic in terms of states' willingness to comply with adjudicatory rulings. The WTO's compulsory jurisdiction decreases this selection bias because the respondent state need not agree for the adjudicatory system to proceed. The WTO dispute resolution is also frequently used by states so there are a sufficient number of cases to provide a meaningful quantitative analysis.

Our sample of WTO cases may still have selection bias problems. Some trade disputes may be resolved through diplomatic means before a request for consultation is ever filed at the WTO. If so, then these cases do not become part of our data set. As a result, our data set may be biased in the sense that the dispute has to be difficult enough to resolve that it cannot be handled diplomatically. In addition, some disputes will not involve a sufficient quantity of trade to be worthy of the expense and energy of international litigation. Some states may also not have the financial or legal capacity to meaningfully engage the WTO system and thus will engage the dispute resolution system less frequently than states with greater financial and legal capacities. This tendency to avoid WTO litigation may also be heightened when the United States is the respondent state because developing countries may fear a diplomatic backlash to trade litigation. On the whole, the data set is not free of selection bias concerns, but it provides a good sample of cases involving a variety of trade issues brought by a wide range of complaining states.

Our study also focuses exclusively on the United States as the respondent in WTO litigation. We do so because we are interested in how the domestic source of trade policy influences a state's compliance behavior. To do so we have to open the "black box" of

the state's decision-making and understand how trade policy is made. This is a state specific inquiry. We have chosen to look to the United States because it is a frequent party to trade litigation and we are familiar with its trade policy processes. The inquiry is highly relevant to understanding patterns of trade law adjudication – the United States is one of the most common defendants at the WTO – but this comes with some limitations. Because our study focuses on one governmental structure, it may not be generalizable to states. In addition, the economic power of the United States may provide the government with a greater capacity to resist international calls for compliance; thus its rates of non-compliance may be higher than in other states.[14] However, understanding how international law and international court decisions work to influence economically powerful states like the United States provides important insight into constraining effects of international law.

II. THEORY: Surveying the Approaches to Government Decision-Making

Compliance is a major focus in any study of international law. In a system without central enforcement where states rely on self-help mechanisms, the willingness of states to comply with international rules that go against their perceived self-interest (immediate or otherwise) is always in question. Consequently, the field of international law is highly focused on the question of why states comply and how to increase compliance. By far, the greatest focus is on the demand side of compliance – that is, the external pressures on the violating state to conform its actions to be consistent to international law. To a lesser extent, the field of international law also looks at the supply side of compliance. That is, the internal decision of the state regarding whether and how it will change its behavior to conform to international law. This section briefly reviews different approaches to international law compliance in general, and states' responses to international courts more specifically. Bernhard Zangl has usefully discussed how international relations theories can be applied to international dispute resolution.[15] Our review of the literature follows his and discusses additional domestic models of government decision-making. This section also sets out different approaches expectations for how the United States will respond to adverse WTO decisions.

Realism. Realist approaches to international law focus primarily on the perceived national interests of the state and the distribution of power within the international system. Realist approaches to international law question whether treaty rules or customary law are a real constraint on state action or simply a reflection of powerful state

[14] The American dualist legal structure may also give political actors in the United States government more domestic legal leeway to resist implementation of international legal rulings. We do not want to emphasize this point too strongly, however, because other more monist states also give political actors greater leeway with regards to international trade obligations. See Marco Bronckers, *The Effect of the WTO in European Court Litigation*, 40 TEXAS INT'L L.J. 443 (2005)(discussing how the ECJ does not give WTO ruling direct effect).

[15] See Bernhard Zangl et al, *Between law and politics: Explaining international dispute settlement behavior*, 18 EUR. J. OF INT'L REL. 369 (2011), see also Barnhard Zangl, *Judicialization matters! A comparison of dispute settlement under GATT and the WTO*, 52 INT'L STUD. Q. 825 (2008).

preferences.[16] Jack Goldsmith and Eric Posner argue that where international rules dictate a course of action that is contrary to the state's interests, then the state will comply only if the costs of violating the rule – reciprocity or retaliation by other states – are higher than the benefits.[17] Realists are further skeptical of the influence of international courts or other judicial bodies in improving compliance with international law. Eric Posner and John Yoo argue that states only comply with adverse international judgments when the judgment is in the interests of both litigating states.[18] They argue that dependent courts (ad hoc tribunals whose judges are selected by the litigating parties) are better able to provide such judgments than independent tribunals (permanent judicial bodies with standing body of judges).

Within the framework of compliance with WTO decisions, realist theory leads to a couple of expectations.[19] First, the state's level of compliance should be influenced by potential for retaliation or reciprocity by other states. If a state alters its current policy – which we can assume is a reflection of the state's interest because it is the policy outcome they have previously chosen – to comply with international law or an international ruling, it will be because of the state's concern for the response of other nations. As a result, we should expect that the greater economic power of the complaining party (or parties) should lead to greater levels of compliance.[20] Second, we should expect that the state will comply with the decisions of dependent tribunals more than independent tribunals because the judgments of the former will more closely match the state's interests. This hypothesis is not testable with regards to the WTO system because the form of the adjudication is constant in our study. However, we can be relatively confident that realists would not expect issues such as the persuasiveness of the court's opinion to influence compliance decisions.

Institutionalism. Institutionalist approaches to compliance are also focused on state interests, but anticipate that the structure of the regime itself may promote compliance. Institutions can build webs of cooperation and establish linkages across issue areas.[21] Failure to cooperate in one issue area reverberates throughout the international system and raises the costs of non-compliance. For instance, establishing a hard law regime puts the state's reputation for abiding by its promises into play. In addition, institutionalists are more optimistic about the possible influence of international

[16] Jack Goldsmith and Eric Posner, THE LIMITS OF INTERNATIONAL LAW (2005); John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5 (1994/95).
[17] Goldsmith & Posner, *supra* note 16.
[18] Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 17-18 (2005)
[19] We cannot test whether compliance is lower with the WTO system of independent judges as compared to the GATT system because our data set only contains WTO cases. Barnhard Zangl compares the two systems rates of compliance and finds that the WTO performs better than dependent GATT tribunals. See Barnhard Zangl, *Judicialization matters! A comparison of dispute settlement under GATT and the WTO*, 52 INT'L STUD. Q. 825 (2008).
[20] This should be true regardless of whether there is an explicit authorization to retaliate by the WTO because the states will probably not be constrained by WTO rules limiting retaliation or reciprocity if they believe another state is violating international rules.
[21] *See* generally, Robert O. Keohane, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984)

courts on compliance. Kenneth Abbott and Duncan Snidal argue that the creation of international courts will increase compliance by offering authoritative interpretations of the treaty law (solving the auto-interpretation problem) and advertising non-compliance.[22] As a result, international court judgments further raise the reputational costs of non-compliance and this should lead to more compliance with the treaty regime.[23]

Applied to WTO litigation, institutionalists (like realists) will expect that the retaliatory capacity of the complaining states will influence compliance. Institutionalists would additionally predict that the greater the linkages between states – the more treaty regimes they share and the greater their cooperation on different issue areas – the greater the costs of non-compliance. The greater the linkage is between states, the greater the costs are of harming one's reputation with treaty partners and the higher the costs are of non-compliance.

