

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Edited by **Beth A. Simmons**
and **Richard H. Steinberg**

PART V

TREATY DESIGN AND DYNAMICS

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

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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.

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. 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 *** 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. *** Paul Keal has termed such policies the "unspoken rules" of superpower diplomacy.³

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,

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. *** 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.⁴ 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.⁵ Reagan repeatedly criticized the Soviets on both counts but in practice 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.

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.

⁴ 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 Norburga K. Calvo-Goller and Michael A. Calvo in *The SALT Agreements: Content-Application-Verification* (Dordrecht, Netherlands: Martinus Nijhoff, 1987), pp. 318 and 326 ff.

⁵ 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 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

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.⁶ 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

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.

⁶ 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.

less clearly delimited,⁷ and the very authority to make and execute them may be in doubt.⁸ 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.⁹

The interpretive problems are even more acute with tacit understandings and implicit rules that are not well articulated between the parties.¹⁰ 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

⁷ 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 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. *** 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

expectations – without cooperation.¹¹ Genuine 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.¹² 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.”¹³ 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

¹¹ 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.

¹² 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.

¹³ Anthony Aust, “The Theory and Practice of Informal International Instruments,” *International and Comparative Law Quarterly* 35 (October 1986), p. 791.

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 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,