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Why are some international agreements informal?

Charles Lipson

“Verbal contracts,” Samuel Goldwyn once said, “aren’t worth the paper they’re written on.” Yet informal agreements and oral bargains suffuse international affairs. They are the form that international cooperation takes in a wide range of issues, from exchange rates to nuclear weapons. Take monetary affairs, for instance. Except for the regional European Monetary System, there have been no formal, comprehensive agreements on exchange rates since the downfall of the Bretton Woods system in 1971. A prolonged effort to resurrect the pegged-rate system failed, although new treaties were drawn up and duly signed. Private financial markets simply overwhelmed these official efforts, and central bankers eventually conceded the point. The one comprehensive agreement since then, concluded in 1976 in Jamaica, merely ratified a system of floating rates that had emerged unplanned. For the past fifteen years, monetary arrangements have been a succession of informal agreements of indefinite duration, most recently the Plaza Communiqué and the Louvre Accord, designed to cope with volatile currency movements.¹ The Bretton Woods system itself depended on such agreements in its declining years. It was held together by the tacit agreement of European central banks not to convert their major dollar holdings into gold. The system fell apart when Germany and France abandoned that commitment. They did so because they believed that the United States had abandoned its own (tacit) commitment to restrain inflation and to avoid large current account deficits. Put another way, the U.S.

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1. See Yoichi Funabashi, *Managing the Dollar: From the Plaza to the Louvre* (Washington, D.C.: Institute for International Economics, 1988); and Peter B. Kenen, *Managing Exchange Rates* (London: Routledge, 1988). Kenen reproduces key portions of the Plaza Communiqué (22 September 1985) and the Louvre Accord (22 February 1987) on p. 50.

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formal pledge to convert dollars into gold at \$35 per ounce—the very heart of the Bretton Woods system—was sustained only by silent agreements that America would not be called upon to do so.²

Such informal agreements are vital in security relationships as well. America's relations with the Soviet Union have relied heavily on unspoken understandings. These tacit relationships are crucial for two reasons. First, the Americans and Soviets have made very few direct treaty commitments, and fewer still in key areas of national security. Second, for much of the postwar period, each side was openly hostile to the other and outspoken in denying the value and even the legitimacy of cooperation. The rhetoric went much further at times, challenging the adversary's right to govern at home, its basic security interests abroad, and its trustworthiness in diplomatic dealings. For all that, the United States and Soviet Union have generally framed their basic security policies in more prudent and cautious terms. The U.S. decision to pursue containment rather than "rollback," even at the height of Cold War tensions, was a tacit acknowledgment of the Soviet sphere of influence in Eastern Europe. When popular uprisings broke out during the 1950s, the United States did nothing—nothing to aid resistance movements in Germany, Poland, and Hungary and nothing to deter their forcible suppression. In a related area of unspoken agreement, each side has been careful to avoid any direct engagement of military forces, despite the frequent involvement of Soviets and Americans in limited wars around the world. Paul Keal has termed such policies the "unspoken rules" of superpower diplomacy.³

Unspoken rules are not the only kinds of informal arrangements between the superpowers. In the case of strategic arms limitations, both the Americans and the Soviets publicly announced that they would continue to observe the first SALT treaty after it expired in October 1977. The principal aim was to sustain a climate of cooperation while SALT II was being negotiated. Leonid Brezhnev and Jimmy Carter signed an interim SALT II agreement in 1979, but the treaty itself was never ratified by the Senate. It was finally withdrawn in 1981. Even so,

2. See John Williamson, *The Failure of World Monetary Reform, 1971–1974* (New York: New York University Press, 1977); and Kenneth W. Dam, *The Rules of the Game: Reform and Evolution in the International Monetary System* (Chicago: University of Chicago Press, 1982). For a counterargument focusing on U.S. domestic politics rather than on the breakdown of international commitments, see Joanne Gowa, *Closing the Gold Window: Domestic Politics and the End of Bretton Woods* (Ithaca, N.Y.: Cornell University Press, 1983).

3. See Paul Keal, *Unspoken Rules and Superpower Dominance* (London: Macmillan, 1983). Some diplomatic efforts were made to articulate the rules, but they did little in themselves to clarify expectations. In 1972, as the strategic arms limitation talks (SALT I) were concluded, Nixon and Brezhnev signed the Basic Principles Agreement. It sought to specify some key elements of the superpowers' relationship and thereby facilitate the development of detente. The product was vague and ambiguous. Worse, it seemed to indicate—wrongly—U.S. agreement with the Soviet position on peaceful coexistence and competition in other regions. Alexander George calls these elements "a pseudoagreement." For the text of the agreement, see *Department of State Bulletin*, 26 June 1972, pp. 898–99. For an analysis, see Alexander George, "The Basic Principles Agreement of 1972," in Alexander L. George, ed., *Managing U.S.–Soviet Rivalry: Problems of Crisis Prevention* (Boulder, Colo.: Westview Press, 1983), pp. 107–18.

the Americans and Soviets avoided undercutting the agreement and tacitly observed its key provisions until the late 1980s. This cooperation is remarkable because the Reagan administration had come to power strenuously opposing ratification of the SALT II agreement, helped prevent its passage in the Senate, and held fast to its declared opposition. In dealing with the Soviets, however, the administration was more accommodating. In the early days of the Reagan administration, the State Department announced that the United States "would not undercut" the agreement. The President himself made a similar statement in 1982 and largely kept to the bargain.⁴ The unratified treaty was observed informally even during the Reagan administration's major arms buildup. Both sides restricted specific categories of long-range nuclear weapons to meet SALT II limitations, despite the absence of any formal agreement to do so.

The Reagan administration always claimed that its nuclear policies were unilateral and voluntary. Yet it devoted considerable attention to possible Soviet "violations" of what was, after all, a nonexistent treaty.⁵ These violations were important because President Reagan always stated that U.S. arms restraints depended on Soviet reciprocity and progress toward a new arms treaty.⁶ Reagan repeatedly criticized the Soviets on both counts but in practice

4. The State Department announced its position in a brief public statement on 4 March 1981. The administration continued to debate its arms control policy, and Reagan continued to criticize Carter's SALT II agreement. In early May 1982, he told a press conference that the agreement "simply legitimizes an arms race" and added that "now the parts [of the agreement] that we're observing . . . have to do with the monitoring of each other's weaponry, and so both sides are doing that." In late May 1982, on the eve of the strategic arms reduction talks (START), Reagan finally stated that the United States "would not undercut" the SALT II agreement. He continued to criticize it, however, and left uncertain which portions of the agreement the United States would observe. See the Department of State announcement of 4 March 1981, cited by Strobe Talbott in *Deadly Gambits: The Reagan Administration and the Stalemate in Nuclear Arms Control* (New York: Vintage Books, 1985), p. 225; the President's press conference statement of 13 May 1982, quoted in *Weekly Compilation of Presidential Documents*, vol. 18, no. 19, 17 May 1982, p. 635; and the President's "Remarks at Memorial Day Ceremonies at Arlington National Cemetery," delivered on 31 May 1982 and included in *Public Papers of the President of the United States: Ronald Reagan, 1982*, book 1 (Washington, D.C.: Government Printing Office, 1983), p. 709.

5. In 1984, in a confidential report to Congress, President Reagan cited in detail Soviet noncompliance with numerous arms control agreements. Reagan's accompanying message stated that "violations and probable violations have occurred with respect to a number of Soviet legal obligations and political commitments in the arms control field." SALT II violations were included, and the reference to "political commitments" alludes to them. These criticisms were expanded in another report, issued in 1985. The Soviets rejected these charges and made counterclaims regarding U.S. violations. Relevant documents are cited by Notburga K. Calvo-Goller and Michael A. Calvo in *The SALT Agreements: Content-Application-Verification* (Dordrecht, Netherlands: Martinus Nijhoff, 1987), pp. 318 and 326 ff.

6. President Reagan did restate the U.S. commitment not to undercut SALT II in June 1985, some six months before the unratified treaty would have expired. U.S. policy, however, was always contingent on reciprocal Soviet adherence. On that point, Reagan was sharply critical: "The United States has not taken any actions which would undercut existing arms control agreements. The United States has fully kept its part of the bargain; however, the Soviets have not. . . . Certain Soviet violations are, by their very nature, irreversible. Such is the case with respect to the Soviet Union's flight-testing and steps toward deployment of the SS-X-25 missile, a second new type of ICBM [intercontinental ballistic missile] prohibited by the unratified SALT II agreement. Since

continued to observe SALT limits until well after the expiration date of the proposed treaty. The agreement was tacit, but no less an agreement for that.

Informal accords among states and transnational actors are not exceptional. The scale and the diversity of such accords indicate that they are an important feature of world politics, not rare and peripheral. The very informality of so many agreements illuminates basic features of international politics. It highlights the continuing search for international cooperation, the profusion of forms it takes, and the serious obstacles to more durable commitments.

All international agreements, whether formal or informal, are promises about future national behavior. To be considered genuine agreements, they must entail some reciprocal promises or actions, implying future commitments. Agreements may be considered informal, to a greater or lesser degree, if they lack the state's fullest and most authoritative imprimatur, which is given most clearly in treaty ratification.

The informality of agreements varies by degrees, along two principal dimensions. The first is the government level at which the agreement is made. A commitment made by the head of state (an executive agreement) is the most visible and credible sign of policy intentions short of a ratified treaty. In important matters, commitments by lower-level bureaucracies are less effective in binding national policy. They are simply less constraining on heads of state, senior political leaders, and other branches of government, partly because they lack a visible impact on national reputation. The second dimension is the form, or means, by which an agreement is expressed. It may be outlined in an elaborate written document, or it may involve a less formal exchange of notes, a joint communiqué, an oral bargain, or even a tacit bargain.⁷ Written agreements allow greater attention to detail and more explicit consideration of the contingencies that might arise. They permit the parties to set the boundaries of their promises, to control them more precisely, or to create deliberate ambiguity and omissions on controversial matters. At the other end of the spectrum—most informal of all—are oral and tacit agreements. Their promises are generally more ambiguous and less clearly delimited,⁸ and the very

the noncompliance associated with the development of this missile cannot be corrected by the Soviet Union, the United States reserves the right to respond in a proportionate manner at the appropriate time." See the President's statement of 10 June 1985, quoted in *Weekly Compilation of Presidential Documents*, vol. 21, no. 24, 17 June 1985, pp. 770–71.

7. It is worth noting that all of these distinctions are ignored in international law. Virtually all international commitments, whether oral or written, whether made by the head of state or a lower-level bureaucracy, are treated as "binding international commitments." What is missing is not only the political dimension of these agreements, including their status as domestic policy, but also any insight into why states choose more or less formal means for their international agreements.

8. Tacit and oral agreements, by their very nature, do not specify promises in great detail and rarely spell out contingencies or remedies. Consider, for example, the informal cooperation between friendly intelligence agencies such as the U.S. Central Intelligence Agency and Israel's Mossad. Besides exchanging information, both sides engage in unacknowledged spying on each other. But what are the limits? What violates the informal agreement, and what differentiates serious violations from "normal cheating"? To clarify these issues and to encourage regular

authority to make and execute them may be in doubt.⁹ If disputes later arise, it is often difficult to specify what was intended *ex ante*. Indeed, it may be difficult to show that there *was* an agreement.¹⁰

The interpretive problems are even more acute with tacit understandings and implicit rules that are not well articulated between the parties.¹¹ Are these arrangements cooperative agreements at all? That depends. They are *not* if they simply involve each actor's best strategic choice, given others' independent choices. This Nash equilibrium may produce order and predictability—that is, regular behavior and stable expectations—without cooperation.¹² Genuine

cooperation, the United States and Israel have signed informal accords, beginning with a secret agreement in 1951. Even so, such agreements are necessarily incomplete, sometimes making it difficult to differentiate cheating from permissible activity. According to Blitzer, "U.S. law enforcement officials . . . long suspected that Israel was playing fast and loose with the long-standing U.S.-Israeli understanding barring covert operations against each other. Yes, there is always some spying going on, even among very close friends and allies. But that is a far cry from actually planting a 'mole' in a friendly country's intelligence community. Thus, there is a huge difference between unobtrusive intelligence-gathering operations, on the one hand, and the actual running of paid spies in each other's country, on the other." Over time, actors can use sanctions and exhortation to specify these contingent obligations and to signal the limits of their tolerance. But ambiguities will surely remain. See Wolf Blitzer, *Territory of Lies: The Exclusive Story of Jonathan Jay Pollard—The American Who Spied on His Country for Israel and How He Was Betrayed* (New York: Harper & Row, 1989), p. 163; and Dan Raviv and Yossi Melman, *Every Spy a Prince: The Complete History of Israel's Intelligence Community* (Boston: Houghton Mifflin, 1990), pp. 77 ff.

9. The State Department's 1981 statement, for example, that the United States "would not undercut" the unratified SALT II treaty if the Soviets reciprocated is an informal commitment. To international lawyers, its status is clear-cut. The State Department has unambiguously committed the United States by using the standard diplomatic language of obligation to a treaty pending ratification. But what about the domestic political status of that promise? The debate within the Reagan administration raged for another year before the President publicly ratified the State Department position. Even then, the Congress and courts need not be bound by these executive branch statements.

10. Recognizing these limitations on oral bargains, domestic courts refuse to recognize such bargains in many cases, thereby creating a powerful incentive for written contracts. There is no such incentive to avoid oral bargains in interstate agreements.

11. According to Downs and Rocke, "A state bargains tacitly with another state when it attempts to manipulate the latter's policy choices through its behavior rather than by relying on formal or informal diplomatic exchange." Actions, not diplomatic words, are the crucial form of communications, and their aim is joint, voluntary cooperation rather than outright coercion. Downs and Rocke's contribution is to show how imperfect information affects states' strategic choices and may produce inadvertent arms races. Their focus is on uncertain estimates of others' strategies, preferences, and specific actions (either completed or intended), and not on the ambiguous meaning of tacit agreements and other informal bargains. See the following works of George W. Downs and David M. Rocke: "Tacit Bargaining and Arms Control," *World Politics* 39 (April 1987), p. 297; and *Tacit Bargaining, Arms Races, and Arms Control* (Ann Arbor: University of Michigan Press, 1990), p. 3.

12. See Jon Elster's discussion of "the two problems of social order," in *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), chap. 1. Elster's key distinction is between regular behavior patterns and cooperation. He distinguishes five main varieties of cooperation: helping others, voluntarily bearing costs of externalities, physical collaboration in joint ventures, mutual agreements to transfer rights (private orderings), and conventional equilibria (in which no party can improve its outcome by unilaterally deviating). In this article, my discussion of international cooperation focuses only on reciprocal contractual exchanges, which involve future performance and where the possibility of profitable defection might arise.

tacit cooperation involves something more. It is based on shared expectations that each party can improve its own outcome if its strategic choices are modified in expectation of reciprocal changes by others.¹³ Shared “understandings” can arise in either case. They are not a unique marker of cooperative agreements. What distinguishes cooperation, whether tacit or explicit, are the subtle forms of mutual reliance and the possibilities of betrayal and regret.