Liberalism. Liberal theory provides a more differentiated view of state decision-making. Liberal theory argues that states act in systemically different ways depending on their form of government. Most notably, Anne-Marie Slaughter argues that democratic states have internalized the rule of law far more than non-democratic states and thus comply with international law far more.[24] Slaughter also argues that democratic states treat each other differently than non-democratic states. Because other democracies share their rule of law values (in addition to the web of economic and social relationships between democracies), democratic states will comply with their legal obligations to one another more than their obligations with regards to non-democracies.[25]

While our study cannot test whether the United States complies more with international law and international judicial decisions more often than non-democracies, it can examine whether the United States acts differently based on the form of government in a complaining state. Liberal theory would expect that the rates of compliance would be higher with regards to democracies than non-democracies. More generally, liberal theory has a more expansive view of the state in terms of how government preferences are formed.[26] While liberal theory does not produce any specific predictions about how different domestic institutions should respond to international judicial decisions, it provides more room for expecting different domestic policy processes to influence the state's actions internationally.

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[22] Kenneth Abbott & Duncal Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

[23] There is some question about where the reputation cost is incurred. If the state takes the full reputational hit when it is declared "in violation" of the treaty regime, then there is little additional incentive for the state to alter its policy to come into compliance. Alternatively (and more realistically), other state's perception of the state will be influenced by both the court's judgment and how the state responds to the court's judgment. It is the latter that we examine in this study.

[24] Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[25] *Id.*

[26] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

Finally, there are more general theories of state decision-making that specifically include domestic politics.

Public Choice. One of the most prominent models, particularly for economic issues, is the public choice approach to interest group lobbying. Public choice approaches posit that domestic groups are powerful when they can organize, raise funds, and articulate a clear policy demand. In the more simplistic public choice models, national governments do not have any set preferences and are simply a means of transmitting (sometimes conflicting) interest group demands into policy outcomes. Under this approach, governments are not concerned about international law but about adjusting policies to maintain political support. Applied to WTO litigation, the public choice model predicts that the government will be less likely to comply with an adverse decision the greater the level of domestic interest group support the policy has.[27]

Institutional Sources of Compliance. An alternative means to account for domestic politics is to focus on the government institutions in the domestic policy process. Instead of viewing the government as a transmission belt for interest group pressure, this approach views different political actors as having unique concerns and different abilities to act. First, the executive branch is uniquely concerned with foreign policy. Compared to Congress, the executive branch is responsible for maintaining good foreign relations and the executive branch's performance is based more on foreign policy success. While there are foreign relations committees, members of Congress are less engaged in international affairs. Second, the ability of the institutions to act and act quickly is different. The executive branch has fewer veto players than Congressional action does. The President can unilaterally act in some areas of foreign affairs and can form sole executive agreements that regulate some elements of administrative law. Executive agencies have more complicated procedures for altering regulations and these regulations are subject to legal challenge, but agencies act as a part of the hierarchical structure of the executive branch. By contrast, decision-making in Congress is more difficult. Bicameralism and super-majority voting rules in the Senate establish barriers to altering status quo policies.

Applied to WTO litigation, this model predicts that compliance will be lower if Congressional action is necessary to supply compliance. Congress has fewer interests in having high levels of compliance with international law to maintain good foreign relations than the executive branch. In addition, Congress has a more difficult time acting to change established policies than the executive branch. All else being equal, we expect that the executive branch will comply with adverse WTO decisions more often and in a shorter period of time than Congress will.

[27] Interest group politics can also come into play when and if the WTO authorizes retaliation. The system of retaliation is based on the idea that national interest groups – who otherwise have little interest in the challenged policy – will mobilize to remove the policy if they are targeted by retaliation. In this version of the paper, we account for the lobbying power of the group benefited by the policy.

III. DATA COLLECTION

To test these expectations, we have built an original dataset of disputes filed against the United States in the WTO. Since our theory makes specific predictions on how the actor required to supply compliance influences whether and when compliance will occur, we have collected a large amount of information on each dispute that has not previously been collected or analyzed by scholars. In the process of doing so, we have made a number of important decisions on how to classify and code WTO disputes. In this section, we briefly outline the process we have used to construct the original data set built for our project while explaining the coding decisions that were made along the way. First, we outline the universe of cases that is included within our dataset. Second, we discuss the three dependent variables used to test our theory. Third, we describe the independent variables that we have collected to test our theory of compliance.

A. Universe of Cases

The first important decision that we made while constructing our dataset is determining which cases to include. As of December 31, 2011, there had been 113 requests for consultations filed with the WTO in which the United States was the respondent. It would be inappropriate to assume based on this fact, however, that the correct number of observations to look at to test our hypothesis would be 113 cases. This is because the total includes cases that were consolidated and cases where the United States prevailed and did not have to take subsequent compliance actions. Additionally, in many cases it would be inappropriate to include cases that were settled before litigation was completed. As a result, determining the universe of cases for our study required in-depth classification of all of the requests for consultation with the United States filed at the WTO.

Given these concerns, we used a three-step process to cull the cases to give us our final universe of cases. First, any disputes that were either consolidated with earlier cases or repeats of early cases on the exact topic were turned into a single dispute. For example, DS2 brought by Venezuela and DS4 brought by Brazil were consolidated into a single observation because they were consolidated during the dispute resolution process. Likewise, DS85 and DS151 were treated the same way because they were both cases brought by the European Union on the same issue. This resulted in 23 cases being removed from the initial 113 disputes.[28] Second, since the United States is not expected to take steps to comply in disputes that it either won or litigation is still ongoing, these disputes were also removed from the dataset. To identify these cases, we relied on a document produced by the United States Trade Representative Office that identified cases where the "US won on the core issue(s)."[29] This resulted in 35 additional disputes

[28] For a discussion of how consolidated cases and cases brought by multiple complaints were treated for coding, *see infra* notes 41, **Error! Bookmark not defined.**, 44, 45 and 46. For a discussion of an alternative approach that we took to address these cases, *see infra* notes 68 - 70.

[29] *See Snapshot of WTO Cases Involving the United States*, United States Trade Representative, December 21, 2011. Although this document was obtained from the USTR website, it appears that the version used for this paper may no longer be available online. A copy is currently on file with the authors.

being excluded from the dataset. Third, we excluded cases that were settled without the litigation process being completed. We compiled this list both by relying on the USTR document previously mentioned[30] and the reported status of cases reported on the WTO website. This resulted in 18 additional cases being removed from our dataset.[31] Finally, after these steps, we were left with 37 cases where the United States did not prevail on the core issue at stake in the dispute. These cases then formed the basis of our universe of cases for our later empirical tests. A breakdown of the 113 disputes filed with the WTO prior to December 31, 2011 is presented in **Table 1**.

Table 1: Breakdown of the Universe of Cases

Category of Cases	**Total Cases**
Consolidated or Repeat Cases	23
US Prevailed on Core Issue / Monitoring in Progress	35
U.S. Settled / No Longer in Progress ("Settled Cases")	18
U.S. Did Not Prevail on Core Issue	
Dispute Resolved ("Compliant Cases")	24
Dispute Not Resolved ("Non-Compliant Cases")	13
Total Cases	**113**

B. Dependent Variable

After establishing our universe of cases, the second task was to determine the relevant dependent variables to test our theory. In our cases, there are two outcomes that we were primarily interested in: (1) whether compliance occurred; and (2) how long it took compliance to occur.

