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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.[41] 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 where there is some uncertainty about compliance.[42] 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,[43] while the gains from breaking an agreement are likely to be more

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

[42] "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.

[43] 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.

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.[44] 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.[45]

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 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.' "[46]

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The real point is to understand how *** perceptions of mutual advantage can support various kinds of international cooperation and how different legal forms, such as treaties, fit into this essentially political

[44] 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.

[45] 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.

[46] 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.

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.[47] Nor does it mean that conflict 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

[47] 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 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.

are the slowest to complete.[48] 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.[49] If the executive lacks a secure governing majority or if the 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. *** Even when agreements are much less contentious, the machinery of ratification can grind slowly.[50] ***

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

[48] 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.

[49] 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 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.

[50] 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.

foreign affairs is broad, but not broad enough to hand over the canal and surrounding territory to Panama without Senate approval.[51] ***

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 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.[52]

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.[53]

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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.

[51] 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.

[52] 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).

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

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.[54] 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.[55] In practice, states can *always* abandon their international commitments, since enforcement is so costly and problematic. The real point of such treaty terms, then, is to

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

[55] David, *The Strategy of Treaty Termination.*

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.[56] 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.

* * *

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

[56] 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.

that matter, unprovoked punishment). It does so by making disputes more salient and accessible and by underscoring the gravity of promises. ***

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 always aimed at formal documents with full ratification. Discussions during a summit meeting or a walk in the woods may lay the essential groundwork for an arms agreement, but they are *not* agreements in themselves.[57]

Over the history of superpower arms control, only the tacit observance of SALT II could be classified as a major informal agreement. *** Perhaps these tacit arrangements and encoded signals were the most that could be salvaged from the failed treaty.

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.[58] 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.[59] This self-generated compliance is crucial in superpower arms

[57] 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.

[58] Bilder, *Managing the Risks of International Agreement,* pp. 49–51.

[59] 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.

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.[60]

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. ***

* * *

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.[61] 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 latters, supplemented by secret oral promises. During the

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

[61] 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.

crisis, the Soviets had put forward a number of inconsistent proposals for settlement. President Kennedy responded to the most conciliatory: Premier Khrushchev's latter of 26 October 1962. The next day, Kennedy accepted its basic terms and set a quick deadline for Soviet counter-acceptance. 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 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.[62] ***

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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. 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

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

to develop markedly different conceptions about their implied commitments as allies.[63]

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 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.[64] 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.[65]

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

[63] 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.

[64] 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.

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