The central point here is not taxonomic, presenting definitions of tacit arrangements and other informal bargains simply to classify them. The goal is to understand how different kinds of agreements can be used to order international relationships. The means of international cooperation are frequently informal, and it is important to explore their rationale, uses, and limitations. At the same time, we should not mistake all shared understandings for voluntary, informal bargains.

Informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels. What are the impediments? And what are the advantages of informal agreements in addressing them? First, informal bargains are more flexible than treaties. They are willows, not oaks. They can be adapted to meet uncertain conditions and unpredictable shocks. “One of the greatest advantages of an informal instrument,” according to a legal counselor in Britain’s Foreign Office, “is the ease with which it can be amended.”¹⁴ Although treaties often contain clauses permitting renegotiation, the process is slow and cumbersome and is nearly always impractical. This point can be put in another, less obvious way: informal agreements make fewer informational demands on the parties. Negotiators need not try to predict all future states and comprehensively contract for them. Second, because informal arrangements do not require elaborate ratification, they can be concluded and implemented quickly if need be. In complex, rapidly changing environments, speed is a particular advantage.

Finally, informal agreements are generally less public and prominent, even when they are not secret. This lower profile has important consequences for democratic oversight, bureaucratic control, and diplomatic precedent. Informal agreements can escape the public controversies of a ratification debate. They can avoid the disclosures, unilateral “understandings,” and amendments that sometimes arise in that open process. Because of their lower profile, they are also more tightly controlled by the government bureaucracies that negotiate and implement the agreements and less exposed to intrusion by other

13. In tacit cooperation, one party in effect takes a chance in the expectation that another will simultaneously take an equivalent chance, leaving both better off. Neither party takes such chances when it maximizes unilaterally and independently. Stable expectations can arise in either case, based upon stable Nash equilibria. It is important not to exaggerate the scale of international cooperation by calling all shared expectations “cooperation.” They may be nothing more than unilateral maximizing.

14. Anthony Aust, “The Theory and Practice of Informal International Instruments,” *International and Comparative Law Quarterly* 35 (October 1986), p. 791.

agencies. Agencies dealing with specific international issues, such as environmental pollution or foreign intelligence, can use informal agreements to seal quiet bargains with their foreign counterparts, avoiding close scrutiny and active involvement by other government agencies with different agendas.

The lower profile and the absence of formal national commitment also mean that informal agreements are less constraining as diplomatic precedents. They do not stand as visible and general policy commitments, as treaties so often do. In all these ways, the most sensitive and embarrassing implications of an agreement can remain nebulous or unstated for both domestic and international audiences, or even hidden from them.

Yet all of these diplomatic benefits come at a price, and sometimes a very high one. The flexibility of informal agreements also means that they are more easily abandoned. Avoiding public debates conceals the depth of national support for an agreement. Ratification debates can also serve to mobilize and integrate the multiple constituencies interested in an agreement. These policy networks of public officials (executive, legislative, and bureaucratic) and private actors sustain agreements during the implementation stage. Joint communiqués and executive agreements sidestep these basic democratic processes. This evasion typically means that the final agreements are less reliable for all participants.

These costs and benefits suggest the basic reasons for choosing informal agreements:

- (1) the desire to avoid formal and visible pledges,
- (2) the desire to avoid ratification,
- (3) the ability to renegotiate or modify as circumstances change, or
- (4) the need to reach agreements quickly.

Because speed, simplicity, flexibility, and privacy are all common diplomatic requirements, we would expect to find informal agreements used frequently. Because the associated costs and benefits vary in different circumstances, we would also expect to find a distinct pattern of formal and informal agreements. Finally, we would expect to find various types of informal agreements used to meet particular needs.

This article examines the strengths and weaknesses of informal agreements. It is an inquiry into the neglected institutional constraints on international cooperation—and the imperfect devices to overcome them. It considers the basic choices between treaties and informal instruments, as well as the choices among different kinds of informal arrangements, all of which can be used to express cooperation among states. Finally, it asks what these varied forms of cooperation can tell us about the more general impediments to international agreement. The aim here is to use the *choice of forms of agreement* to explore some problems of rational cooperation in international affairs and particularly their contextual and institutional dimensions.

Self-help and the limits of international agreement

When states cooperate, they can choose from a wide variety of forms to express their commitments, obligations, and expectations. The most formal are bilateral and multilateral treaties, in which states acknowledge their promises as binding commitments with full international legal status. At the other extreme are tacit agreements, in which obligations and commitments are implied or inferred but not openly declared, and oral agreements, in which bargains are expressly stated but not documented. In between lie a variety of written instruments to express national obligations with greater precision and openness than tacit or oral agreements but without the full ratification and national pledges that accompany formal treaties. These informal arrangements range from executive agreements and nonbinding treaties to joint declarations, final communiqués, agreed minutes, memoranda of understanding, and agreements pursuant to legislation. Unlike treaties, these informal agreements generally come into effect without ratification and do not require international publication or registration.

Although these agreements differ in form and political intent, legal scholars rarely distinguish among them. The dominant view is that international agreements, whatever their title, are legally binding upon the signatories, unless clearly stated otherwise. Thus, informal agreements, if they contain explicit promises, are conflated with treaties. They are rarely studied directly, except for the curiosity of “nonbinding” agreements such as the Helsinki Final Act.¹⁵

This distinction between agreements that legally bind and agreements that do not is a traditional one. It is central to the technical definition of treaties codified in the Vienna Convention on the Law of Treaties. Article 26 states that treaties are “binding upon the parties” and “must be performed by them in good faith.”¹⁶ Similarly, texts on international law emphasize the binding nature of treaties and, indeed, a wide range of other international agreements.¹⁷

The implicit claim is that international agreements have a status similar to domestic contracts, which *are* binding and enforceable. This claim is seriously misleading. It is a faulty and legalistic characterization of international

15. See, for example, Oscar Schachter, “The Twilight Existence of Nonbinding International Agreements,” *American Journal of International Law* 71 (April 1977), pp. 296–304; Michael J. Glennon, “The Senate Role in Treaty Ratification,” *American Journal of International Law* 77 (April 1983), pp. 257–80; and Fritz Münch, “Non-Binding Agreements,” in *The Encyclopedia of Public International Law*, vol. 7 (Amsterdam: North-Holland, 1984), pp. 353–57. The one general (and quite valuable) legal treatment of informal agreements is “The Theory and Practice of Informal International Instruments” by Anthony Aust, a practitioner in the British Foreign Office.

16. The Vienna Convention on the Law of Treaties was opened for signature on 23 May 1969 and entered into force on 27 January 1980, after ratification by thirty-five nations. See UN document A/CONF. 39/27, 1969.

17. See, for example, Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961); and Taslim Elias, *The Modern Law of Treaties* (Dobbs Ferry, N.Y.: Oceana Publications, 1974).

agreements in practice and is also a poor guide to why states sometimes use treaties and other times use informal means to express agreements. Although international agreements are contracted commitments, any simple analogy to domestic contracts is mistaken for several reasons. First, in domestic legal systems, binding agreements are adjudicated and enforced by courts, backed by the instruments of state power. This judicial power is wide-ranging. It includes, among other things, the right to interpret the parties' intentions at the time the bargain was initially made, the right to decide whether an agreement exists legally or is impermissible because it is procedurally flawed or violates public policy, and the right to interpose missing contract clauses to deal with unforeseen conditions. Most fundamentally, the courts can hold parties responsible for their promises, whether those promises were originally intended as contracts or not, and can settle their meaning.¹⁸ When parties discuss compliance after agreements have been signed, they bargain in the shadow of law and judicial enforcement.

Individuals and corporations can appeal to the courts to determine whether an ostensible promise, perhaps one given orally or without full documentation, is actually binding, with specific obligations. The courts can thus transmute informal or incomplete agreements into formal obligations. There is simply no equivalent at the international level.¹⁹ The legal battle between Texaco and Pennzoil illustrates this judicial power. Their case hinged on the meaning of Pennzoil's "agreement in principle" to buy Getty Oil. Was their agreement binding even though the final contract was never signed? The question arose because, soon after the agreement had been reached, another company, Texaco, mounted a higher bid for Getty. Texaco indemnified Getty and its largest shareholders against any lawsuits and completed the purchase.²⁰ Pennzoil then sued Texaco. The size of the companies meant that the stakes were unusually high: the jury awarded Pennzoil over \$10 billion and the final

18. For a system of contract law to be effective, the parties cannot simply abandon their commitments unilaterally. Or, rather, they cannot abandon these commitments without facing legal penalties. Reflecting this understanding, the key disputes in contract law revolve around what constitutes a binding agreement and what constitutes an appropriate penalty for nonperformance. International legal scholarship largely avoids these fundamental issues, and it says all too little about related issues of renunciation, violation, and monitoring of agreements.

19. Incomplete domestic agreements can be filled in by court decisions. Incomplete international agreements remain incomplete. They are beyond the reach of international court decisions, much less enforcement. For an astute discussion of the weakness of treaties that contemplate further, detailed negotiations, see Richard Baxter, "International Law in 'Her Infinite Variety,'" *International and Comparative Law Quarterly* 29 (October 1980), p. 552. In these general treaties, Baxter says, the individual provisions "are *pacta de contrahendo*, which cannot be enforced if the parties do not reach agreement. There is no way in which an agreement can be forced upon them and there is likewise no way in which they can be compelled to negotiate. The assertion that the duty to negotiate or to conclude an agreement implies a duty to negotiate in good faith is an empty one. . . . In the relations of States, a complaint that negotiations have not been carried on in good faith is mere rhetoric."

20. For an account of the purchase and the litigation, see Thomas Petzinger, Jr., *Oil and Honor: The Texaco-Pennzoil Wars* (New York: Putnam, 1987).

out-of-court settlement was for \$3 billion. But the stakes were high for another reason as well. The case raised significant questions about the legal status of “agreements in principle,” which are commonly used in business as precursors to formal contracts. The size of Pennzoil’s victory was unprecedented. But there was nothing unprecedented about the power of the courts to settle contractual disputes such as this, to determine whether a contract even exists, to infer its terms, and to ensure compliance with any damage awards, however large.²¹

The definitive settlement of such conflicts is the routine province of domestic legal systems. Courts are empowered to decide rights and obligations in specific disputes. They can sort out the inevitable mistakes, negligence, and outright fraud that bedevil agreements. They can set a price to be paid for nonperformance. In unusual cases, they can order a party to perform its contractual obligations, as the courts interpret them (“specific performance”). We need not concern ourselves here with this body of law in any detail or with important cross-national differences. But we should recognize the fundamental impact of judicial authority on exchange relationships.

Whether the issue involves simple promises or complicated commercial transactions, the availability of effective, compulsory arbitration by courts supports and facilitates agreements. It does so, in the last resort, by compelling adherence to promises privately made or, more commonly, by requiring compensatory payment for promises broken.²² Moreover, the prospect of such enforcement colors out-of-court bargaining.

There is no debate over the propriety of these judicial functions. They are crucial in complex capitalist economies in which independent agents work together by voluntary agreement. What legal scholars debate is not the propriety of enforcement power but its substantive content and the underlying principles that should govern damage awards when promises are broken.²³ At

21. In the dispute over Getty Oil, compliance issues were complicated by the possible size of any judgment against Texaco. Courts often require bonds to be posted covering any final awards. In this case, a bond of unprecedented size—well beyond the capacity of a bonding agency—was required. The unprecedented scale of Texaco’s bond was an important element in the appeals process and the ultimate out-of-court settlement. The dispute also illustrates the high transactions costs that can accompany major litigation—costs that discourage litigation and encourage the establishment of institutions for the private governance of contractual relationships. Besides the direct costs of litigation, the dispute raised uncertainties about Texaco’s continuing operations, thus reducing the company’s stock price significantly (without adding commensurately to Pennzoil’s price). One study indicates that the legal dispute reduced the combined wealth of Texaco and Pennzoil by some \$3 billion. Approximately two-thirds of this sum was regained after the final settlement. See David M. Cutler and Lawrence H. Summers, “The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco–Pennzoil Litigation,” *Rand Journal of Economics* 19 (Summer 1988), pp. 157–72.

22. This backing for promises is qualified in at least two senses. First, it leaves aside the expense and opportunity costs of using the courts (some of which may be recovered in the final judgment). Second, it assumes that the contested promises can somehow be demonstrated to the satisfaction of a third party. For oral promises, this may be a difficult hurdle, as Goldwyn noted.

23. Fried and Atiyah represent opposite poles in this debate. Fried argues that the common law of contracts is based on the moral institution of promising, rather than on commercial exchange. To sustain this institution, the recipients of broken promises should be awarded their expectations of

the very least, it is argued, recipients should receive the costs they incurred by relying on a broken promise.²⁴ The majority view, in both legal scholarship and common law courts, requires something more. It demands that the recipients of promises receive the benefits they might reasonably have expected had the promises been kept.²⁵

Whatever the standard for damages, it is clear that the courts offer political backing for the exchange of promises and, indeed, for the institution of promising in all its facets. Their role provides an important measure of protection to those who receive promises. It diminishes the tasks of self-protection, lowers the costs of transactions, and thereby promotes contractual agreements and exchange in general.

To lower the burdens of self-protection is not to eliminate them entirely. Using local courts to sustain agreements is often costly or impractical. The enforcement of contractual rights and obligations is imperfect. These costs and uncertainties raise the possibility that breaches of contract will go uncompensated or undercompensated. Knowing that, the parties must look to themselves for some protection against opportunism.²⁶ It is also true that domestic courts do not become involved in contract disputes through their own independent initiatives. They are called upon by parties to the dispute—at the parties' own initiative, at their own cost, and at their own risk. In that sense, access to the courts may be seen as an adjunct to other forms of self-help. Like these other forms, it is costly and the results uncertain.

But the fact that self-help is common to all agreements does not eradicate the fundamental differences between domestic and international bargains. Hanging over domestic bargains is the prospect of judicial interpretation and enforcement, whether the disputes are settled in court or not.²⁷ There is simply no analogue for these functions in international agreements. Of course, the parties to an interstate dispute may, by mutual consent, seek judicial rulings or

profit. Atiyah argues that court decisions have moved away from this strict emphasis, which arose in the nineteenth century, and returned to an older notion of commercial practice, which limits awards to the costs incurred in relying on broken promises. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass.: Harvard University Press, 1981); Patrick S. Atiyah, *From Principles to Pragmatism* (Oxford: Clarendon Press, 1978); and Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

24. For the classic statement, see Lon L. Fuller and William R. Perdue, "The Reliance Interest in Contract Damages," parts 1 and 2, *Yale Law Review*, vol. 46, 1936, pp. 52–96 and 373–420.

25. This is usually a monetary award. Occasionally, it is a requirement to perform the specific promises in the contract. See John Adams and Roger Brownsword, *Understanding Contract Law* (London: Fontana, 1987), p. 144; and Fried, *Contract as Promise*.

26. The courts themselves require some efforts at self-protection. Once a contract has been breached, for instance, the "innocent" party is expected to take reasonable actions to minimize the damages and cannot win awards that cover a failure to do so. For the efficiency implications of this legal doctrine, see Anthony Kronman and Richard Posner, *The Economics of Contract Law* (Boston: Little, Brown, 1979), pp. 160–61.