The first task was to determine how to code whether compliance has occurred in a given dispute. Determining how to do so was made easier by a Congressional Research Service report that documents the status of the WTO Disputes that the United States has been part of at the end of the year. The latest report was published on January 25, 2012.[32] That report listed 13 cases where the United States is currently not in full compliance with the WTO's decision.[33] These cases were thus coded as "1," whereas the other 24

[30] *See id.*
[31] We still attempted to collect compliance information on all of the cases that were settled. We were able to then include these cases back into our dataset to provide a robustness check to our primary results. *See infra* text accompanying notes 66 - 67.
[32] JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RL 32014, WTO DISPUTE SETTLEMENT: STATUS OF U.S. COMPLIANCE IN PENDING CASES (2012).
[33] These thirteen cases are: DS160, DS176, DS184, DS217 & DS234, DS267, DS285, DS294, DS322, DS344, DS350, DS379, DS 382, and DS404.

cases that the United States lost but did not settle were coded as "0". This then became the dependent variable for the results presented in Part IV.A.[34]

The second task was to determine how to code the length of time it took for compliance to occur. To do so, we collected data on the date that each conference request was filed.[35] We then also collected data on the date that the United States complied by curing the violation found in the WTO litigation. Measuring the end date was complicated and defining an exact date proved to be difficult. In constructing this variable, we first checked reports filed with the DSB and looked for when the complainant states reported that compliance had occurred. After doing so, we then checked the Federal Register to determine the exact date that the compliance action occurred. When possible, we then used this as the end date for the total compliance time. When we could not determine a date via the Federal Register, we used the date that the complainant state reported to the DSB that the United States was now complaint. Finally, for cases categorized by the Congressional Research Service as not being fully complaint, we recorded the date that partial compliance occurred; for the three cases where no compliance actions had been taken, we treated these cases as censored observations.[36] After collecting an end compliance date for each case, we then calculated the number of days that elapsed between when the consultation request was filed and when compliance occurred. This served as the dependent variable for the results reported in Part IV.C. Summary information for all three dependent variables discussed in this information is presented in **Table 2**.

Table 2: Summary of Dependent Variable Collection

Category	Total Cases	Total Compliance Time (days)
Compliant Cases	24	1,022
Non-Compliant Cases	13	2,254
Overall	**37**	**1,455**

C. Independent Variables

The third step that we took to construct our original dataset for this project was to collect a range of independent variables that allowed us to operationalize and test our theory of compliance along with competing explanations for if and when the United States complies with adverse WTO rulings. We did this by collecting independent variables that attempted to capture four features of each dispute.

[34] It is worth noting that this CRS report was reported before the United States reached an agreement on zeroing cases in February 2012. We attempt to address this issue in our section on robustness. *See infra* text accompanying notes 65 - 66.

[35] In cases were the complaint was later consolidated, the earlier conference request date was used.

[36] *See* Grimmett, *supra* note 32. The three cases where the United States is completely non-complaint are: DS176, DS285, and DS379.

First, we collected two variables that attempt to capture relevant domestic political features of each dispute. The first variable, *Congress Required*, is whether Congressional action would be required to bring the offending measure into compliance. This is the most critical variable to our paper, and was designed to help us test our theory that the actor expected to supply compliance is a major factor in determining how and when the United States takes steps to comply with WTO decisions. This is a dummy variable coded as 1 if the United States Congress would have to take a vote to remove or change legislation to remedy a violation alleged in the initial complaint. The variable was coded as 0 if the United States could become complaint by either allowing a measure to expire, or by the President or an executive agency taking unilateral action.[37] The second variable in this category is whether there was *Divided Government* at the time a complaint was filed. This is a dummy variable that was coded as 1 if the President's party did not control both houses of Congress. The justification for including this variable in our analysis is that there is evidence that divided government influences the United States patterns of adjudication in the WTO.[38]

Second, we collected two variables that are designed to capture the relationship between the United States and the complainant(s). The variable *USA Exports* attempts to capture the trading relationship between the two countries.[39] The variable is a natural log of the total value of the exports from the United States to the complainant's country in the year the conference request was filed.[40] In cases of multiple complainants, the total value of the exports for the complainant countries was added together.[41] Additionally, a dummy variable was coded for whether the United States has a *Formal Alliance* with any of the complainant states. This variable is included because there is evidence that alliances influence the likelihood of trade disputes in the WTO.[42] A dispute was only coded as "1" if one of the complainant countries had a "Type 1" alliance according to the Correlates of War dataset, which signifies that the United States has a formal military alliance with one of the countries that initiated the dispute.[43]

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[37] This variable was coded by the authors based on the content of the initial complaint without simultaneously looking at the eventual result of the case. The result was that seven cases were coded as requiring Congressional action: DS108, DS136 & DS162, DS160, DS176, DS217 & DS234, DS267, DS285, and DS152. For a discussion of an alternative approach that was used to code this variable, *see infra* text accompanying notes 60 - 64.

[38] *See* CHRISTIANA L. DAVIS, WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO 63 (2012). Davis' evidence suggests that divided government influences the decision to bring WTO disputes as a complainant, but her basic argument that constraints on the executive make negotiation more difficult would also suggest that it would be more difficult to quickly settle trade disputes.

[39] We also collected data on USA Imports to the complainant states. Since the correlation between exports and imports was 0.95, we did not include the imports variable in our analysis. Substituting imports for exports, however, does not substantively change our results.

[40] This source for this data is the United States Department of Commerce, Bureau of the Census, Foreign Trade Division, Trade Flow Data for 2011.

[41] In our section on robustness checks, we discuss an alternative approach we used for dealing with cases with multiple complainants. *See infra* text accompanying 68 - 70.

[42] *See* DAVIS, *supra* note 38, at 92-100. It is worth noting that there are many other recent studies on WTO disputes that do not include a variable for alliances between dyads. *Id.* at 93. We believe, however, that after Davis' research it is appropriate to include this measure.

[43] D. M. Gibler & M. R. Sarkees, *Measuring Alliance: The Correlates of War Formal Interstate Alliance Dataset, 1816-2000*, 41 J. PEACE RESEARCH 211 (2004). It is worth noting that we have elected to use the

Table 3: Descriptive Statistics

Variable	Mean	SD	Min	Max
US Domestic				
Congress Required	0.19	0.40	0	1
Divided Government	0.73	0.45	0	1
Relationship				
USA Exports	10.40	1.95	4.85	13.30
Formal Alliance	0.70	0.46	0	1
Complainant				
GDP Per Capita	9.26	1.31	6.01	12.02
Population	18.95	1.99	11.31	21.57
Polity Score	6.82	5.15	-7	10
Dispute				
Trade Remedy Case	0.68	0.48	0	1
Contributions	18.78	0.64	17.62	19.86

Third, we collected three variables that was designed to capture the relevant characteristics of the country, or countries, that initiated the dispute. The natural log of the country's *GDP Per Capita* was recorded for the year that the request for consultation was filed.[44] Additionally, the natural log of the *Population* was recorded for the year that the request for consultation was filed.[45] Final, as a measure of the complainant countries regime, we use the country's *Polity Score*. This is a measure of whether a country is autocratic or democratic on a scale of -10 to 10. This variable is based on the "polity2" variable from the Polity IV project.[46]

Fourth, we collected two variables that capture the characteristics of the individual dispute. For the first, we coded whether each case was a *Trade Remedy Case*. Disputes were coded as Trade Remedy cases if they were classified by the WTO for being about anti-dumping, safeguards, or countervailing measures. For the second, we

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Correlates of War (COW) Alliance data set as opposed to the "ATOP" dataset, and the ATOP dataset was used by Davis' in her recent book. *See* DAVIS, *supra* note 38, at 94 n.43. The justification for using the COW dataset despite that fact is that the ATOP data is only available through 2004. In contrast, the COW data is extended to 2008, and thus covers a greater portion of our sample. *See* D.M. GIBLER, INTERNATIONAL MILITARY ALLIANCES, 1648-2008 (2009).

