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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.

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.

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*** 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.[66]

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.

Tacit agreements, on the other hand, are not explicit. They are implied, understood, or inferred rather than directly stated.[67] 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.[68] The superpowers staked out their respective spheres of

[66] 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.

[67] 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.

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

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.[69] While Democrats reinterpreted these agreements or considered them irrelevant because of Soviet violations, Republicans denounced them as immoral or even treasonous.[70] Backed by these domestic sentiments, U.S. foreign policy was couched in the language of universal freedoms, conceding nothing to the Soviets in Eastern Europe.[71] 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

[69] 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.

[70] 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.

[71] Arthur M. Schlesinger, Jr., "Origins of the Cold War," *Foreign Affairs* 46 (Autumn 1967), pp. 22–52.

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. *** 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.[72] 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 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.

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

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.[73]

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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.[74]

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.[75] The agreements themselves are not

[73] 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.

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

[75] 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.

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 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 latters 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.[76] At the other extreme are oral bargains, which are 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.[77] Sincere mistakes, omissions, and misunderstandings may creep in during this translation process with no opportunity to correct

[76] 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 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.

[77] 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.

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.[78]

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 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.[79]

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

[78] 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: im possible." 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.

[79] 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.

balance-of-power diplomacy in the eighteenth and nineteenth centuries.[80] 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.[81] ***

Aside from these protocols, secret pacts have rarely been used for important interstate projects since World War I. That partly reflects the

[80] 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.

[81] 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 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.

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 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.[82]

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."[83]

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.

[82] 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.

[83] 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.

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 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 intergovernmental paper."[84] Their presence testifies to the perennial efforts to achieve international cooperation and to its institutional variety. Their form testifies silently to its limits.

[84] Baxter, "International Law in 'Her Infinite Variety,'" p. 549.