27. See Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (April 1979), pp. 950–97. Mnookin and Kornhauser also conclude that the impact of differing legal arrangements on divorce settlements cannot be specified with precision. They attribute that to a more general theoretical gap: a limited understanding of how alternative institutional arrangements can affect bargaining outcomes.

private arbitration. In multilateral treaties, states may also agree in advance to use procedures for dispute resolution.²⁸ These procedures may have teeth. They can raise the diplomatic costs of violations and ease the burdens of retaliation. But the punishments are also highly circumscribed. For the most part, they simply define and justify certain limited acts of self-enforcement or retaliation. At most, they may force a violator to withdraw from an agreement or a multilateral organization, giving up the benefits of participation.²⁹ That can be punishment, to be sure, but it falls far short of the legal sanctions for violating domestic contracts. There, the rights of withdrawal are accompanied by external enforcement of damages, usually based on disappointed expectations of profit. The fact that *all* agreements contain some elements of self-protection and some institutions for private governance should not obscure these basic differences between domestic and international bargains.³⁰

Domestic legal systems not only aid in enforcing contracts but also set effective boundaries on the scope and nature of private agreements. Statutes and court rulings limit the private, voluntary ordering of relationships. A significant portion of criminal law, for example, is devoted specifically to punishing certain categories of private agreements, from prostitution and gambling to the sale of illicit drugs. The rationale is that larger public purposes should override the immediate parties' own desires: their bargains should be barred or constrained. Civil laws governing rent control, usury, insider trading, cartel price-fixing, homosexual marriage, and indentured servitude are all directed at preventing private bargains, for better or for worse.³¹ Such

28. These are often ad hoc procedures designed for a specific agreement. Their powers may be quasi-judicial, as in the dispute mechanisms of the General Agreement on Tariffs and Trade (GATT), or merely consultative, as in the procedures of the U.S.–Soviet Standing Consultative Commission, established in SALT I and SALT II. The presence of quasi-judicial bodies attached to specific agreements indicates, once again, the limits of international adjudication. And it points to the ad hoc means devised to manage the risks of international cooperation. See Richard B. Bilder, *Managing the Risks of International Agreement* (Madison: University of Wisconsin Press, 1981), pp. 56–61.

29. A signatory always has the practical option of withdrawal, whether it is included as a legal option in the treaty or not. For legal analyses, see Arie E. David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (New Haven, Conn.: Yale University Press, 1975), pp. 203–16; and Herbert W. Briggs, “Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice,” *American Journal of International Law* 68 (January 1974), pp. 51–68.

30. There have been proposals, based on efficiency grounds or libertarian principles, that private agents play a much larger role in enforcing domestic laws and contracts and that they be compensated by bounties, paid either by violators or the state. These proposals cannot be applied to international agreements without significant modification, since they ultimately envision authoritative judicial interpretation and enforcement. See Gary S. Becker and George J. Stigler, “Law Enforcement, Malfeasance and Compensation of Enforcers,” *Journal of Legal Studies* 3 (January 1974), pp. 1–18; Gary S. Becker, “Crime and Punishment: An Economic Approach,” *Journal of Political Economy* 76 (March–April 1968), pp. 169–217; and George J. Stigler, “The Optimum Enforcement of Laws,” *Journal of Political Economy* 78 (May–June 1970), pp. 526–36.

31. As Mnookin and Kornhauser point out in their study of divorce laws, “A legal system might allow varying degrees of private ordering upon dissolution of the marriage. Until recently, divorce law attempted to restrict private ordering severely.” See Mnookin and Kornhauser, “Bargaining in the Shadow of the Law,” pp. 952–53.

restrictions and the rules governing them are central elements of domestic legal systems.

Similarly, the law can restrict the *form* of agreements. One clear-cut and prominent example is the U.S. Statute of Frauds, which requires that certain agreements be put in writing. According to the statute, if a contract is larger than \$500, and if neither party has made payment or performed its obligations, then the courts will only enforce *written* agreements. Although there are exceptions to this straightforward rule, it does underscore the capacity of domestic law to channel agreements, by requiring particular documentation, for example, or witnesses or specific language.³²

Again, there are simply no equivalent restrictions on either the form or substance of international agreements. The domain of *permissible* international agreements is simply the domain of *possible* agreements.³³ This absence of restraint is not due simply to the lack of an international legislature and executive (though surely they are absent). It is due equally to the absence of an effective system of adjudication. One major limitation on prohibited domestic bargains, aside from any direct penalties, is that illicit bargains are not enforced by courts. This restricts such bargains by making them more costly to execute. To implement illegal contracts requires special precautions and sometimes entails the establishment of a broader set of institutional arrangements: a criminal enterprise.³⁴

These high costs of self-enforcement and the dangers of opportunism are important obstacles to extralegal agreements. Indeed, the costs may be prohibitive if they leave unsolved such basic problems as moral hazard and time inconsistency. The same obstacles are inherent features of interstate bargaining and must be resolved if agreements are to be concluded and carried out. Resolving them depends on the parties' preference orderings, the transparency of their preferences and choices (asymmetrical information), and the private institutional mechanisms set up to secure their bargains.³⁵ It has little to do, however, with whether an international agreement is considered "legally binding" or not. In domestic affairs, on the other hand, these legal boundaries

32. Three standard reasons are given for the legal requirement that contracts be put in writing. First, it should impart caution before an agreement is completed. Second, it should make clear to the parties that they have undertaken specific obligations. Third, if disagreements later arise, it should provide better evidence for courts. See the classic analysis by Lon L. Fuller: "Consideration and Form," *Columbia Law Review*, vol. 41, 1941, pp. 799–824; and *Anatomy of Law* (New York: Praeger, 1968), pp. 36–37.

33. There is one restriction worth noting on the legal form of international agreements. The World Court will only consider agreements that have been formally registered with the United Nations. If the World Court were a powerful enforcement body, this restriction would influence the form of major agreements.

34. Criminal organizations such as the Mafia can be understood partly as an institutional response to the problems of providing criminal services when the bargains themselves are illegal. For a fascinating economic study of such institutional arrangements, see Peter Reuter, *Disorganized Crime: Illegal Markets and the Mafia* (Cambridge, Mass.: MIT Press, 1983).

35. On the mechanisms of private governance, see Oliver R. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York: Free Press, 1985).

make an enormous difference—the difference between selling contraband whiskey in Al Capone’s Chicago and selling the same product legally ten years later.

In international affairs, then, the term “binding agreement” is a misleading hyperbole. To enforce their bargains, states must act for themselves. This limitation is crucial: it is a recognition that international politics is a realm of contesting sovereign powers. For that reason, it is misleading to understand treaties (as international lawyers typically do) in purely formal, legal terms, as instruments that somehow bind states to their promises. It is quite true that treaties incorporate the language of formal obligation, chiefly phrases such as “we shall” and “we undertake,” together with specific commitments. Such conventional diplomatic language is a defining feature of modern treaties. But that language cannot accomplish its ambitious task of binding states to their promises. This inability is an inherent limitation on bargaining for international cooperation. It means that treaties, like all international agreements, must be enforced endogenously.

What do treaties do?

If treaties do not truly bind, why do states use that language? Why frame agreements in that form? The chief reason, I think, is that states wish to signal their intentions with special intensity and gravity and are using a well-understood form to do so. The decision to encode a bargain in treaty form is primarily a decision to highlight the importance of the agreement and, even more, to underscore the durability and significance of the underlying promises. The language of “binding commitments,” in other words, is a diplomatic communication aimed at other signatories and, often, at third parties. In the absence of international institutions that permit effective self-binding or offer external guarantees for promises, treaties use conventional forms to signify a seriousness of commitment. By making that commitment both solemn and public, the parties indicate their intention, at least, to adhere to a particular bargain.

The effect of treaties, then, is to raise the political costs of noncompliance. That cost is raised not only for others but also for oneself. The more formal and public the agreement, the higher the reputational costs of noncompliance. The costs are highest when the agreement contains specific written promises, made publicly by senior officials with the state’s fullest imprimatur. States deliberately choose to impose these costs on themselves in order to benefit from the counterpromises (or actions) of others. Given the inherent constraints of international institutions, these formal pledges are as close as states can come to precommitment—to a contractual exchange of promises. In short, one crucial element of treaties is that they visibly stake the parties’ reputations to

their pledges.³⁶ The loss of credibility (because of deliberate violations) is a real loss, although it is certainly *not* always a decisive one, in terms of policy calculus.³⁷ Informal agreements are generally less reliable and convincing precisely because they involve less of a reputational stake.³⁸ The stakes are diminished either because the agreements are less public (the audience is narrower and more specialized) or because high-level officials are less directly involved.

In a world of imperfect information, where others' current and future preferences cannot be known with certainty, reputation has value. As a result, it can be used as a "hostage" or bond to support contracts. Because breaking a contract or even appearing to do so degrades reputation, it produces a loss of reputational capital. The threat of such loss promotes compliance, although it cannot guarantee it. Whether it succeeds depends on (1) the immediate gains from breaking an agreement, (2) the lost stream of future benefits and the rate of discount applied to that stream, and (3) the expected costs to reputation from specific violations.³⁹

Not all violations discredit equally.⁴⁰ First, not all are witnessed. Some that are seen may be considered justifiable or excusable, perhaps because others have already violated the agreement, because circumstances have changed significantly, because compliance is no longer feasible, or because the contracted terms appear ambiguous. Thus, memory, inference, and context—social learning and constructed meaning—all matter. Second, not all actors have a reputation worth preserving. Some simply do not have much to lose, whether their violations are visible or not. Moreover, they may not choose to

36. If a state already has a poor reputation for keeping its promises, then it risks little in staking that reputation on other agreements, and its pledges will fail to convince future partners without special efforts (such as bonds, hostages, or collateral) and careful monitoring, all designed to minimize reliance on "trust." That does not rule out treaties, but it suggests that they may be disingenuous and cannot be relied upon. Stalin and Hitler, for example, found their pact useful because it produced immediate gains for each: the division of Eastern Europe. The incorporation of the new territories also postponed a confrontation between the two. The pact was useful for these immediate and simultaneous gains, not for any future promises of cooperation it held out.

37. Of course, commitments may be cast aside, no matter how formal, as Saddam Hussein did when he declared Iraq's border agreement with Iran "null and void" in 1981. The agreement, reached in 1975 in Algiers, stated that "land and river frontiers shall be inviolable, permanent and final." There is a cost to discarding such an agreement unilaterally, even if that cost seems remote at the time. It virtually rules out the ability to conclude useful agreements on other border disputes. See United Nations, *Yearbook of the United Nations*, 1981, vol. 35 (New York: United Nations, 1985), pp. 238–39. See also Iran, Ministry of Foreign Affairs, Legal Department, *A Review of the Imposed War* (Tehran: Ministry of Foreign Affairs, 1983), including the text of the 1975 treaty, the treaty addendum, and Iran's interpretation.

38. In this sense, secret treaties are similar to informal agreements.

39. In other words, if the future is highly valued, there can be an equilibrium in which the (current discounted) value of a reputation exceeds any short-run gains from taking advantage of it. If the prospective gains from reputation are sufficiently large, then it also pays to invest in reputation. See David M. Kreps, *A Course in Microeconomic Theory* (Princeton, N.J.: Princeton University Press, 1990), p. 532.

40. J. Mark Ramseyer, "Legal Rules in Repeated Deals: Banking in the Shadow of Defection in Japan," *Journal of Legal Studies* 20 (January 1991), p. 96.

invest in reputation, presumably because the costs of building a good name outweigh the incremental stream of rewards.⁴¹ Sovereign debtors, for example, value their reputation least when they do not expect to borrow again.⁴² Alternatively, actors with poor reputations (or little track record) may choose to invest in them precisely to create expectations about future performance. If these expectations can produce a stream of rewards and if the future is highly valued, it may be rational to make such investments.⁴³ Thus, the value of reputation lost depends on the visibility and clarity of both promises and performance, on the value of an actor's prior reputation, and on the perceived usefulness of reputation in supporting other agreements.

Compliance with treaties, as I have noted, is specifically designed to be a salient issue, supported by reputation. Unfortunately, the hostage of reputation is not always strong support. Some states foresee little gain from enhanced reputation, either because the immediate costs are too high or the ongoing rewards are too little, too late. They may sign treaties cynically, knowing that they can violate them cheaply. Others may sign treaties in good faith but simply abandon them if their calculations about future rewards change. Finally, some states may invest heavily to demonstrate the credibility of their promises, to show that they are reliable partners, unswayed by short-term gains from defection.⁴⁴ The general importance of reputation, in other words, does not

41. Again, the shadow of the future is crucial. If future rewards are sharply discounted, then it pays to exploit prior reputation (to disinvest) to reap short-term rewards.

42. Elsewhere, I have shown that sovereign debtors in the nineteenth century moved to settle their old defaults when they contemplated seeking new loans. Creditors had the greatest bargaining leverage at precisely these moments. See Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley and Los Angeles: University of California Press, 1985), p. 47. See also Carlos Marichal, *A Century of Debt Crises in Latin America: From Independence to the Great Depression, 1820–1930* (Princeton, N.J.: Princeton University Press, 1989), pp. 122–23.

43. The short-term price of reputation may either be foregone opportunities or direct expenditures, such as fixed investments that are most valuable within a specific bilateral relationship. Williamson has explored the use of such fixed investments to make credible commitments in *The Economic Institutions of Capitalism*.

44. The United States made such an investment in reputation in the late 1970s, after its credibility as leader of the North Atlantic Treaty Organization (NATO) was damaged by the neutron bomb affair. The problem arose after the Carter administration first supported and then opposed NATO's deployment of new antitank weapons, equipped with enhanced radiation warheads or neutron bombs. Key European leaders had already declared their support publicly, at considerable political cost, and now they had to reverse course. After the crisis died down, the Carter administration proposed another approach to nuclear modernization: Pershing II missiles. The administration then held fast (as did the Reagan administration) in support of its new plan. It did so despite a rising tide of public protest abroad and wavering support from European leaders, especially the Germans, who had initially proposed the modernization. According to Garthoff, "The principal effect of the neutron weapon affair was to reduce Western confidence in American leadership in the alliance, and later to lead the United States to seek to undo that effect by another new arms initiative for NATO. . . . The Carter administration itself felt it needed to compensate for its handling of the neutron decision. It sought to do so by responding boldly to a perceived European concern through exercising vigorous leadership. . . . Doubts about the military necessity or even desirability of deploying new [long-range tactical nuclear force] systems were overwhelmed by a perceived political necessity within the alliance." See Raymond L. Garthoff, *Detente and*

eliminate the problem of multiple equilibria. Just as there can be economic markets with some sellers of high-quality goods and some sellers of shoddy goods, both of them rational, there can be diplomatic environments in which some states are reliable treaty partners and some are not.⁴⁵

Reputation, then, can contribute to treaty self-enforcement if not ensure it. Self-enforcement simply means that an agreement remains in force because, at any given moment, each party believes it gains more by sustaining the agreement than by terminating it. That calculation includes all future benefits and costs, appropriately discounted to give their present value.⁴⁶ Enhancing a reputation for reliability is one such benefit. It is of particular value to governments engaged in a range of international transactions requiring trust and mutual reliance. Of course, other costs and benefits may outweigh these reputational issues.⁴⁷ The key point, however, is that reputation can be used to support international cooperation and has important implications for its form. The choice of a formal, visible document such as a treaty magnifies the reputational effects of adherence and buttresses self-enforcement.