[44] This data is taken from the World Bank Development Indicators. Since Taiwan is not included in the World Bank data, Taiwan's GDP Per Capita was taken from the CIA World Fact Book.

[45] This data is also from the World Bank Development Indicators. Since Taiwan is not included in the World Bank data, Taiwan's population was obtained from: <http://www.tradingeconomics.com>.

[46] *See* MONTY G. MARSHALL & KEITH JAGGERS, POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTIC AND TRANSITIONS, 1800-2010 (2011), *available at* <http://www.systemicpeace.org/inscr/inscr.htm> (last visited April 1, 2012). The European Union was given a value of "10" in all years. Antigua and Barbuda are not included in the Polity IV dataset, but were coded as 5 based on a value of 4 in the Freedom House Political Freedom Index (which translated to a polity score of 5 for other countries with the same Freedom House score). Countries with multiple complainants had their polity score averaged and then rounded to a whole number.

coded the *Contributions* made in the United States by interest groups and lobbyists representing the sector at issue in each dispute. Each dispute was coded as relating to one of thirteen sectors based on a categorization scheme developed by the Center for Responsive Politics.[47] The natural log is the total political contributions made by each sector to candidates and committees in the election cycle prior to when the request for consultation was filed.[48] Although scholars have used both political contributions[49] and sector employment[50] as measures of the political influence of industries when studying compliance with WTO decisions, we believe that using the political contributions variable is the most direct way to capture which industries will have political clout that might influence the United States government's compliance decisions. A summary of all of the variables discussed in this section is presented in **Table 3**.

IV. RESULTS

After building this original dataset, we performed a number of statistical tests to determine whether the domestic sources of policy actions needed to bring the United States into compliance with WTO decisions directly influence whether and when America complied. In this section, we present the results of those tests. First, we present models that estimate the influence of the *Congress Required* variable and other variables have on whether the United States actually complied with the WTO's ruling. Second, we present models that estimate the influence of the *Congress Required* variable on the amount of total time that elapsed from when a conference request was filed until the United States came into compliance. Third, we discuss a series of robustness checks that we performed to try and ensure that our results were not merely a result of questionable coding decisions or model dependency. All of our results provided strong support to our theory that the actor required to comply is a significant determinate of if and when the United States complies with WTO decisions.

A. Compliance

The first test of our theory that we performed is estimating the impact of whether Congress was required to act on whether the United States fully complied with the WTO's rulings. For this test, the number of observations was the 37 disputes the United

[47] Information on this data is available from the Center for Responsive Politics, *available at* <http://www.opensecrets.org/industries/methodology.php> (last visited October 9, 2012).
[48] It is worth noting that there are two types of cases for which it is difficult to classify what sector of the economy is affected. The first are zeroing cases. For these cases, we used "steel" as the effected industry because the underlying products were primarily forms of steel (i.e. steel bearings). The second type of cases that were difficult to classify were cases that did not directly implicate a specific industry (i.e. DS108: US – Foreign Sales Corporations). For these cases, to provide the most difficult test for our theory, we classified these disputes as being part of the sector with the highest donations in the previous election cycle.
[49] *See* DAVIS, *supra* note 38, at 126-127.
[50] *See* Tobias Hofmann & See Yeon Kim, *The Political Economy of Compliance in WTO Disputes*, Working Paper (2011).

States did not settle or prevail on the core issue in the dispute. Of these 37 cases, there were 13 disputes that the Congressional Research Service listed the United States as not being compliant as of January 25, 2012. We then estimated a series of logit models that estimated the impact that a range of variables had on whether a case would be one of the 13 non-compliant cases.[51] The results of these tests are presented in **Figure 1**.[52]

Figure 1 presents the simulated first differences as each variable moves from its minimum to maximum value of logit models estimating compliance with WTO decisions as the dependent variable.[53] In each graph, each line represents the point estimate and confidence interval for an individual variable included within the model.[54] Point estimates to the right of zero means that the variable is associated with a high probability of non-compliance. Statistically significant variables are presented in blue, and all others are in red.

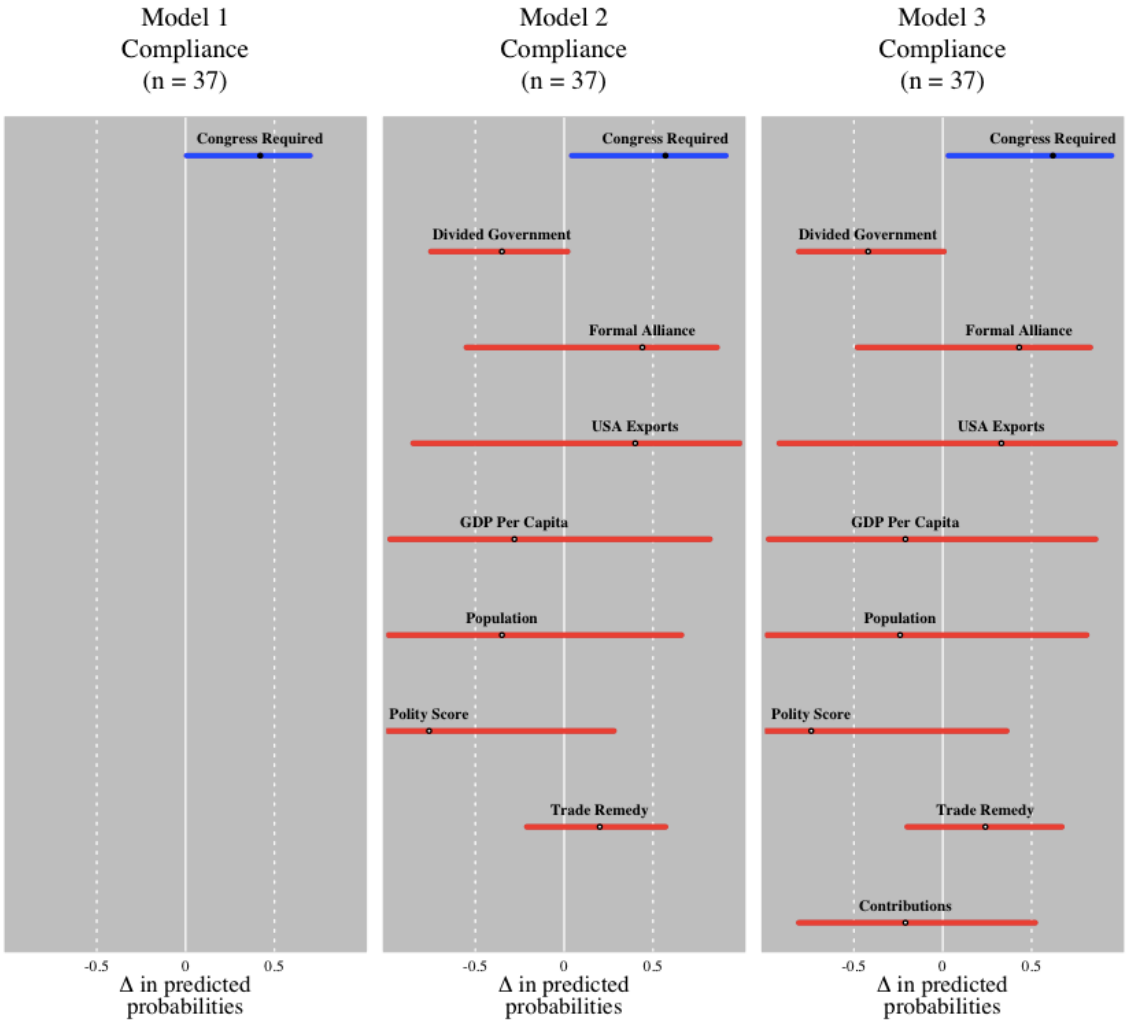
[51] It is worth noting that using probit instead of logit models only increases the statistical significance of our results.