Nations still can and do break even their most formal and solemn commitments to other states. Indeed, the unscrupulous may use treaty commitments as a way of deceiving unwary partners, deliberately creating false expectations or simply cheating when the opportunity arises. (Informal agreements are less susceptible to these dangers. They raise expectations less than treaties and so are less likely to dupe the naive.) But states pay a serious price for acting in bad faith and, more generally, for renouncing their commitments. This price comes not so much from adverse judicial decisions at The Hague but from the decline in national reputation as a reliable partner, which impedes future agreements.⁴⁸ Indeed, opinions of the World Court gain much of their significance by reinforcing these costs to national reputation.

Put simply, *treaties are a conventional way of raising the credibility of promises by staking national reputation on adherence.* The price of noncompliance takes several forms. First, there is loss of reputation as a reliable partner. A reputation for reliability is important in reaching other cooperative agreements

Confrontation: American–Soviet Relations from Nixon to Reagan (Washington, D.C.: Brookings Institution, 1985), pp. 853 and 859.

45. Firms can guarantee quality by offering warranties. But what guarantees the warranty? The answer for expensive items may be the threat of litigation. But for less expensive items, it is simply the firm's reputation. "The hostage for performance," according to Rubin, "must be in the familiar form of a quasirent stream [either of profits or return on capital]. In either case, the price of the product must be above marginal cost, and the difference must be high enough so that cheating by the firm does not pay." See Paul Rubin, *Managing Business Transactions: Controlling the Cost of Coordinating, Communicating, and Decision Making* (New York: Free Press, 1990), p. 147.

46. L. G. Telser, "A Theory of Self-Enforcing Agreements," *Journal of Business* 53 (January 1980), pp. 27–28.

47. Thus, a single agreement can be self-enforcing, even if it is divorced from any reputational concerns. Conversely, even when reputational issues are salient, a treaty may break down if other costs are more important.

48. A poor reputation impedes a state's future agreements because the state cannot use its reputation as a credible and valuable "performance bond."

where there is some uncertainty about compliance.⁴⁹ Second, the violation or perceived violation of a treaty may give rise to specific, costly retaliation, ranging from simple withdrawal of cooperation in one area to broader forms of noncooperation and specific sanctions. Some formal agreements, such as the General Agreement on Tariffs and Trade (GATT), even establish a limited set of permissible responses to violations, although most treaties do not. Finally, treaty violations may recast national reputation in a still broader and more dramatic way, depicting a nation that is not only untrustworthy but is also a deceitful enemy, one that makes promises in order to deceive.

This logic also suggests circumstances in which treaties—and, indeed, *all* international agreements—ought to be most vulnerable. An actor's reputation for reliability has a value over time. The present value of that reputation is the discounted stream of these current and future benefits. When time horizons are long, even distant benefits are considered valuable now. When horizons are short, these future benefits are worth little,⁵⁰ while the gains from breaking an agreement are likely to be more immediate and tangible. Thus, under pressing circumstances, such as the looming prospect of war or economic crisis, the long-term value of a reputation for reliability will be sharply discounted. As a consequence, adherence to agreements must be considered less profitable and therefore less reliable.⁵¹ This points to a striking paradox of treaties: they are often used to seal partnerships for vital actions, such as war, but they are weakest at precisely that moment because the present looms larger and the future is more heavily discounted.⁵²

This weakness is sometimes recognized, though rarely emphasized, in studies of international law. It has no place at all, however, in the law of treaties. All treaties are treated equally, as legally binding commitments, and typically lumped together with a wide range of informal bargains. Treaties that declare alliances, establish neutral territories, or announce broad policy guidelines are

49. "Reputation commands a price (or exacts a penalty)," Stigler once observed, "because it economizes on search." When that search must cover unknown future behavior, such as a partner's likelihood of complying with an agreement, then reputations are particularly valuable. See George Stigler, "The Economics of Information," *Journal of Political Economy* 69 (June 1961), p. 224.

50. This discount rate refers only to the present value of known future benefits. It assumes perfect information about future payoffs. Greater risk or uncertainty about future benefits can also affect their present value.

51. This logic should apply to all agreements lacking effective third-party enforcement, from modern warfare to premodern commerce. For an application of this approach to medieval economic history, see John M. Veitch, "Repudiations and Confiscations by the Medieval State," *Journal of Economic History* 46 (March 1986), pp. 31–36.

52. Of course, states often do go to war alongside their long-time allies. My point is that if the costs are high (relative to longer-term reputational issues), their decision will be guided largely by their calculus of short-term gains and losses. That determination is largely independent of alliance agreements and formal treaties of mutual support. Knowing that, states facing war are reluctant to count too heavily on prior commitments, however formal or sincere, by alliance partners. By the same token, opponents have considerable incentives to design coalition-splitting strategies by varying the immediate costs and stakes to individual coalition members. This debate over long-term reputation versus short-term costs figured prominently in the British cabinet's debate over commitments to France before World War I.

not classified separately. Their legal status is the same as that of any other treaty. Yet it is also understood, by diplomats and jurists alike, that these three types of treaty are especially vulnerable to violation or renunciation. For this reason, Richard Baxter has characterized them as “soft” or “weak” law, noting that “if a State refuses to come to the aid of another under the terms of an alliance, nothing can force it to. It was never expected that the treaty would be ‘enforced.’ ”⁵³

According to Baxter, treaties announcing alliances or broad policy guidelines are sustained only by perceptions of mutual advantage.⁵⁴ He calls them “political treaties” and emphasizes their fragility: “They . . . are merely joint statements of policy which will remain alive only so long as the States concerned see it to be in their mutual interest to concert their policies. One simply cannot think of ‘violations’ of such instruments.”⁵⁵

What Baxter shrinks from are the full implications of this position: it applies quite generally to all kinds of international agreements. Baxter admits, in effect, that international law is marginal to the major political projects of states. He admits, too, that treaties are sometimes concluded with no expectation of effective enforcement. He limits his judgment to what he terms “political treaties.” But are *any* treaties really founded on this expectation of external enforcement, as opposed to self-interested adherence and self-generated sanctions? If treaties of alliance are weak because they lack such enforcement mechanisms, so are most international bargains. (The salient exception is when local courts can be used to enforce international obligations. That, however, is less an exception than a confirmation of the weakness of international enforcement.) If “political treaties” are sustained solely by perceptions of mutual advantage, so are all international bargains. There is simply no institutional infrastructure to do more.

The real point is to understand how these perceptions of mutual advantage can support various kinds of international cooperation and how different legal forms, such as treaties, fit into this essentially political dynamic. The environment of contesting sovereign powers does not mean, as realist theories of international politics would have it, that cooperation is largely irrelevant or limited to common cause against military foes.⁵⁶ Nor does it mean that conflict

53. See Baxter, “International Law in ‘Her Infinite Variety,’ ” p. 550. See also Ignaz Seidl-Hohenfeldern, “International Economic Soft Law,” *Recueil de cours* (Collected Courses of the Hague Academy of International Law), vol. 163, 1979, pp. 169–246.

54. See Baxter, “International Law in ‘Her Infinite Variety,’ ” p. 551. Baxter refers to alliances and statements of broad political intent (such as the Yalta Agreement) as “political treaties.” He does not define the term further or distinguish it from other kinds of treaties.

55. *Ibid.*

56. Realists consider cooperation important in only one sphere: military alliances. “In anarchy, states form alliances to protect themselves,” says Walt. “Their conduct is determined by the threats they perceive.” Although such alliances are important, they are simply considered the by-products of a world fundamentally characterized by conflict and the contest for relative gains. As Grieco bluntly puts it, “States are predisposed toward conflict and competition, and they often fail to

and the resources for it are always dominant in international affairs. It does mean, however, that the bases for cooperation are decentralized and often fragile. Unfortunately, neither the language of treaties nor their putative legal status can transcend these limitations.

Rationales for informal agreements

Speed and obscurity

What we have concentrated on thus far are the fundamental problems of international agreements. Treaties, like less formal instruments, are plagued by difficulties of noncompliance and self-enforcement. These potential problems limit agreements when monitoring is difficult, enforcement is costly, and expected gains from noncompliance are immediate and significant. The traditional legal view that treaties are valuable because they are binding is inadequate precisely because it fails to comprehend these basic and recurrent problems.

To understand the choice between treaties and informal agreements, however, we need to move beyond the generic problems of monitoring, betrayal, and self-enforcement. Imperfect information and incentives to defect apply to all kinds of international bargains; they do not explain why some are framed as joint declarations and some as treaties. We therefore need to consider more specific properties of informal and formal agreements, along with their particular advantages and limitations.

To begin with, treaties are the most serious and deliberate form of international agreement and are often the most detailed. As such, they are the slowest to complete.⁵⁷ After the diplomats have finally left the table, the agreement must still win final approval from the signatories. That usually means a slow passage through the full domestic process of ratification. The process naturally differs from country to country, but in complex governments, and especially in democracies with some shared powers, gaining assent can be time-consuming.⁵⁸ If the executive lacks a secure governing majority or if the

cooperate even when they have common interests.” See Stephen M. Walt, *The Origins of Alliances* (Ithaca, N.Y.: Cornell University Press, 1987), p. x; and Joseph M. Grieco, *Cooperation Among Nations: Europe, America, and Non-Tariff Barriers to Trade* (Ithaca, N.Y.: Cornell University Press, 1990), p. 4.

57. Adelman emphasizes the slowness of negotiating formal agreements, especially major agreements with the Soviets. The Limited Test Ban Treaty (1963) took eight years to complete; the Non-Proliferation Treaty (1968) took more than three years; and the SALT I agreement (1972) took more than two years. The SALT II agreement (1979) took seven years and still failed to win Senate ratification. See Kenneth Adelman, “Arms Control With and Without Agreements,” *Foreign Affairs* 63 (Winter 1984–85), pp. 240–63.

58. The slowness and difficulty of ratifying complex agreements and the problems of adapting to meet changing circumstances often lead states to choose less formal mechanisms. The United States and European Community (EC) have made exactly that choice to deal with their conflicts over “competition policy” and antitrust. The two sides “have abandoned the idea of drawing up a

legislature has significant powers of oversight, it can take months. It also opens the agreement and the silent calculus behind it to public scrutiny and time-consuming debate.

For controversial treaties, such as the ones ceding U.S. control over the Panama Canal, ratification can be very slow and painful indeed. The canal treaties had virtually universal support among foreign policy professionals dealing with Central and South America.⁵⁹ But they also faced heated opposition within the U.S. Senate, mainly from conservative Republicans, who charged that America was giving away a valuable strategic asset and getting nothing tangible in return. When the treaties were presented for ratification, the 1978 midterm elections were approaching, and polling data showed that some proponents were vulnerable on this issue. After exhaustive hearings, the Senate Foreign Relations Committee reported the bill favorably. The treaty debate on the Senate floor was the second longest in American history; repetitive arguments dragged on through February, March, and April 1978.⁶⁰ Opponents had a clear incentive to prolong the debate, not only to defeat the treaty or weaken it with unfriendly amendments but also to punish treaty supporters in particular and the Democratic party in general on election day.⁶¹

Even when agreements are much less contentious, the machinery of ratification can grind slowly, as in the case of the relatively straightforward treaty covering criminal extradition between the United States and Turkey.⁶² Extradition treaties are commonplace. They use standardized language, make

special treaty on competition issues,” such as mergers and acquisitions, according to the *Financial Times*, “because it would be too complicated, and would involve obtaining the approval of both the U.S. congress and EC member states. Instead, they discussed more flexible arrangements providing for a better exchange of information, regular meetings and discussions on current cases, and a means of settling disputes.” See *Financial Times*, 17 January 1991, p. 6.

59. One reason U.S. diplomats favored the Panama Canal treaties was that Latin American states were so uniformly opposed to continued U.S. ownership of the waterway. The disposition of this issue was crucial to America’s role in the hemisphere. A number of Latin American leaders were involved in the negotiations, and some eighteen heads of state attended the final signing ceremony. The whole episode clearly demonstrates how “third parties” can have a direct stake in bilateral treaty arrangements and how these diplomatic relationships can be enhanced or, more likely, embarrassed by frank disclosures during the public ratification process. See Robert A. Pastor and Jorge G. Castañeda, *Limits to Friendship: The United States and Mexico* (New York: Knopf, 1988), pp. 159–61.

60. J. Michael Hogan, *The Panama Canal in American Politics: Domestic Advocacy and the Evolution of Policy* (Carbondale: Southern Illinois Press, 1986), pp. 190–91 and 200–205.

61. This key treaty won ratification by a single vote, and only then after intense presidential lobbying and some significant amendments. The Carter administration’s political dilemma was nicely summarized by the Republican leader in the Senate, Howard Baker: “The Canal has a constituency and the treaty has no constituency.” See Timothy Stater, “Climax: Senate Ratification, 1977–1978,” in G. Harvey Summ and Tom Kelly, eds., *The Good Neighbors: America, Panama, and the 1977 Canal Treaties* (Athens: Ohio University Center for International Studies, 1988), pp. 90–91; and George D. Moffett, *The Limits of Victory: The Ratification of the Panama Canal Treaties* (Ithaca, N.Y.: Cornell University Press, 1985).

62. See “Treaty on Extradition and Mutual Assistance in Criminal Matters Between the United States of America and the Republic of Turkey, with Appendix. Signed June 7, 1979, Entered into Force January 1, 1981,” in *United States Treaties and Other International Agreements*, vol. 32, part 3 (Washington, D.C.: Government Printing Office, 1986), pp. 3111 ff.

standard exceptions (refusing, for example, to extradite suspects for political crimes), and leave room for both policy discretion and ordinary court procedures.⁶³ There was nothing unusual about the U.S. treaty with Turkey, nor was there any special domestic opposition to it. It was signed on 7 June 1979. From there, ratification proceeded at a stately pace. The President transmitted it to the Senate in early August. The Senate Foreign Relations Committee acted quickly, as such matters go, and reported favorably on 20 November 1979. The full Senate gave its consent eight days later. Turkey did not complete its ratification for another year, in late November 1980. The formal exchange of ratifications between the governments took place two weeks later. At the end of December, the U.S. President proclaimed the treaty, and it entered into force the next day, 1 January 1981, some eighteen months after the initial documents had been signed.⁶⁴

It is little wonder, then, that governments prefer simpler, more convenient instruments. It is plain, too, that executives prefer instruments that they can control unambiguously, without legislative advice or consent. But there are important domestic constraints, some rooted in constitutional prerogatives, some in legal precedent, and some in the shifting balance of domestic power. To cede control of the Panama Canal, for instance, the President had no choice but to use a treaty. His authority to conduct foreign affairs is broad, but not broad enough to hand over the canal and surrounding territory to Panama without Senate approval.⁶⁵ Similarly, criminal extradition between the United States and Turkey needed a treaty, at least on the U.S. side. American courts, following common law precedent, simply will not extradite defendants without this formal instrument. Informal extradition, done at the discretion of political authorities, is permitted in some countries with judicial systems based on Roman civil law. But the United States, Britain, and most other common law countries require explicit, reciprocal treaty arrangements.⁶⁶

Aside from extradition, which bears directly on the civil rights of accused criminals, the courts rarely affect the form of international agreements. That is true even for U.S. courts, which are normally quite willing to review political decisions. They try to avoid direct involvement in foreign policy issues and hold to this narrow line even when larger constitutional questions arise. They have

63. I. A. Shearer, *Extradition in International Law* (Manchester, UK: Manchester University Press, 1971).

64. See "Treaty on Extradition and Mutual Assistance in Criminal Matters Between the United States of America and the Republic of Turkey."