[52] All statistical tests presented in this paper were conducted using "Zelig" for R. *See* Kosuke Imai, Gary King, & Olivia Lau, *Toward A Common Framework for Statistical Analysis and Development*, 17 J. COMPUTATIONAL & GRAPHICAL STATISTICS 892 (2008). *See also* Kosuke Imai, Gary King, & Olivia Lau, *Zelig: Everyone's Statistical Software* (2007), *available at* <http://gking.harvard.edu/zelig>.

[53] For a discussion of the merits of using simulating first differences, *see generally* Gary King, Michael Tomz, & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 341 (2000).

[54] For a defense of presenting regression results as graphs instead of tables, *see* Jonathan P. Kastellec & Eduardo L. Leoni, *Using Graphs Instead of Tables in Political Science*, 5 PERSPECTIVES ON POL. 755 (2007).

Figure 1: Logit Models Estimating Likelihood of Non-Compliance



As Figure 1 clearly shows, in each of the three models estimated, disputes where the *Congress Required* variable is coded as 1 are associated with roughly a 50% higher probability that the United States will be non-compliant with a WTO decision. This ranges from a 42% higher probability in Model 1 to a 62% in Model 3. This result is consistent in the parsimonious model presented in Model 1, when controlling for a range of independent variables that account for alternative explanations in Model 2, and even when including data on the political contributions associated with the relevant sector of the economy at issue in the dispute in Model 3. In fact, not only is the *Congress Required* variable in each model presented, it is the *only* variable that achieves statistical significance. These results thus lend strong support to our theory that the source of domestic policy measures is a significant issue in the "state's" decision of whether to comply with WTO decisions.

Figure 1 also provides evidence on what other factors influence, or do not influence, compliance decisions. Neither the results in Model 2 or Model 3 provide any evidence that characteristics about the complaining state or states influence the United States government's likelihood of complying with WTO decisions. Interestingly, the level of United States exports to the complaining state, which is a measure of the potential retaliatory capability of the complaining state, does not have any stastically significant effects. This is contrary to realists and institutionalists approaches expectations that concerns for retaliation or reciprocity are driving governments' compliance decisions. In addition, the existence of other formal alliances with complaining states also does not appear to influence compliance decisions. While this finding does not disprove the institutionalist's expectation that having more formal treaty alliances will lead to greater linkages between regimes and thus greater compliance in all regimes, the evidence is not supportive of the idea that a web of treaty relationships between country dyads will improve compliance. In addition, the results of Model 2 and Model 3 do not support the conjecture by liberal theory that democracies will be more likely to comply with international obligations when dealing with other democracies. A higher polity score, indicating more democratic institutions, did not have any statistically significant effect on the United States compliance levels indicating that the United States is no more likely to comply with international law obligations to other democracies than to non-democracies.

More broadly, none of the independent variables accounting for external pressures on the state to comply were statistically significant. This suggests as a general matter that domestic pressure, rather than international pressure, is responsible for understanding *the variance* in United States compliance decisions. This does not necessarily mean that external pressure is not a significant cause of compliance. Rather, it is possible that the level of external pressure to comply may be constant for all cases, and so external pressure is not a good predictor of when the United States chooses to comply (or not) for any particular case. The level of external pressure may help establish a baseline level of compliance for all cases but does not predict movement around the baseline. However, the fact that dyad specific factors are not important is still notable. Basic realist propositions, such as the United States is more likely to comply when sued by a more economically powerful state, turn out to not be supported. Neither are propositions that "interdependence" between country dyads (through shared democratic governance structure or formal alliances) should lead to greater compliance with treaty obligations borne out.

Finally, the other case specific variables were also not relevant to the compliance decision. The level of political contributions in Model 3 did not have a statistically signficant influence on compliance. This is notable because it indicates that a simple interest group lobbying model is not a very good predictor of compliance on trade issues. More importantly for this study, controlling for political contributions means that differences between the actions of Congress as compared to the actions of the executive branch are not driven by interest group action. The differences between United States compliance decision when Congressional action is needed or not persist even when we account for political contributions. This result means that it more likely that the nature of

the two institutions, not interest group politics, is making the *Congress Required* variable important. The study also accounts for cases that challenge American domestic trade remedy actions. Trade remedy actions involve domestic level decisions to apply safeguards, anti-dumping measures, and countervailing duties, and these decisions are frequently the challenged at WTO. To make sure that these cases were not driving our results, we included a dummy variable to account for any trade remedy specific variation. Some trade scholars may be surprised that this variable is not statistically significant, indicating that the United State is no more likely to comply (or not to comply) in a trade remedy cases than in any other issue area.

B. Total Compliance Time

The second test of our theory that we performed was estimating the impact of whether Congressional action was required to bring a measure into compliance on the total amount of time that compliance took. The total amount of time that compliance takes is a measure of the *quality* of compliance. Because the WTO litigation process can be manipulated by dragging out the panel and appeals process through requests for compliance panels and other delaying tactics, discussion of compliance are not exclusively focused on whether a nation ultimately complied but also on how long compliance takes.[55] This test attempts to measure the quality of compliance by accounting for the compliance timeline.

For these tests, once again the number of observations was the 37 disputes where the United States did not settle or prevail on the core issue in the case. For each of these cases, the dependent variable was calculated as the number of days from when the conference request was filed until when the United States took an action to come into compliance.[56] Using this new dependent variable, we then estimated a series of models containing the same independent variables used in Figure 1. Using this data, we estimated a series of Cox Proportionate Hazard Models.[57] The reason that we selected the Cox model is that it has the advantage of not requiring assumptions about the distribution of time until an event occurs.[58] The results of these tests are presented in **Figure 2.**

Using a similar method to the one we used to present results in the last section,[59] Figure 2 presents graphical representations of three cox proportional hazard regression

[55] Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2012)

[56] For the 13 cases that the United States was listed as not in compliance by the CRS report discussed in Part IV.B., we used the date when the United States came into at least partial compliance. The three cases where no steps have been taken are treated as censored observations as of August 31, 2012.