65. Just what agreements must be submitted as treaties remains ambiguous. It is a constitutional question, of course, but also a question of the political balance of power between the Congress and the President. At one point, President Carter's chief of staff, Hamilton Jordan, announced that Carter would decide whether the Panama Canal agreements were treaties or not. He "could present [the accords] to the Congress as a treaty, or as an agreement, and at the proper time he'll make that decision." Interview on "Face the Nation," CBS News, cited by Loch K. Johnson in *The Making of International Agreements: Congress Confronts the Executive* (New York: New York University Press, 1984), p. 141.

66. Ivor Stanbrook and Clive Stanbrook, *The Law and Practice of Extradition* (Chichester, UK: Barry Rose, 1980), p. xxvii.

done little, for instance, to restrict the widespread use of executive agreements, which evade the Senate's constitutional right to give "advice and consent" on formal treaties.⁶⁷

Despite the courts' reluctance to rule on these issues, informal agreements do raise important questions about the organization of state authority for the conduct of foreign affairs. Informal agreements shift power toward the executive and away from the legislature. In recent decades, the U.S. Congress responded by publicly challenging the President's right to make serious international commitments without at least notifying the Senate. It also disputed the President's control over undeclared foreign conflicts by passing the War Powers Resolution.⁶⁸

During the final years of the Vietnam War, when the President's authority over foreign affairs was most bitterly contested, a congressional committee investigated the use of informal agreements and discovered a "vast mass of agreements, commitments, and correspondence . . . in which undertakings of one sort or another [were] made."⁶⁹ Another congressional committee found that "there [had] been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain[ed] wholly unknown to Congress and to the people."⁷⁰ The result was a law—the Case Act—which promoted congressional oversight of informal agreements. It required that the State Department transmit to Congress *all* international agreements, including written versions of oral agreements, within two months of their conclusion.⁷¹ This law fell short of equating informal agreements with treaties, since it did not require congressional approval for all informal bargains, as is constitutionally required for treaties.⁷² But it did serve notice that informal agreements had proliferated unacceptably and had assumed important implications for policymaking. The Case Act tentatively bid to open these back channels to legislative supervision and broader debate.

67. The U.S. Constitution, Article II, Section 2, provides that the President "shall have power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." For a detailed study of the constitutional issues, see Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y.: Foundation Press, 1972).

68. See the War Powers Resolution, 87 Stat. 555, 1973; and 50 *United States Code* 1541–48, 1980.

69. See Baxter, "International Law in 'Her Infinite Variety,'" pp. 554–55. See also U.S. Congress, Senate Committee on the Judiciary, *Congressional Oversight of Executive Agreements: Hearings on S. 3475*, 92d Congress, 2d sess., 1972.

70. U.S. Congress, Senate Committee on Foreign Relations, *Transmittal of Executive Agreements to Congress*, Senate Report no. 92-591, 92d Congress, 2d sess., 1972, pp. 3–4.

71. The Case Act passed the Senate and House overwhelmingly in 1972 and has been amended several times since then. The State Department finally issued implementation regulations in 1981. The original act was Public Law 92-403. For the amended version, see 1 *United States Code* 112b, 1988. For implementing regulations, see 22 *Code of Federal Regulations*, part 181; and 46 *Federal Register*, 13 July 1981, pp. 35917 ff.

72. A detailed study of the Case Act shows the limits of congressional activism. The Senate, in particular, wanted a more direct role in shaping informal agreements. But during the period from the 1950s through the 1980s, there was never a majority that would require informal agreements to be submitted for ratification. The Case Act succeeded, in part, because it recognized these political limits and required only notification. See Johnson, *The Making of International Agreements*, chap. 5.

To summarize, then, informal agreements are often chosen because they allow governments to act quickly and quietly. These two rationales are often intertwined, but each is important in its own right, and each is sufficient for choosing informal means of international cooperation.

Uncertainty and renegotiation

Informal agreements may also be favored for an entirely different reason: they are more easily renegotiated and less costly to abandon than treaties. This flexibility is useful if there is considerable uncertainty about the distribution of future benefits under a particular agreement. In economic issues, this uncertainty may arise because of a shift in production functions or demand schedules, the use of new raw materials or substitute products, or a fluctuation in macroeconomic conditions or exchange rates. These changes could sabotage national interests in particular international agreements. The consequences might involve an unacceptable surge in imports under existing trade pacts, for example, or the collapse of producer cartels. In security affairs, nations might be uncertain about the rate of technological progress or the potential for new weapons systems. By restricting these innovations, existing arms treaties may create unexpected future costs for one side.⁷³ Such developments can produce unexpected winners and losers, in either absolute or relative terms, and change the value of existing contractual relations. Put another way, institutional arrangements (including agreements) can magnify or diminish the distributional impact of exogenous shocks or unexpected changes.

States are naturally reluctant to make long-term, inflexible bargains behind this veil of ignorance. Even if one state is committed to upholding an agreement despite possible windfall gains or losses, there is no guarantee that others will do the same. The crucial point is that an agreement might not be self-sustaining if there is an unexpected asymmetry in benefits. Such uncertainties about future benefits, together with the difficulties of self-enforcement, pose serious threats to treaty reliability under conditions of rapid technological change, market volatility, or changing strategic vulnerabilities. The presence of such uncertainties and the dangers they pose for breach of treaty obligations foster the pursuit of substitute arrangements with greater flexibility.

States use several basic techniques to capture the potential gains from cooperation despite the uncertainties. First, they craft agreements (formal or informal) of limited duration so that all participants can calculate their risks and benefits under the agreement with some confidence. Strategic arms treaties of several years' duration are a good example. Second, they include provisions that permit legitimate withdrawal from commitments under specified terms and conditions.⁷⁴ In practice, states can *always* abandon their

73. For one model of how technical innovations could complicate treaty maintenance, see Downs and Rocke, *Tacit Bargaining, Arms Races, and Arms Control*, chap. 5.

74. David, *The Strategy of Treaty Termination*.

international commitments, since enforcement is so costly and problematic. The real point of such treaty terms, then, is to lower the general reputational costs of withdrawal and thereby encourage states to cooperate initially despite the risks and uncertainties. Third, they incorporate provisions that permit partial withdrawal, covering either a temporary period or a limited set of obligations. GATT escape clauses, which permit post hoc protection of endangered industries, are a well-known example.⁷⁵ Finally, states sometimes frame their agreements in purely informal terms to permit their frequent adjustment. The quota agreements of the Organization of Petroleum Exporting Countries (OPEC) do exactly that. While the OPEC agreements are critically important to the participants and are central to their economic performance, they are framed informally to permit rapid shifts in response to changing market conditions. Once again, the form of agreements is *not* dictated by their substantive significance.

OPEC's primary goal is to enhance national revenues by managing the world oil market. It is a producer cartel, or at least it hopes to be. Its basic strategy is to achieve price targets through quotas for individual members. That entails frequent meetings on an irregular schedule, at least twice a year and sometimes more if conditions warrant. After all, energy demand is hard to forecast, and OPEC does not entirely control the supply. Its control is incomplete because there are important non-OPEC producers, because there are alternatives to petroleum, and because OPEC members cheat on their quotas. This cheating is another reason for frequent OPEC meetings: they provide the opportunity to direct collective pressure and individual threats at cheaters.

To facilitate these negotiations, there is a small formal organization, headquartered in Vienna. But OPEC's reasons for existence—its price targeting and production quotas—are set out in informal agreements and conference communiqués, approved by participating oil ministers.⁷⁶ These agreements are designed to last for only a few months, at most.⁷⁷ The oil output quotas reached in June 1989, for example, covered only the second half of the year. As soon as the bargain was sealed, the ministers agreed to meet again in three months to review market conditions and quotas.⁷⁸ OPEC's formal, institutional framework can facilitate negotiations, but it does not transcend or

75. Article XIX of the GATT covers safeguards. It permits the Contracting Parties to offer emergency protection to industries disrupted by imports. See Marco Bronckers, *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community, and United States Law* (Deventer, Netherlands: Kluwer, 1985); and Peter Kleen, "The Safeguard Issue in the Uruguay Round: A Comprehensive Approach," *Journal of World Trade* 25 (October 1989), pp. 73–92.

76. Typical was the communiqué issued in late 1983 at the conclusion of OPEC's sixty-ninth conference. It restated OPEC's production ceiling of 17.5 million barrels per day and its marker price of \$29. See Ian Skeet, *OPEC: Twenty-Five Years of Prices and Politics* (Cambridge: Cambridge University Press, 1988), p. 196.

77. *Ibid.*, introduction and chap. 1.

78. See James Tanner and Allanna Sullivan, "OPEC Peace May Be Short-Lived as Debate Looms on New Quotas," *Wall Street Journal*, European edition, 12 June 1989, pp. 1 and 10; and "A Confederacy of Cheats," *Economist*, 10 June 1989, p. 88.

transform the immediate purposes of the member states.⁷⁹ What really matters is not the formal organization but the nexus of informal agreements on crude oil production and the members' (uneven) compliance.

At the other end of the spectrum, in terms of formality, lie arms control treaties with detailed limitations on specific weapons systems for relatively long periods. They, too, must confront some important uncertainties. They do so principally by restricting the agreement to verifiable terms and a time frame that essentially excludes new weapons systems. The institutional arrangements are thus tailored to the environment they regulate.

Modern weapons systems require long lead times to build and deploy. As a result, military capacity and technological advantages shift slowly within specific weapons categories. With modern surveillance techniques, these new weapons programs and shifting technological capacities are not opaque to adversaries. The military environment to be regulated is relatively stable, then, so the costs and benefits of treaty restraints can be projected with some confidence over the medium term.

Given these conditions, treaties offer some clear advantages in arms control. They represent detailed public commitments, duly ratified by national political authorities. Although an aggrieved party would still need to identify and punish any alleged breach, the use of treaties raises the political costs of flagrant or deliberate violations (or, for that matter, unprovoked punishment). It does so by making disputes more salient and accessible and by underscoring the gravity of promises. Moreover, at least in nuclear weaponry, both sides feel that they could cope with major treaty violations, if necessary, by withdrawing from the treaty and pursuing their own weapons programs at an accelerated pace. Strong treaty commitments, in other words, would not expose them to the possibility of a devastating surprise defection.⁸⁰ Both sides are confident that their satellites and human intelligence can detect major violations in time to produce and deploy countervailing weapons.⁸¹

Following this logic, most arms control agreements have been set out in treaty form. Whether the subject is nuclear or conventional forces, test bans or weapons ceilings, American and Soviet negotiators have always aimed at formal documents with full ratification. Discussions during a summit meeting

79. OPEC's founders had hoped to create an operating international institution, not merely a negotiating forum. In the original organization, there was even an enforcement section. The section was effectively dropped by 1964 and disappeared formally in 1966. This transformation amounted to an "implicit admission . . . that OPEC and its Secretary General would not act, as had been visualized at its creation, as an operating arm of its members." See Skeet, *OPEC: Twenty-Five Years of Prices and Politics*, p. 237.

80. On the importance of surprise for cooperation in security affairs, see Charles Lipson, "International Cooperation in Economic and Security Affairs," *World Politics* 37 (October 1984), pp. 1-23.

81. Following the same logic, both sides have been cautious about treaties covering chemical and biological weapons, whose production and deployment have been much more difficult to detect. Monitoring a partial ban would be extremely difficult, especially since other kinds of production facilities could be converted to military uses.

or a walk in the woods may lay the essential groundwork for an arms agreement, but they are *not* agreements in themselves.⁸²

Over the history of superpower arms control, only the tacit observance of SALT II could be classified as a major informal agreement. Of course, the SALT negotiators had actually produced a formal agreement, filled with contractual details and the language of binding commitments. It had majority support in the U.S. Senate, but a final vote was never held because it lacked the necessary two-thirds majority.

After ratification foundered, the treaty lived a twilight existence. Members of the Reagan administration publicly debated the matter with no guidance from above. The hawkish secretary of the navy, John Lehman, announced that the United States should not comply with either SALT I or SALT II. The State Department, on the other hand, announced that the United States would “take no action that would undercut existing agreements so long as the Soviet Union exercises the same restraint.”⁸³ This language is actually a diplomatic code: it is the standard way to acknowledge legal obligations while a treaty is pending ratification. For well over a year, however, the President himself refused to make a similar acknowledgment. He finally did so in May 1982,⁸⁴ but at the same time he continued to criticize SALT and actually stated that the United States would observe only those portions of the agreement dealing “with the monitoring of each other’s weaponry.”⁸⁵ In practice, the United States did not exceed the treaty’s limitations on specific weapons for some years. Still, the scope of official commitments was always informal and ambiguous.⁸⁶ Perhaps these tacit arrangements and encoded signals were the most that could be salvaged from the failed treaty.

82. Note, however, that if the discussions pertained to domestic bargains, a court might interpret these “agreements in principle” as contractually binding, depending on the level of detail and the promissory language. Once again, the absence of effective international courts matters.

83. Public statement issued by U.S. Department of State on 4 March 1981 and cited by Talbott in *Deadly Gambits*, p. 225.

84. In his “Remarks at Memorial Day Ceremonies at Arlington National Cemetery,” p. 709, President Reagan made the following statement: “As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint.”

85. Presidential response to a question on 13 May 1982, quoted in *Weekly Compilation of Presidential Documents*, vol. 18, no. 19, 17 May 1982, p. 635.

86. President Carter declared that the United States would continue to observe the terms of the interim SALT II agreement after its expiration and was roundly criticized for exceeding his legal powers. His successor, who had campaigned against SALT II, declined to make any “parallel unilateral policy declarations.” The Congress was not so inhibited. In the 1984 Defense Authorization Act, it declared that the United States should not undermine existing international agreements on offensive strategic arms, at least until the SALT II agreement expired in December 1985, provided the Soviet Union did the same. President Reagan made a similar statement but added that the Soviets must also pursue a new agreement on strategic arms (the START talks). In December 1986, the United States exceeded the aggregate SALT limits on strategic weapons when it put a new B-52, equipped with cruise missiles, into service. Even then, one year after the original expiration date of the SALT II agreement, the United States defended its actions as a sanction for Soviet violations. See Calvo-Goller and Calvo, *The SALT Agreements*, p. 330.

SALT II, in its informal guise, actually survived beyond the expiration date of the proposed treaty. Like most arms control agreements, it had been written with a limited life span so that it applied in predictable ways to existing weaponry, not to new and unforeseen developments. Time limits like these are used to manage risks in a wide range of international agreements.⁸⁷ They are especially important in cases of superpower arms control, in which the desirability of specific agreements is related both to particular weaponry and to the overall strategic balance. As the military setting changes, existing commitments become more or less desirable. Arms control agreements must cope with these fluctuating benefits over the life of the agreement.

The idea is to forge agreements that provide sufficient benefits to each side, when evaluated at each point during the life of the agreement, so that each will choose to comply out of self-interest in order to perpetuate the treaty.⁸⁸ This self-generated compliance is crucial in superpower arms control. Given the relative equality of power, U.S.–Soviet military agreements are not so much enforced as observed voluntarily. What sustains them is each participant's perception that they are valuable and that cheating would prove too costly if it were matched by the other side or if it caused the agreement to collapse altogether. To ensure that treaties remain valuable over their entire life span, negotiators typically try to restrict them to known weaponry and stockpiles. That translates into fixed expiration dates.⁸⁹

When agreements stretch beyond this finite horizon, signatories may be tempted to defect as they develop new and unforeseen advantages or become more vulnerable to surprise defection, issues that were not fully anticipated when the agreement was made. The preference orderings that once supported cooperation may no longer hold. That has been one of the dilemmas surrounding the antiballistic missile (ABM) treaty in recent years.

The ABM treaty established strict, permanent limits on U.S. and Soviet missile defenses.⁹⁰ Since its ratification in 1972, however, the possibilities of missile defense have advanced considerably. The United States, with its more advanced economy, has widened its lead in the relevant new technologies of

87. Bilder, *Managing the Risks of International Agreement*, pp. 49–51.

88. Raymond Vernon, writing on foreign investments, has shown the dangers of violating this approach. Even if an agreement provides significant benefits to both sides, it may provide those benefits to one side immediately and to the other much later. Such agreements are vulnerable to noncompliance in midstream, after one side has already received its benefits. This is one element of Vernon's "obsolescing bargain." It is a variant of Hobbes's critique of covenants, in which one side performs its side of the bargain first. See Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books, 1971). On the general logic of self-sustaining agreements, see Telser, "A Theory of Self-Enforcing Agreements," pp. 27–44.

89. This allows negotiators to make reasonable calculations about the various parties' *ex post* incentives to defect during the life of the agreement.

90. See "Limitation of Anti-Ballistic Missile Systems, Signed May 26, 1972, with Agreed Interpretations, Common Understandings, and Unilateral Statements," in *United States Treaties and Other International Agreements*, vol. 23, part 4 (Washington, D.C.: Government Printing Office, 1973), pp. 3435–61.

microelectronics, software, and lasers. The Reagan administration relied on this superiority to develop the strategic defense initiative (SDI) and urged a reinterpretation of the ABM treaty in order to test some of its weaponry. The dispute over how to interpret the ABM treaty is thus grounded in the consequences of these new technologies and in the slow, cumulative shift in national advantages they have produced.⁹¹ The debate illustrates, once again, the difficulties of using rigid, formal instruments, which lack external enforcement, to regulate a shifting and unpredictable international environment.

All of these issues refer to the detailed regulation of slow-changing strategic environments. Although the issues are crucial to national defense, they are not so sensitive diplomatically that the agreement itself must be hidden from view. Cooperative arrangements in such issues, according to the arguments presented here, are likely to be in treaty form.

Hidden agreements

When security issues must be resolved quickly or quietly to avoid serious conflict, then less formal instruments will be chosen. If the terms are especially sensitive, perhaps because they would humiliate one party or convey unacceptable precedents, then the agreement itself may be hidden from view.⁹² The most dangerous crisis of the nuclear era, the Cuban missile crisis, was settled by the most informal and secret exchanges between the superpowers. The overriding aim was to defuse the immediate threat. That meant rapid agreement on a few crucial issues, with implementation to follow quickly. These informal exchanges were not the prelude to agreement, as in SALT or ABM negotiations; they *were* the agreement.

The deal to remove missiles from Cuba was crafted through an exchange of letters, supplemented by secret oral promises. During the crisis, the Soviets had put forward a number of inconsistent proposals for settlement. President Kennedy responded to the most conciliatory: Premier Khrushchev's letter of 26 October 1962. The next day, Kennedy accepted its basic terms and set a quick deadline for Soviet counteracceptance. The essence of the bargain was that the Soviets would remove all missiles from Cuba in return for America's pledge not to invade the island. The terms were a clear U.S. victory. They completely overturned the Soviet policy of putting nuclear missiles in the Western Hemisphere. The Soviets got nothing publicly. They were humiliated.

U.S. acceptance of the bargain was set out in diplomatic messages sent directly to Khrushchev. President Kennedy also sent his brother Robert to

91. These issues are the subject of an extensive literature. See, for example, Stephen J. Cimbala, ed., *The Technology, Strategy and Politics of SDI* (Boulder, Colo.: Westview Press, 1987).

92. In modern international politics, these hidden agreements are informal because ratification is public and the treaties are registered with the United Nations. In earlier international systems, however, neither condition applied and secret treaties were possible.

speak with Soviet Ambassador Anatoly Dobrynin, to convey U.S. acceptance and to add several points that were too sensitive to include in any documentation, however informal.⁹³ Years later, the substance of their conversation became public. Dobrynin had asked if the United States would also remove its older missiles from Turkey (and perhaps Italy) as part of the deal. The Soviets had pressed this point before. Their aim was to salvage some thread of victory from the diplomatic confrontation. The Turkish missiles were no longer strategically important, and for some time the United States had been considering withdrawing them unilaterally. But now any agreement to remove them would acquire a markedly different meaning. That is exactly what the Soviets wanted: a visible quid pro quo. The Soviets could then claim some symmetry in the outcome of the Cuban missile crisis. Each side would have gotten its adversary to remove some threatening missiles based near its territory. The United States, bargaining from a position of overwhelming nuclear superiority, refused this direct, visible linkage. Robert Kennedy informed Dobrynin that the United States would not unilaterally withdraw missiles that had been stationed there by an allied decision made by the North Atlantic Treaty Organization (NATO). A concession on the Turkish missiles simply could not be part of the Cuban missile agreement. Having said this, the President's brother then stated that the United States "expected" the Turkish missiles to "be gone" soon after the crisis.⁹⁴ Both sides understood this as a firm pledge, but one that must remain invisible, lest it signal any U.S. weakness. While framed as a unilateral choice, its timing and its immediate disclosure to the Soviets were clearly designed to help settle the Cuban missile crisis.

The Soviets continued to press for some written assurances, not because they doubted that the missiles would be removed but because they wanted some credit for their removal. Dobrynin took an unsigned letter from Khrushchev to Robert Kennedy on 29 October 1962, again seeking some direct, written commitment on the Turkish and Italian missiles. "Robert Kennedy called Dobrynin back the next day," according to Raymond Garthoff, "returned the draft Khrushchev letter, and categorically rejected any such written exchange. He informed Dobrynin that if the Soviet Union published anything claiming that there *was* such a deal, the U.S. intentions with respect to the Jupiter missiles would change, and it would negatively reflect on the U.S.-Soviet relations. The Soviets dropped the matter."⁹⁵ This part of the deal remained secret and deniable. The Soviets said nothing publicly, and NATO quietly removed its aging missiles from Turkey and Italy within six months.⁹⁶

93. Raymond L. Garthoff, *Reflections on the Cuban Missile Crisis*, revised ed. (Washington, D.C.: Brookings Institution, 1989), pp. 86–87.

94. Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: Norton, 1971), pp. 108–9.

95. Garthoff, *Reflections on the Cuban Missile Crisis*, p. 95 n.

96. Ibid.

The bargains that ended the Cuban missile crisis were all informal, but their motives and their degree of informality differed. The key decisions to remove missiles from Cuba in exchange for a pledge of noninvasion were informal because of time pressure. They were embodied in an exchange of messages, rather than in a single signed document, but at least the key points were in writing. The removal of outdated Turkish and Italian missiles was also part of the overall bargain—an essential part, according to some participants—but it was couched in even more informal terms because of political sensitivity.⁹⁷ The sensitivity in this case was America's concern with its image as a great power and, to a lesser extent, with its role in NATO. This kind of concern with external images is one reason why informal agreements are used for politically sensitive bargains: they can be hidden.

Once again, there are costs to be considered. If a hidden agreement is exposed, its presence could well suggest deception—to the public, to allies, and to other government agencies. Even if the agreement does stay hidden, its secrecy imperils its reliability. Hidden agreements carry little information about the depth of the signatories' commitments, poorly bind successor governments, and fail to signal intentions to third parties. These costs are clearly exemplified in the secret treaties between Britain and France before World War I. They could do nothing to deter Germany, which did not know about them. Moreover, they permitted the signatories to develop markedly different conceptions about their implied commitments as allies.⁹⁸

Hidden agreements carry another potential cost. They may not be well understood inside a signatory's own government. On the one hand, this low profile may be a valuable tool of bureaucratic or executive control, excluding

97. It is sometimes argued that the Turkish and Italian missiles were not part of any deal, since the United States would soon have removed them even if the Soviets had not raised the issue. The counterargument, which I find more convincing, is that the Soviets sought their removal as part of the bargaining on Cuba and the United States did, in effect, agree that it "expected" to remove them. The American decision was timed and disclosed specifically to encourage Soviet acceptance of the larger deal. Garthoff calls this decision "an additional sweetener" that "certainly made it easier for Khrushchev to accept the basic over-the-table settlement." See Garthoff, *Reflections on the Cuban Missile Crisis*, p. 87; see also pp. 88 and 94–95. Given the high stakes in Cuba, Soviet behavior was probably little changed by the Turkish side-payment. We will never know with certainty. From the U.S. viewpoint, however, it was wise to make the concessions part of the bargaining: they were minor, secret, and potentially quite rewarding. When information is imperfect, as it was in this case, clever negotiators can "bargain away" concessions that would have been undertaken anyway. The tactic is to make them appear contingent, with the goal of extracting additional concessions and sealing the final bargain. That is exactly what the United States did with the aging Turkish and Italian missiles, while minimizing the reputational costs of any apparent concessions.

98. In 1906, the British Foreign Minister, Sir Edward Grey, discussed the dilemmas posed by these expectations. The entente agreements, signed by a previous British government, "created in France a belief that we shall support [the French] in war. . . . If this expectation is disappointed, the French will never forgive us. There would also I think be a general feeling that we had behaved badly and left France in the lurch. . . . On the other hand the prospect of a European war and of our being involved in it is horrible." See document no. 299, in G. P. Gooch and Harold Temperley, eds., *British Documents on the Origin of the War, 1898–1914*, vol. 3 (London: His Majesty's Stationery Office, 1928), p. 266.

other agencies from direct participation in making or implementing international agreements. On the other hand, the ignorance of the excluded actors may well prove costly if their actions must later be coordinated as part of the agreement. When that happens, hidden agreements can become a comedy of errors.

One example is the postwar American effort to restrict exports to the Soviet bloc. To succeed, the embargo needed European support. With considerable reluctance, West European governments finally agreed to help, but they demanded secrecy because the embargo was so unpopular at home. As a result, the U.S. Congress never knew that the Europeans were actually cooperating with the American effort.⁹⁹ In confused belligerence, the Congress actually passed a law to cut off foreign aid to Europe if the allies did not aid in the embargo.¹⁰⁰

This weak signaling function has another significant implication: it limits the value of informal agreements as diplomatic precedents, even if the agreements themselves are public. This limitation has two sources. First, informal agreements are generally less visible and prominent, and so they are less readily available as models. Second, treaties are considered better evidence of deliberate state practice, according to diplomatic convention and international law. Public, formal agreements are conventionally understood as contributing to diplomatic precedent. Precisely for that reason informal agreements are less useful as precedents and more useful when states want to limit any broader, adverse implications of specific bargains. They frame an agreement in more circumscribed ways than a treaty. Discussions between long-time adversaries, for instance, usually begin on an informal, low-level basis to avoid any implicit recognition of wider claims. Trade relations may also be conducted indirectly, using third-party entrepôts, to avoid any formal contract relationships between estranged governments.

Relations between the People's Republic of China and Taiwan have been conducted informally for these very reasons. The point is not so much to keep the dealings secret (they are, in fact, sometimes announced) but to limit linkage to any larger issues. Both sides, for example, can profit from commercial exchange, but neither wants to prejudice its claim to be the sole legitimate government of China. The result is a proliferation of informal contacts and agreements, often using overseas Chinese as middlemen. Hong Kong and

99. Although the State Department did try to persuade Congress that Western Europe was aiding the embargo, its efforts were in vain. Quiet reassurances from the State Department were distrusted by a hard-line, anticommunist Congress, which saw them as self-serving maneuvers to preserve diplomatic ties. See Michael Mastanduno, "Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period," in G. John Ikenberry, David A. Lake, and Michael Mastanduno, eds., *The State and American Foreign Economic Policy* (Ithaca, N.Y.: Cornell University Press, 1988), p. 136.

100. See Mutual Defense Assistance Control Act of 1951 ("Battle Act"), 82d Congress, 1st sess., 65 Stat. 644.

Singapore, with their large populations of ethnic Chinese, have frequently served as intermediaries.¹⁰¹

Hong Kong is particularly well located to facilitate indirect trade and investment between Taiwan and the mainland. In 1989, this commerce reached \$3.5 billion, up from \$1 billion in the mid-1980s.¹⁰² Singapore, which has cultivated political ties to both countries, now occupies “a unique position of advantage in the conduct of informal relations” between them, according to Michael Leifer and Michael Yahuda.¹⁰³ In April 1989, Singapore served as the conduit for the first known criminal extradition from the mainland to the island. Three mainland police flew to Singapore with their prisoner and transferred him to Taiwanese officers for return to the island.¹⁰⁴ A more formal, regularized procedure, like the extradition treaty between the United States and Turkey, would present insurmountable problems. It would require documentation that named the two signatories and was ratified by them. Would the document refer to the Republic of China or to the province of Taiwan? Either reference would concede a much larger issue: diplomatic recognition. In this case and in many others, informal agreements are useful because they facilitate cooperation on specific issues while constraining any wider implications regarding other issues or third parties. They permit bounded cooperation.¹⁰⁵

The status of tacit agreements

We have concentrated, until now, on informal bargains that are openly expressed, at least among the participants themselves. The form may be written or oral, detailed or general, but there is some kind of explicit bargain.

101. Note that Singapore and Hong Kong do not have formal diplomatic relations with either the People's Republic of China or Taiwan. Far from being an impediment, this absence of formal ties contributes to their role as intermediaries. Given the long-standing controversy over diplomatic recognition, the best way to maintain links to both the mainland and the island is through these informal, back channels. The same channels have been used extensively by overseas Chinese communities to arrange for burials or to visit the graves of ancestors interred on the mainland.

102. These figures, which were reported in *The New York Times*, 14 April 1990, p. 17, are based on data from the Ministry of Economic Affairs in Taiwan and the government in Hong Kong and include trade and investment routed through Hong Kong companies to avoid Taiwanese restrictions.

103. Michael Leifer and Michael Yahuda, “Third Party China?” working paper, London School of Economics, 1989, p. 1.

104. *Ibid.*, p. 2.

105. Because informal extradition arrangements are ad hoc, they are easily severed. That is a mixed blessing. It means that extradition issues are directly implicated in the larger issues of bilateral diplomacy. They cannot be treated as distinct, technical issues covered by their own treaty rules. For example, the bloody suppression of popular uprisings in 1989 in the People's Republic of China blocked prisoner exchanges and made trade and investment ties politically riskier.