[57] *See* D. R. Cox, *Regression Models & Life Tables*, 34 J. ROYAL STATISTICAL SOCIETY 187 (1972). For a discussion on the use of durational models generally, *see* Jim E. Alt, Gary King, & Curtis S. Signorino, *Aggregation Among Binary, Count, and Duration Models: Estimating the Same Quantities From Different Levels of Data*, 9 POL. ANAL. 21 (2001); JANET M. BOX-STEFFENSMEIER & B. S. JONES, EVENT HISTORY MODELING: A GUIDE FOR SOCIAL SCIENTISTS (2004).

[58] Janet M. Box-Steffensmeier & Christpher J. W. Zorn, *Duration Models and Proportionate Hazards in Political Science*, 45 AM. J. POL. SCI. 972, 974 (2001).

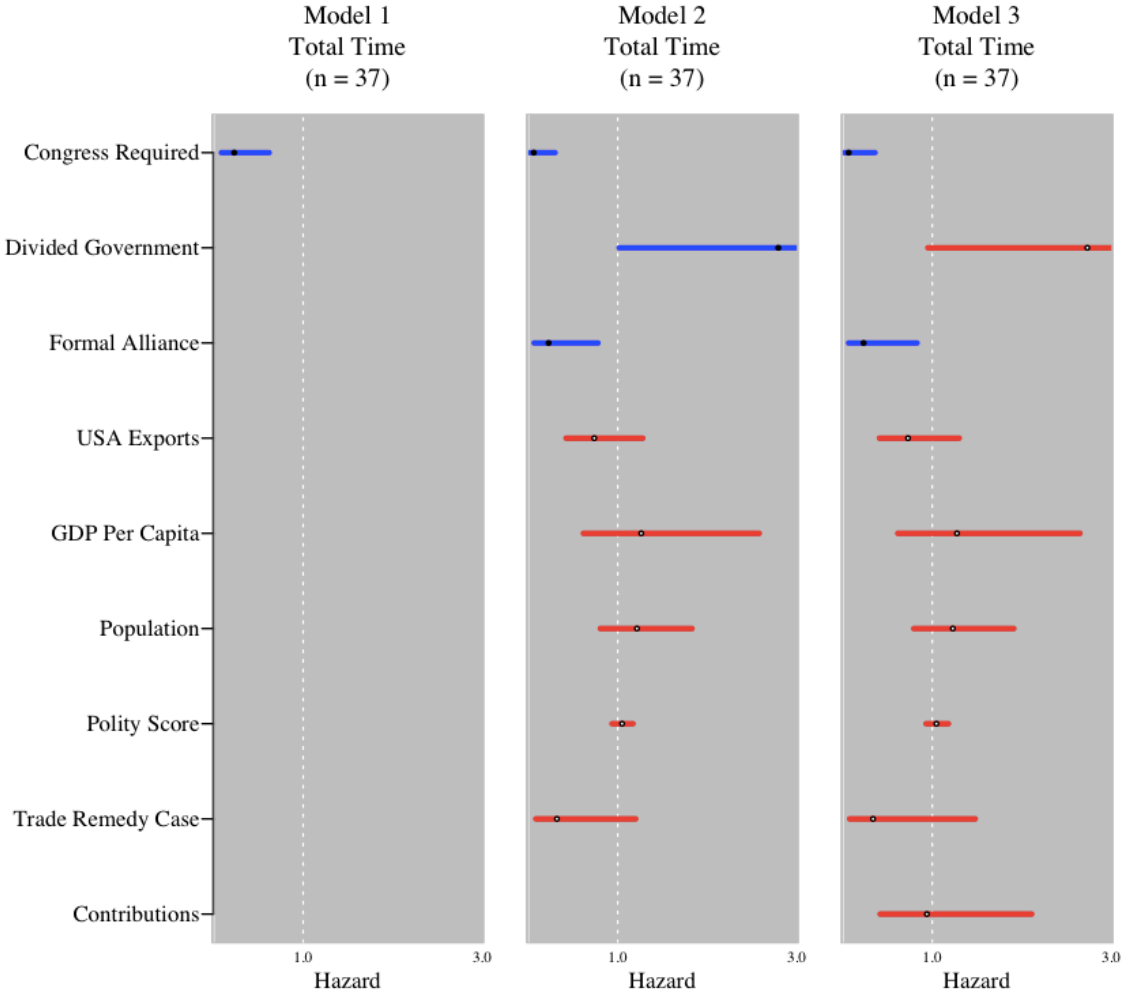
[59] *See supra* text accompanying notes 53 - 54 .

models. These three models include the same independent variables as Figure 1. The difference, however, is that Figure 1 presented the results of logit models that can be interpreted as the change in probability that an event will occur – in our case, non-compliance with a WTO decision. In contrast, the results presented in Figure 2 are hazard ratios. Hazard ratios with a value of less than 1.0 mean that an event will take longer to occur, whereas hazard ratios with a value of greater than 1.0 is likely to occur more quickly.

In all three of the models included in Figure 2, the *Congress Required* variable is below 1.0 and is statistically significant. The hazard ratio in these models for the *Congress Required* variable ranges from 0.23 in Model 1 to 0.07 in Model 3. In all three cases, this result is statistically significant at the 0.01 level. In other words, these models suggest that we can say with 99% confidence that the disputes that require congressional action to be resolved take longer than other disputes. This result is robust whether in the parsimonious model or with all of our covariates included. These results support our theory by presenting strong evidence, even controlling for competing theories, that who is required to provide compliance has a significant impact on how long it takes the United States to comply with adverse WTO rulings.

Figure 2 also presents interesting results with regards to competing hypotheses concerning compliance. Again, the retaliatory capacity of the complaining state (or states) does not speed up compliance. The polity score of the complaining state is not significant indicating that the United States is not more likely to comply with adverse WTO judgments faster if the complaining state is another democracy. More difficult to explain is the formal alliance variable. This independent variable is statistically significant but it works in the opposite manner than institutional theory would predict. The United States is likely to take longer to comply with WTO decisions when it has a formal alliance with the complaining state than when the complaining state is not a security ally. The direction of the variable indicates that having greater interdependence in formal treaty regimes does not lead to a higher quality of compliance in terms of timing.

Figure 2: Cox PH Models Estimating Total Complaince Time



C. Robustness Checks

In order to ensure that our results are not the result of either our coding decisions or model dependency, we have performed a number of robustness tests to confirm our results. Each of these robustness tests help to present further evidence to support our theory that a driving factor in the United States' compliance with WTO decisions is which branch of government is required to take action.

First, one concern is that our coding decisions of the *Congress Required* variable may not have included all of the cases where Congressional Action was required for the United States to remedy the violation alleged in the initial compliant. Given that our initial coding of the variable was intentionally conservative to create a difficult test for our theory, we coded four alternative versions of the *Congress Required* variable to ensure that our results were not based solely on our cautious coding decisions. For these alternative variables, we added additional cases to our initial list of those requiring

congressional action. Specifically, we changed the coding of: (1) Helms-Burton;[60] (2) softwood lumber;[61] (3) zeroing;[62] and (4) all three of the previous cases simultaneously.[63] After doing so, we re-estimated the models presented in Figures 1 and 2 using each of the four alternate versions of the *Congress Required* variable. For all of the models and alternative variables, the results were substantially the same as those presented in the paper.[64]

Second, another concern is that our results for estimating whether the United States would comply with an adverse WTO decision presented in Figure 1 were driven by the timing of the Congressional Research Service report that we used to code the dependent variable.[65] The concern is that shortly after the CRS report was released, the United States finally reached a deal to resolve a number of zeroing cases. As a result, we created an alternate dependent variable that changed the coding for the three zeroing cases listed in the CRS report as non-compliant to compliant.[66] After doing so, we re-estimated the models presented in Figure 1. The *Congress Required* variable remained statistically significant at the 0.05 level or higher in all three models.