Tacit agreements, on the other hand, are not explicit. They are implied, understood, or inferred rather than directly stated.¹⁰⁶ Such implicit arrangements extend the scope of informal cooperation. They go beyond the secrecy of oral agreements and, at times, may be the only way to avoid serious conflict on sensitive issues. Such bargains, however, are all too often mirages, carrying the superficial appearance of agreement but not its substance.

The unspoken “rules” of the Cold War are sometimes considered tacit agreements.¹⁰⁷ The superpowers staked out their respective spheres of influence and did not directly engage each other’s forces. Yet they made no explicit agreements on either point. In the early years of the Cold War, the United States quietly conceded de facto control over Eastern Europe to the Soviets. The policies that laid the basis for NATO were designed to contain the Soviet Union, both diplomatically and militarily, but nothing more. They made no effort to roll back the Soviet army’s wartime gains, which had been converted into harsh political dominion in the late 1940s. America’s restraint amounted to a spheres-of-influence policy without actually acknowledging Moscow’s regional security interests. This silence only confirmed the Soviets’ worst fears and contributed to bipolar hostilities.

In the bitter climate of the early Cold War period, however, no U.S. official was prepared to concede the Soviets’ dominance in Eastern Europe. Earlier conferences at Yalta and Potsdam had seemed to do so, but now these concessions were pushed aside, at least rhetorically.¹⁰⁸ While Democrats reinterpreted these agreements or considered them irrelevant because of Soviet violations, Republicans denounced them as immoral or even treasonous.¹⁰⁹ Backed by these domestic sentiments, U.S. foreign policy was couched in the language of universal freedoms, conceding nothing to the Soviets in

106. This definition is based on the second meaning of “tacit” in *The Oxford English Dictionary*, 2d ed., vol. 17 (Oxford: Clarendon Press, 1989), p. 527.

107. See Keal, *Unspoken Rules and Superpower Dominance*; and Friedrich Kratochwil, *Rules, Norms and Decisions* (Cambridge: Cambridge University Press, 1989), chap. 3.

108. A few international lawyers argued that the Yalta and Potsdam agreements were binding treaty commitments. The U.S. State Department did publish the Yalta Agreement in the *Executive Agreements Series* (no. 498) and in *U.S. Treaties in Force* (1963). In 1948, Sir Hersch Lauterpacht said that they “incorporated definite rules of conduct which may be regarded as legally binding on the States in question.” The British and American governments explicitly rejected that view. In 1956, in an aide-mémoire to the Japanese government, the State Department declared that “the United States regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating governments and . . . not as of any legal effect in transferring territories.” See *Department of State Bulletin*, vol. 35, 1956, p. 484, cited by Schachter in “The Twilight Existence of Nonbinding International Agreements,” p. 298 n. See also L. P. L. Oppenheim, *Peace*, vol. 1 of H. Lauterpacht, ed., *International Law: A Treatise*, 7th ed. (London: Longmans, Green, 1948), p. 788, section 487.

109. The one major exception among U.S. politicians was former vice president Henry Wallace, representing the left wing of the Democratic party. Wallace openly stated that the Soviets had legitimate security interests in Eastern Europe and should not be challenged directly there. His views were widely denounced in both parties and won few votes.

Eastern Europe.¹¹⁰ In practice, however, the United States tacitly accepted Soviet control up to the borders of West Germany.

How does tacit acceptance of this kind compare with the informal but explicit bargains we have been considering? They are quite different in principle, I think. The most fundamental problem in analyzing so-called tacit bargains lies in determining whether any real agreement exists. More broadly, is there some kind of mutual policy adjustment that is (implicitly) contingent on reciprocity? If so, what are the parties' commitments, as they understand them? Often, what pass for tacit bargains are actually policies that have been chosen unilaterally and independently, in light of the unilateral policies of others. There may be an "understanding" of other parties' policies but no implicit agreements to adjust these policies on a mutual or contingent basis. Each party is simply maximizing its own values, subject to the independent choices made or expected to be made by others. What looks like a silent bargain may simply be a Nash equilibrium.

This is not to say that tacit bargains are always a chimera. Each party can adjust its policies on a provisional basis, awaiting some conforming adjustment by others. Thomas Schelling has consistently argued that this is the most fruitful approach to superpower arms control.¹¹¹ Robert Axelrod has used experimental games to analyze the possibilities and robustness of such tacit bargains. In Axelrod's games, there can be no explicit bargains, however informal, because direct communication is prohibited. After all, the prisoners' dilemma is no dilemma at all if players can openly contract around it. Still, some players may effectively offer tacit agreements. They confront new partners by making an initial "generous" move.¹¹² That move is sensible only if some respond with generosity themselves, rather than aggressively playing them for a sucker. The whole point of a tit-for-tat strategy is to communicate the possibility of a tacit bargain: a willingness to play cooperatively if, and only if, the other side will do so as well. The problem, as George Downs and David Rocke have shown, is that states may not always know when others are cooperating or defecting and may not know what their intentions are.¹¹³ One state may then punish others for noncompliance or defections that are more apparent than real and thus begin a downward spiral of retaliation. Such imperfect knowledge does not prevent tacit cooperation, but it does suggest

110. Arthur M. Schlesinger, Jr., "Origins of the Cold War," *Foreign Affairs* 46 (Autumn 1967), pp. 22-52.

111. See Thomas C. Schelling, "Reciprocal Measures for Arms Stabilization," *Daedalus* 89 (Fall 1960), pp. 892-914; Thomas C. Schelling, "What Went Wrong with Arms Control?" *Foreign Affairs* 64 (Winter 1985-86), pp. 219-33; and Thomas C. Schelling and Morton H. Halperin, *Strategy and Arms Control*, 2d ed. (Washington, D.C.: Pergamon-Brassey, 1985), pp. 77-90. Schelling's point is strongly endorsed by Adelman in "Arms Control With and Without Agreements."

112. Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

113. See the following works by Downs and Rocke: "Tacit Bargaining and Arms Control"; and *Tacit Bargaining, Arms Races, and Arms Control*.

serious impediments and risks to tacit bargaining, the need for more “fault tolerant” strategies, and the potential gains from more explicit communication and greater transparency.

In ongoing diplomatic interactions in which each side continually responds to the other’s policies and initiatives, it may also be difficult to distinguish between tacit bargains and unilateral acts. One side may consider its own restraint part of an implicit bargain, while the other considers it nothing more than prudent self-interest. In the early Cold War, for instance, the United States could do nothing to reverse Soviet control in Eastern Europe without waging war. There was little to be gained by providing substantial aid to local resistance movements. Their chances for success were slim, and the dangers of escalation were significant. Any U.S. efforts to destabilize Soviet control in Eastern Europe would have markedly increased international tensions and raised the dangers of U.S.–Soviet conflict in central Europe. Under the circumstances, American policy was restrained. More aggressive action in Eastern Europe was deterred by the risks and poor chances of success, not by the implied promise of some reciprocal restraint by the Soviets. There was a learning process but no tacit bargain.

In any case, most tacit bargains are hard to identify with confidence. By their very nature, implicit agreements leave little trace. Moreover, what may appear to be implicit agreements are often explicable as outcomes of more narrowly self-interested unilateral policies. Given these difficulties, one valuable approach to uncovering tacit bargains is to examine the reactions and discourse surrounding possible “violations.” Tacit bargains, like their more explicit counterparts, are based on the reciprocal exchange of benefits. Breaking the terms of that exchange is likely to be given voice. There will be talk of betrayal and recriminations, words of regret at having extended generous but uncompensated concessions. There ought to be some distinctive recognition that reasonable expectations and inferences, built up during the course of joint interactions, have been breached. Thus, there is regret and not merely surprise.¹¹⁴

Consider the differences in America’s reaction to expanded Soviet influence in two cases: Cuba in 1959–60 and Afghanistan in 1979–80. After the Cuban revolution, the Soviets managed to develop a de facto ally in the Western Hemisphere. The United States was shocked by a challenge so close to its own territory. It was shocked because the Soviet–Cuban alliance challenged America’s unique power in the Western Hemisphere and posed significant new strategic problems, not because it broke some silent understanding with the Soviets over respective spheres of influence. What had been violated was America’s unchallenged position as the great power in its own region.

114. In *The Cement of Society*, Elster makes this distinction between regret and surprise and relates it to two forms of order. Departures from regularized, predictable behavior give rise to surprise. Unreciprocated cooperation produces regret.

America's assertion of that unique position had been the beginning of its rise to global power in the late nineteenth century.¹¹⁵ Since then, it had taken all challenges to its regional hegemony very seriously indeed. There was no claim, however, that the Soviets had violated some general understanding with the United States or had somehow failed to reciprocate America's restrained policies near the Soviet border. On the basis of America's pronouncements and reactive policies, there was simply no evidence that a tacit bargain had been broken.

Compare that with America's reaction to the Soviet invasion of Afghanistan. The Carter administration, which had been pursuing a policy of increased trade and normalized relations with the Soviets, clearly considered the invasion a direct attack on the broad, implicit agreement underlying detente.¹¹⁶ For the first time, Soviet troops had been used for aggressive purposes outside Eastern Europe. President Carter's own sense of shock, outrage, and betrayal were widely shared in America and, to a lesser extent, among the Western allies.¹¹⁷ It was this deep sense of violation, and not just the potential military threat to the Persian Gulf, that ended a decade of closer ties between the superpowers.¹¹⁸

The Soviets, of course, saw matters differently. They viewed detente in more restrictive terms, related principally to the nuclear balance, European diplomacy, and trade flows, detached from the invasion of Afghanistan or support for guerrilla factions in the Horn of Africa, Angola, Mozambique, or Central America.

These different understandings, which have been so well documented,¹¹⁹ are

115. Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860–1898* (Ithaca, N.Y.: Cornell University Press, 1963).

116. See Garthoff, *Detente and Confrontation*, chap. 27. Until the Afghanistan invasion, there had been a sharp debate within the Carter administration over the implied terms of detente. The problem with implied terms, after all, is that they may well be ambiguous and differently understood by different actors, across states and within them. The eventual winner was National Security Adviser Zbigniew Brzezinski, who clearly stated his position early in the Carter administration while discussing the Horn of Africa. In March 1978, he wrote to President Carter that "the Soviets must be made to realize that detente, to be enduring, has to be both comprehensive and reciprocal. If the Soviets are allowed to feel that they can use military force in one part of the world—and yet maintain cooperative relations in other areas—then they have no incentive to exercise any restraint." See Zbigniew Brzezinski, *Power and Principle: Memoirs of the National Security Adviser, 1977–1981* (New York: Farrar, Straus, Giroux, 1983), p. 186.

117. Adam B. Ulam, *Dangerous Relations: The Soviet Union in World Politics, 1970–1982* (New York: Oxford University Press, 1983), pp. 260–61.

118. "The Soviet occupation of Afghanistan and the American response led to a sharp break from the whole course of U.S.–Soviet relations over the preceding decade," according to Garthoff. "It gave the coup de grâce to the already seriously eroded and weakened mutual policy of detente established in May 1972. . . . In many ways January 1980 was a sharper turning point than January 1981, when Ronald Reagan was inaugurated and repudiated detente." See Garthoff, *Detente and Confrontation*, p. 967.

119. See Mike Bowker and Phil Williams, *Superpower Detente: A Reappraisal* (London: Sage, 1988). Garthoff, in his review of this book, points to the contradictory and self-limiting assumptions that supported detente in the United States and Soviet Union: "Detente [according to Bowker and Williams] was not a cause of America's apparent weakness in the 1970s, but a hard-headed strategy devised by Kissinger and Nixon for coping with an adverse situation by managing the emergence of

important to raise here because they illustrate a common defect in tacit understandings: they are often vague and ambiguous, sometimes disastrously so. They may give rise to radically different interpretations, which go unnoticed at the time. There is, unfortunately, no way to identify and reconcile such differing views except retroactively, when disputes arise over nonperformance. By then, the prospects of future cooperation may already be destroyed by recriminations over “bad faith.”

The dangers of misunderstanding are certainly not unique to tacit agreements. They lurk in all contracts, even the most formal and detailed. But the process of negotiating written agreements does offer a chance to clarify understandings, to agree on joint interpretations, to draft detailed, restrictive language, and to establish mechanisms for ongoing consultation, such as the U.S.–Soviet Standing Consultative Commission. Tacit agreements, by definition, lack these procedures, lack this detail, and lack any explicit understandings.

These limitations in tacit agreements are not always a drawback. If the agreement covers only a few basic points, if the parties clearly understand the provisions in the same way, and if there are no individual incentives to betray or distort the terms, then some key defects of tacit bargains are irrelevant. Some coordination problems fit this description. They involve tacit agreement among multiple participants who cannot communicate directly with one another.¹²⁰

Unfortunately, the hard issues of international politics are different. They involve complicated questions without salient solutions, where national interests are less than congruent. Any commitments to cooperate need to be specified in some detail.¹²¹ The agreements themselves are not so simply self-sustaining. If cooperation is to be achieved, the terms must be crafted deliberately to minimize the risks of misunderstanding and noncompliance.

Choosing between treaties and informal agreements

Because tacit bargains are so limited, states are reluctant to depend on them when undertaking important projects. They want some clear, written signal that

Soviet power. For the Soviet leaders, on the other hand, detente represented an expected opportunity to neutralize superpower relations and exercise Soviet power in a more active way in the Third World. When they did this, however, in Angola, Ethiopia and Afghanistan, the result was to undercut support for detente in the United States and lead to its collapse.” Garthoff, himself a notable student of superpower relations, sees Soviet policies in Africa and Asia as opportunistic rather than strategic. The results, however, were the same for U.S.–Soviet relations. There was a “costly failure of Soviet leaders to appreciate the adverse consequences of their involvements in the Third World on detente with the United States.” See Raymond L. Garthoff, “Review of Bowker and Williams’ *Superpower Detente*,” *International Affairs* 65 (Spring 1989), p. 311.

120. Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Clarendon Press, 1977).

121. This does not rule out deliberate vagueness on some issues as part of a larger, more detailed settlement. Cooperation is not comprehensive, and some issues have to be finessed if any agreement is to be reached.

an agreement has been reached and includes specific terms. When a state's choice of policies is contingent on the choices of others, it will prefer to spell out these respective choices and the commitments they entail and will want to improve information flows among interdependent actors. These requirements can be met by either a formal treaty or an informal agreement, each with its own generic strengths and weaknesses. Each is more or less suited to resolving specific kinds of international bargaining problems.

These differences mean that actors must choose between them for specific agreements. However, they may also complement each other as elements of more inclusive bargains. The treaty commitments that define NATO, for instance, are given their military and diplomatic significance by a stream of informal summit declarations that address contemporary alliance issues such as weapons modernization, arms control, and Soviet policy initiatives.

Informal agreements, as I have noted, are themselves quite varied, ranging from simple oral commitments to joint summit declarations to elaborate letters of intent, such as stabilization agreements with the International Monetary Fund (IMF). Some of the most elaborate are quite similar to treaties but with two crucial exceptions. The diplomatic status of the promises is less clear-cut, and the agreements typically do not require elaborate ratification procedures. They lack, to a greater or lesser extent, the state's fullest and most authoritative imprimatur. The effects on reputation are thus constrained, but so is the dependability of the agreement.

States equivocate, in principle, on their adherence to these informal bargains. They are often unwilling to grant them the status of legally binding agreements. But what does that mean in practice, given that *no* international agreements can bind their signatories like domestic contracts can? The argument presented here is that treaties send a conventional signal to other signatories and to third parties concerning the *gravity* and *irreversibility* of a state's commitments. By putting reputation at stake, they add to the costs of breaking agreements or, rather, they do so if a signatory values reputation. Informal agreements are typically more elusive on these counts.

These escape hatches are the common denominators of informal agreements, from the most elaborate written documents to the sketchiest oral agreements. The Helsinki Final Act, with its prominent commitments on human rights, is otherwise virtually identical to a treaty. It includes sixty pages of detailed provisions, only to declare that it should not be considered a treaty with binding commitments.¹²² At the other extreme are oral bargains, which are

122. The Helsinki Final Act, formally known as the Final Act of the Conference on Security and Cooperation in Europe, was concluded in 1975 and signed by thirty-five states. On the one hand, the states declared their "determination to act in accordance with the provisions contained" in the text. On the other hand, these were not to be the binding commitments of a treaty. The text plainly said that it was not eligible for registration with the United Nations, as a treaty would be. Several democratic states, led by the United States, declared at the time that this document was not a treaty. "There does not appear to be any evidence that the other signatory states disagreed with this understanding," according to Schachter. The result is a curious contradiction: a nonbinding

the most secret, the most malleable, and the quickest to conclude. Like their more elaborate counterparts, they are a kind of moral and legal oxymoron: an equivocal promise.

The speed and simplicity of oral bargains make them particularly suited for clandestine deals and crisis resolution. But for obvious reasons, states are reluctant to depend on them more generally. Oral agreements can encompass only a few major points of agreement; they cannot set out complicated obligations in any detail. They are unreliable in several distinct ways. First, it is difficult to tell whether they have been officially authorized and whether the government as a whole is committed to them. Second, they usually lack the visibility and public commitment that support compliance. Third, to ensure implementation in complex bureaucratic states, oral agreements must be translated into written directives at some point.¹²³ Sincere mistakes, omissions, and misunderstandings may creep in during this translation process with no opportunity to correct them before an interstate dispute emerges. Last, but most important of all, it is easier to disclaim oral bargains or to recast them on favorable terms. Nobody ever lost an argument in the retelling, and oral bargains have many of the same properties. Perhaps this is what Sam Goldwyn had in mind when he said that verbal contracts were not worth the paper they were written on.¹²⁴

Putting informal agreements into writing avoids most of these problems. It generally produces evidence of an intended bargain. What it still lacks is the depth of national commitment associated with treaties. That is the irreducible price of maintaining policy flexibility.

Informal agreements are also less public than treaties, in two ways. First, because states do not acknowledge them as fundamental, self-binding commitments, they are less convincing evidence of recognized state practices. They are thus less significant as precedents. For example, informal agreements on trade or extradition are no proof of implicit diplomatic recognition, as a formal treaty would be. These limitations mean that informal agreements are more easily

bargain. It juxtaposes elaborate “commitments” with a claim that they are not to be registered, as a treaty would be. The point, clearly, is to exempt the provisions from the legally binding status of treaty commitments. For an interesting analysis of the Helsinki agreement and its ambiguous status in international law, see Schachter, “The Twilight Existence of Nonbinding International Agreements,” p. 296. The text of the Helsinki Final Act can be found in *International Legal Materials*, vol. 14, 1975, pp. 1293 ff.

123. This translation of oral agreements into writing is required by the U.S. State Department’s regulations implementing the Case Act. See “International Agreement Regulations,” 22 *Code of Federal Regulations*, part 181; and 46 *Federal Register*, 13 July 1981, pp. 35917 ff.

124. There is a nice irony here. Goldwyn’s disparaging comments about oral agreements are themselves probably apocryphal. He regularly mangled the English language, and quotes like this were often attributed to him, whether he said them or not. The murky origins of this quotation underscore a fundamental problem with oral bargains. How can third parties ever ascertain who really promised what to whom? Goldwyn himself gave one answer to that question: “Two words: impossible.” See Carol Easton, *The Search for Sam Goldwyn* (New York: William Morrow, 1976), pp. 150–51; and Arthur Marx, *Goldwyn: A Biography of the Man Behind the Myth* (New York: Norton, 1976), pp. 8–10.

restricted to a particular issue. They have fewer ramifications for collateral issues or third parties. They permit cooperation to be circumscribed. Second, informal agreements are more easily kept secret, if need be. There is no requirement to ratify them or to enact them into domestic law, and there is no need to register them with international organizations for publication. For highly sensitive bargains, such as the use of noncombatants' territory in guerrilla wars, that is a crucial attribute.¹²⁵

Treaties, too, can be kept secret. There is no inherent reason why they must be made public. Indeed, secret treaties were a central instrument of balance-of-power diplomacy in the eighteenth and nineteenth centuries.¹²⁶ But there are powerful reasons why secret treaties are rare today. The first and most fundamental is the rise of democratic states with principles of public accountability and some powers of legislative oversight. Secret treaties are difficult to reconcile with these democratic procedures. The second reason is that ever since the United States entered World War I, it has opposed secret agreements as a matter of basic principle and has enshrined its position in the peace settlements of both world wars.

The decline of centralized foreign policy institutions, which worked closely with a handful of political leaders, sharply limits the uses of secret treaties. Foreign ministries no longer hold the same powers to commit states to alliances, to shift those alliances, to divide conquered territory, and to hide such critical commitments from public view. The discretionary powers of a Bismarck or Metternich have no equivalent in modern Western states. Instead, democratic leaders rely on informal instruments to strike international bargains in spite of domestic institutional restraints. That is precisely the objection raised by the U.S. Congress regarding war powers and executive agreements.

When leaders are freed from such institutional restraints, they can hide their bargains without making them informal. They can simply use secret treaties and protocols, as Stalin and Hitler did in August 1939 when they carved up Eastern Europe.¹²⁷ The Soviets accurately informed the Germans that “ratifica-

125. States on the borders of a guerrilla war are vital allies to the protagonists. They offer a secure launching pad for military operations and a secure site for communications and resupply. If their role becomes too open and prominent, however, the bordering states could be brought directly into the fighting as protagonists themselves. This is clearly a delicate relationship. It is best managed by informal agreements, usually secret ones, such as those reached by the United States and Laos during the Vietnam War. See Johnson, *The Making of International Agreements*, p. 68.

126. The importance of secret treaties in European diplomacy was underscored when Woodrow Wilson tried to abolish the practice after World War I. Clemenceau and Lloyd George “said emphatically that they could not agree never to make a private or secret diplomatic agreement of any kind. Such understandings were the foundation of European diplomacy, and everyone knew that to abandon secret negotiations would be to invite chaos. To this [Colonel] House replied . . . that there was no intention to prohibit confidential talks on delicate matters, but only to require that treaties resulting from such conversations should become ‘part of the public law of the world.’” Quoted by Arthur Walworth in *America’s Moment: 1918—American Diplomacy at the End of World War I* (New York: Norton, 1977), p. 56.

127. See “Treaty of Non-Aggression Between Germany and the Union of Soviet Socialist Republics, August 23, 1939, Signed by Ribbentrop and Molotov,” document no. 228 in United

tion . . . was merely a formality” and would be completed immediately by the Presidium of the Supreme Soviet.¹²⁸ The actual Treaty of Non-Aggression was made public. What was kept secret was the attached protocol that partitioned Poland and the Baltic into spheres of influence.¹²⁹ The following month, the Nazis and Soviets added two more secret protocols, declaring Latvia, Estonia, and Lithuania part of the Soviet sphere.¹³⁰ Within a year, the Baltic states had been forcibly incorporated into the Soviet Union. For the next fifty years, including the first four years of *glasnost*, the Soviets refused to acknowledge these secret protocols. They scorned the Baltic nationalists (who knew about the deal) and ignored the inconvenient fact that the Allies had copies of the German documents.¹³¹ The old Soviet–Nazi protocols remain sensitive because they undermine the legitimacy of Soviet territorial expansion. They directly impugn the sources of Soviet dominance of a multinational state. There is ample reason, then, why the agreement was made secretly and why the Soviets long tried to keep it that way.

Aside from these protocols, secret pacts have rarely been used for important interstate projects since World War I. That partly reflects the war experience itself and partly reflects America’s rise to global prominence. While the war was still being fought, Leon Trotsky had published the czarist government’s

Kingdom, Foreign Office, *The Last Days of Peace, August 9—September 3, 1939*, series D, vol. 7 of *Documents on German Foreign Policy, 1918–1945* (London: Her Majesty’s Stationery Office, 1956), pp. 245–46. The volume provides official translations of documents from captured archives of the German Foreign Ministry and the Reich Chancellery.

128. See “Telegram, Most Urgent, [from] the Ambassador in the Soviet Union to the [German] Foreign Ministry, August 30, 1939, Signed by Schulenburg,” document no. 447 in *ibid.*, pp. 439–40.

129. See “Secret Additional Protocol, August 23, 1939, Signed by Ribbentrop and Molotov,” document no. 229 in *ibid.*, pp. 246–47. For an analysis of the protocol, see Gerhard L. Weinberg, *The Foreign Policy of Hitler’s Germany: Starting World War II* (Chicago: University of Chicago Press, 1980), pp. 602–10.

130. See “Secret Additional Protocol, September 28, 1939, Between the Government of the USSR and the Government of the German Reich” document no. 159 in United Kingdom, Foreign Office, *The War Years, September 4, 1939—March 18, 1940*, series D, vol. 8 of *Documents on German Foreign Policy, 1918–1945* (London: Her Majesty’s Stationery Office, 1954), p. 166. The document, which was signed in Moscow by Ribbentrop and Molotov, stated the following: “The Secret Additional Protocol, signed August 23, 1939, shall be amended in item 1 to the effect that the territory of the Lithuanian states falls to the sphere of influence of the USSR, while, on the other hand, the province of Lublin and parts of the province of Warsaw fall to the sphere of influence of Germany (cf. the map attached to the Boundary and Friendship Treaty signed today).”

131. The relevant maps and microfilms are held in the Federal Republic’s Foreign Ministry. The captured documents have all been published, in the original and in translation. The Soviets long claimed that they could not find their copies and that the West German microfilms were forgeries. They held to this formulaic answer through 1989, when Baltic nationalism became a serious political challenge. The nationalists, of course, emphasized the illegitimacy of the protocols and actually published their texts as part of their rising protest of Soviet rule. In August 1989, a senior Soviet official finally acknowledged that the Soviets and Nazis had secretly divided Eastern Europe, but he insisted that the secret agreement had no bearing on the current boundaries of the Soviet Union. See Peter Gumbel, “Bonn Has Documents Soviets Don’t Want Very Much to Find,” *Wall Street Journal*, European edition, 23–24 June 1989, pp. 1 and 10; Esther B. Fein, “Soviets Confirm Nazi Pacts Dividing Europe,” *The New York Times*, 19 August 1989, pp. 1 and 5; and Esther B. Fein, “Soviet Congress Condemns ’39 Pact That Led to Annexation of Baltics,” *The New York Times*, 25 December 1989, pp. 1 and 15.

secret treaties. They showed how Italy had been enticed into the war (through the London treaty) and revealed that Russia had been promised control of Constantinople. The Allies were embarrassed by the publication of these self-seeking agreements and were forced to proclaim the larger principles for which their citizens were fighting and dying.¹³²

Woodrow Wilson had always wanted such a statement of intent. He argued that this was a war about big issues and grand ideals, not about narrow self-interest or territorial aggrandizement. He dissociated the United States from the Allies' earlier secret commitments and sought to abolish them forever once the war had been won. At the Versailles peace conference, where Wilson stated his Fourteen Points to guide the negotiations, he began with a commitment to "open covenants . . . openly arrived at." He would simply eliminate "private international understandings of any kind [so that] diplomacy shall proceed always frankly and in the public view."¹³³

These Wilsonian ideals were embodied in Article 18 of the League of Nations Covenant and later in Article 102 of the United Nations (UN) Charter. They provided a means for registering international agreements and, in the case of the UN, an incentive to do so. Only registered agreements could be accorded legal status before any UN affiliate, including the International Court of Justice. This mixture of legalism and idealism could never abolish private understandings, but it did virtually eliminate secret treaties among democratic states. Informal agreements live on as their closest modern substitutes.

Conclusion: international cooperation by informal agreement

The varied uses of informal agreements illuminate the possibilities of international cooperation and some recurrent limitations. They underscore the fact that cooperation is often circumscribed and that its very limits may be fundamental to the participants. Their aim is often to restrict the scope and duration of agreements and to avoid any generalization of their implications. The ends are often particularistic, the means ad hoc. Informal bargains are

132. Trotsky's release of the secret documents was shrewd and effective. There was a strong, sustained reaction against secret diplomacy, mainly in the Anglo-Saxon countries. Wilson himself was politically embarrassed. Either his wartime allies had not told him of their earlier bargains or they had told him and he had kept the secret, despite his principled attacks on secret diplomacy. See Mario Toscano, *An Introduction to the History of Treaties and International Politics*, vol. 1 of *The History of Treaties and International Politics* (Baltimore, Md.: Johns Hopkins University Press, 1966), pp. 42 and 215; and James Joll, *Europe Since 1870*, 2d ed. (Harmondsworth, UK: Penguin Books, 1976), p. 233.

133. Wilson's war aims were stated to a joint session of Congress on 8 January 1918. When European leaders later challenged this commitment to open covenants, Wilson announced that he would never compromise the "essentially American terms in the program," including Point One. See Edward M. House, *The Intimate Papers of Colonel House*, vol. 4, ed. by Charles Seymour (London: Ernest Benn, 1928), pp. 182–83.

delimited from the outset. More often than not, there is no intention (and no realistic possibility) of extending them to wider issues, other actors, longer time periods, or more formal obligations. They are simply not the beginning of a more inclusive process of cooperation or a more durable one.

These constraints shape the form that agreements can take. Interstate bargains are frequently designed to be hidden from domestic constituencies, to avoid legislative ratification, to escape the attention of other states, or to be renegotiated. They may well be conceived with no view and no aspirations about the longer term. They are simply transitory arrangements, valuable now but ready to be abandoned or reordered as circumstances change. The diplomatic consequences and reputational effects are minimized by using informal agreements rather than treaties. Informal agreements may also be chosen because of time pressures. To resolve a crisis, the agreement may have to be struck quickly and definitively, with no time for elaborate documents.

Because informal agreements can accommodate these restrictions, they are common tools for international cooperation. States use them, and use them frequently, to pursue national goals by international agreement. They are flexible, and they are commonplace. They constitute, as Judge Richard Baxter once remarked, a “vast substructure of inter-governmental paper.”¹³⁴ Their presence testifies to the perennial efforts to achieve international cooperation and to its institutional variety. Their form testifies silently to its limits.

134. Baxter, “International Law in ‘Her Infinite Variety,’ ” p. 549.