Third, it is possible that the models that we used to estimate the total compliance time were biased because the models presented in Figure 2 did not include cases that had been settled. To address this possibility, we collected data on the amount of time that elapsed during the litigation and compliance process for cases that ultimately settled. The impact for Figure 2 was that there were eleven additional cases that we have information on when the settlement took place (for the other seven settled cases, it does not appear that the result of the negotiations was ever reported to the DSB, and thus we do not know even the rough date of when the United States took a compliance action).[67] After including these cases, we re-estimated the models presented in Figure 2 with 48 instead of 37 observations. In all three models, the *Congress Required* variable remained statistically significant at the 0.05 level or higher.

Fourth, it would be reasonable to be concerned that our results were at least partially driven by our decision on how to code control variables for cases brought by multiple complainants.[68] For cases with multiple complainants, we elected to code the *Exports*, *GDP Per Capita*, and *Population* as the sum of the totals for all of the complainants, and the *Polity Score* as the average for all of the complainants. In their

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[60] DS38.
[61] DS236.
[62] DS294, DS322, DS350, DS402.
[63] DS38, DS236, DS294, DS322, DS350, DS402.
[64] All of the models estimated were statistically significant at least the 0.05 level (with many at the 0.001 level), with the exception of some of the models in Figures 1 and 2 when the *Congress Required* variable was altered to include only the softwood lumber case (DS236). Of these, all of the models were significant at the 0.1 level with the exception of Model 3 in Figure 1, which had a p-value of 0.13.
[65] *See supra* text accompanying notes 32 - 34.
[66] DS294, DS322, DS350.
[67] The eleven additional cases are: DS6, DS32, DS38, DS39, DS40, DS85, DS88, DS89, DS250, DS281, and DS282.
[68] This includes both consolidates cases and cases where two countries were complainants on the same request for consultation.

paper on compliance with WTO decisions, however, Hofmann and Kim took an alternate approach and elected to code control variables based on the values for the complainant with the largest GDP.[69] Although we are generally concerned that this approach fails to account for the possibility that the stakes may be meaningfully higher when there are multiple complainants than if the complainant with the largest GDP had brought the complaint alone, we recoded our variables for *USA Exports, GDP Per Capita*, *Population*, and *Polity Score* using Hofmann and Kim's approach. After recoding these variables for cases with multiple complainants, we re-estimated the models presented in Figures 1 and 3. After doing so, our results remained substantively the same.[70]

Fifth, a final concern that we attempted to address is the fact that the measure of compliance time presented in Figure 2 could be biased because measuring from when a conference request was filed until compliances means our variable includes both the "litigation time" and the "compliance time." It could be the case that in disputes where Congress is required to act it takes longer to litigate, but that after the litigation has completed, the United States complies just as promptly as other cases. To ensure that this possibility was not driving our results, we attempted to directly measure "compliance time." To do so, for each case we collected the date that the final panel – or appellate body – report for each case was adopted. We then calculated the number of days that elapsed from this point until the date when compliance occurred. After doing so, we re-estimated the models presented in Figure 2 with this new dependent variable. The results from this analysis are presented in **Appendix A**. As the figure in Appendix A clearly shows, the significance and substantive effect of the *Congress Required* variable is still comparable to the results presented in Figure 2. We additionally performed all of the other robustness checks discussed in this section with the new "Compliance Time" dependent variable. As with the results reported in Figures 1 and 2, these robustness checks did not substantively change the results reported in Appendix A.

V. Discussion and Implications

The question of why and when states comply with international law is one of the foundational inquiries in international legal studies. This work attempts to examine compliance actions empirically by studying the compliance behavior of the United States in responses to adverse WTO dispute resolution decisions. While focusing on the United States government alone has some limitations in terms of how well the finds here can generalize to other states, this study has potentially important implications for understandings of international law.

First, opening the "black box" of the state is critical to explaining patterns of compliance. At least in trade law, different domestic actors can be the source of policy compliance on different issues. This study demonstrates that when the executive branch has the power to comply with adverse WTO decisions, then the likelihood of compliance

[69] Hofmann & Kim, *supra* note 50, at 18.
[70] The models in Figure 1 had a p-value of 0.06, whereas the models in Figures 2 and 3 were significant at the 0.01 or 0.001 level.

is significantly high and the compliance comes significantly faster than if congressional action is needed. What actor within the state has the capacity to cure the violation matters for the "state's" compliance.

It is possible that issues for which congressional action is necessary are "high politics" issues than those than can be handled by the executive branch. If so, then the *Congress Required* variable might be picking particularly sensitive trade issues that are harder to resolve, in addition to difference inherent to the different political actors. This is unlikely for two reasons. First, the study includes a variable for the political contributions of the affected industries so this variable should pick up and account for issues that are politically sensitive because of interest group politics. Second, the trade disputes requiring congressional action are set by the issue area, not by the level of controversy. Congress and the executive branch both deal with a mix of high and low politics issues. Some high controversy issues, such as agriculture subsidies and tax rates, require congressional action, but so do some lower politics issues, such as the payment of countervailing duty awards and some minor points of intellectual property law. In addition, many of the issues addressed by the executive branch are "high politics" disputes, such as claims of national security policy and environmental policy.

Our empirical analysis finds that the question of who supplies compliance overwhelms the influence of all international factors in predicting compliance, including the economic size of the complaining state, and other domestic factors, including political contributions. This suggests that it is not useful to talk about a "state's" level of compliance when analyzing patterns of compliance. Rather compliance behavior must be disaggregated based on the source of compliance to be coherently understood. If members of Congress are fundamentally less receptive to appeals that abide by international obligations than members of the executive branch (either because of their constituencies, their lack of participation in the day-to-day practice of foreign affairs, or super-majority voting rules) then our focus should shift to more domestic level variables to understand the effects of international law.

Second, this study suggests that international relations theories that have expectations for "state" action may be overly broad. Different actors within a state may operate based on different logics and the efforts to treat the state as unitary obscures important causal factors. Our study is generally supportive of the idea that executive branch actors may experience more of a "compliance pull" with international law than members of Congress. This could be based on the executive branch's day-to-day operation of foreign affairs, concerns about reciprocity with foreign counterparts, or perception of the legitimacy of the dispute resolution process. Members of Congress may have lower concerns about reciprocity (particularly on daily basis), may have less exposure to the dispute settlement processes, and thus have lower levels of confidence in the legitimacy of the process. If this is true, then it has implications for broader ideas of compliance in addition to more narrow proposals for designing dispute settlement regimes.

In broad brushstrokes, this study indicates that institutionalist's logic may have more force when dealing with executive branch officials. Concerns about reputation or a desire to be perceived as a "law-abiding" state may have greater influence on government officials who deal with the international system directly.[71] In addition, the managerialist approach's emphasis on the importance of "jaw-boning" or "shaming" may also find a more fertile ground when dealing with executive branch officials.[72] By contrast, members of Congress may not be influenced by concerns about the perceptions of foreign policymakers or international officials because they interact with these audiences less often. Jaw-boning may be less effective with members of Congress because they are not at the bargaining table or do not otherwise make themselves available. Furthermore, the same activities that might be embarrassing to an executive branch official, such as openly refusing to abide by an international court decision, may be the source of pride or greater domestic support to a member of Congress.

When dealing with members of Congress, realist logics may better describe compliance behavior. Members of Congress may be more responsive to the material consequences of non-compliance with international rules that would influence their constituencies. As a result, they may not be more likely to respond to economic retaliation than for calls to be more law-abiding. Thus the levels of cooperation that can be sustained when legislative action is necessary may depend on the level of retaliation that can be authorized for non-compliance.[73] In dispute settlement design terms, this means that permitting greater retaliatory remedies, including retrospective damages, may be needed to create the necessary domestic conditions for compliance to occur.

Finally, our study has some implications for understanding post-adjudicative bargaining at the WTO. When a respondent state fails to comply with an adverse WTO decision, the DSB can authorize the complaining state (or states) to suspend concessions. Given this authorization, complaining states have a strategic choice of whether to apply retaliation (which will harm both states) in the hopes of convincing the respondent state to comply, or whether to settle the claim for partial compliance or a side payment. What the optimal strategy is for the complaining states depends on their beliefs about the respondent state's likely behavior. If the complaining state believes that the respondent state may actually comply, then suspending concessions is often the preferred choice. This may harm both states in the short term, but ultimately leads to compliance in the long term. However, if the complaining state believes that the respondent state will not ultimately comply, then it is better off not suspending concessions and settling for partial compliance or a side payment.

So far, post-adjudicative bargaining at the WTO has seen complaining states adopting different strategies. Sometimes complaining states opt to apply sanctions and other times, they choose to settle for side payment (often a money payment). At least

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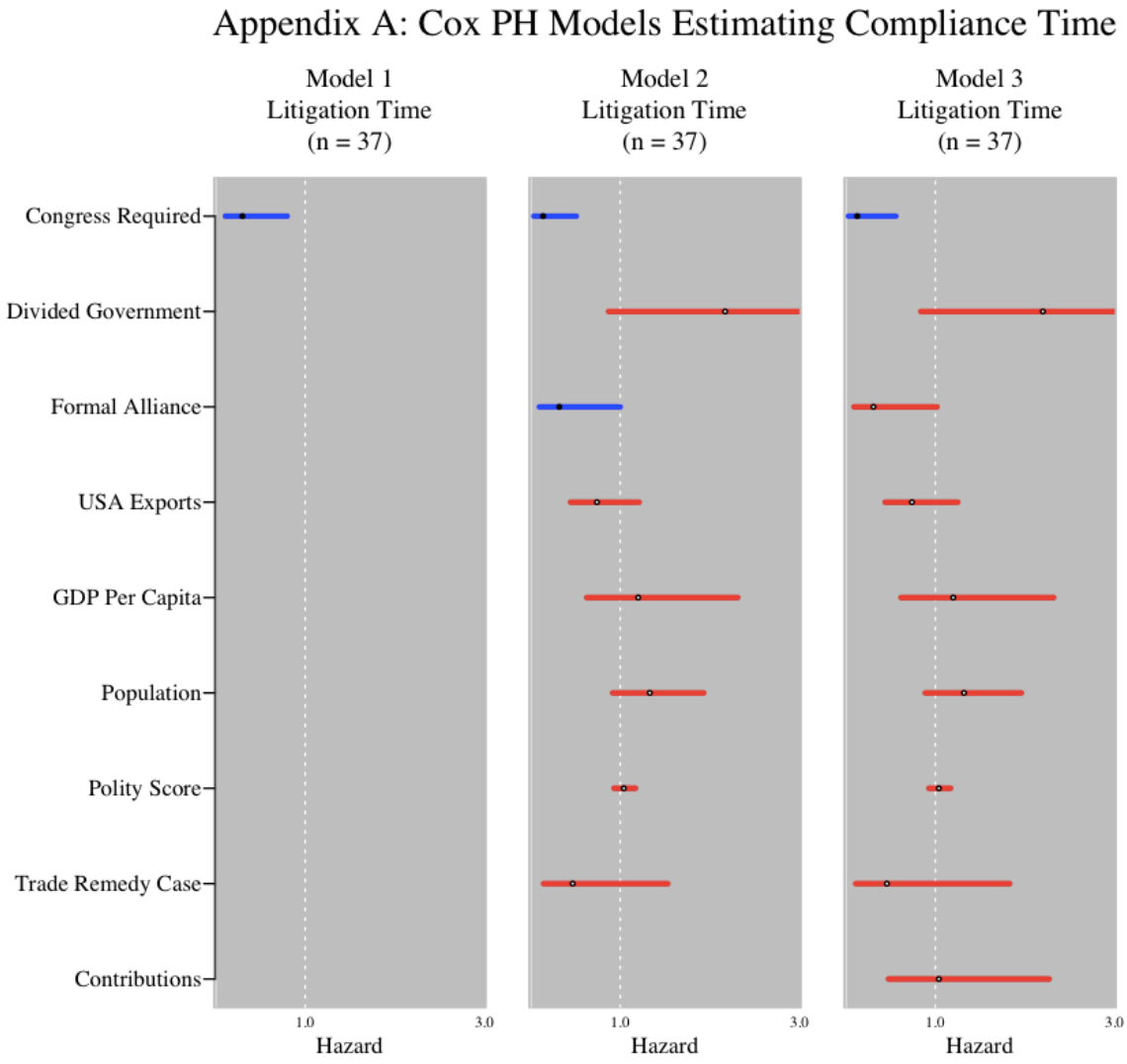
[71] Andrew Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008), Abbott & Snidal, supra note 22, Keohane, supra note 21.
[72] Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993).
[73] George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 279 (1996); Goldsmith and Posner, supra note 16.

with regards to the United States as the respondent, the need to change legislation in a specific case may alter post-adjudicative bargaining. Complaining states may understand that legislative revision of trade issues in the United States is very hard, and thus complaining states may be more likely to settle such claims, particularly if the level of retaliation authorized is low. In other words, the need to involve Congress may convince complaining states that unless the level of retaliation authorized is above some threshold, retaliation is not a worthwhile activity. They are better off foregoing the right to suspend concessions and settling the case for partial compliance (that the executive branch can provide on its own) or a side payment. On the flip side, complaining states may be more likely to apply retaliation (if compliance has not already been forthcoming) when only executive branch action is necessary, because the complaining state's perception of the likelihood of compliance is higher. We have not yet applied this framework to cases of post-adjudicative bargaining, but this approach of disaggregating the supply of compliance offers a potential avenue to differentiating these bargaining outcomes.

Appendix


Appendix A: Cox PH Models Estimating Compliance Time
Model 1
Litigation Time
(n = 37)
Model 2
Litigation Time
(n = 37)
Model 3
Litigation Time
(n = 37)
Congress Required
Divided Government
Formal Alliance
USA Exports
GDP Per Capita
Population
Polity Score
Trade Remedy Case
Contributions
1.0
3.0
Hazard
1.0
3.0
Hazard
1.0
3.0
Hazard