FORM AND SUBSTANCE IN INTERNATIONAL AGREEMENTS

*By Kal Raustiala**

International agreements exhibit a wide range of variation. Many are negotiated as legally binding agreements, while others are expressly nonbinding. Some contain substantive obligations requiring deep, demanding policy changes; others demand little or simply ratify the status quo ante. Some specify institutions to monitor and sanction noncompliance; others create no review structure at all. Thus, there is considerable variation both in the form of international agreements—in their legal bindingness, as well as in the range of structural provisions for monitoring and addressing noncompliance—and in the substantive obligations they impose. This variation in form and substance raises several fundamental questions about the role of international agreements in world politics.[1] Why do states differentiate commitments into those which are legally binding and those which are not? What relationship exists between legality and the substantive provisions of an accord, and between legality and structural provisions for monitoring behavior? What is the relationship between substantive obligations and monitoring provisions? Finally, what difference, if any, do these choices make as to the effectiveness of an agreement?

This article presents a conceptual framework for analyzing the architecture of international agreements. Using the concepts of form and substance, it examines three features of agreements, two related to form and one to substance. Legality refers to the choice between legally binding and nonlegally binding accords[2] (for simplicity, I term this a choice between *contracts* and *pledges*). Substance refers to the deviation from the status quo that an agreement demands. Structure refers to provisions for monitoring and penalizing violators. Each of these terms represents a distinct design element. Yet there are systematic trade-offs among them. Only by understanding these trade-offs can we understand the design and operation of agreements.[3] The framework advanced in this article makes these trade-offs clear, while also reorienting current research in international law. For example, one area that recent scholarship has focused on is compliance with pledges.[4] But without attention to the relationships between legality, substance, and structure, much of this work is inconclusive.[5] In other areas where progress has been made, as in the choice of legal form, the prevailing explanations are incomplete and can be improved by accounting systematically for the connections between design features.

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[1] As of July 2005, there were over fifty thousand in the UN database. *See* United Nations Treaty Collection, Overview, *available at* <http://untreaty.un.org/English/overview.asp>.

[2] *See, e.g.*, Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999).

[3] An early exemplar of this approach is RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

[4] *E.g.*, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) [hereinafter NON-BINDING NORMS]; Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?* 5 J. INT'L ECON. L. 647 (2002).

[5] The same can be said about compliance generally. *See* Kal Raustiala & Anne-Marie Slaughter, *International Law, and International Relations, and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

Using this framework, I make several claims about the architecture of agreements. First, I argue that the notion of "soft law" agreements is incoherent. Under the prevailing approach, pledges are being smuggled into the international lawyer's repertoire by dubbing them soft law. Just as frequently, scholars declare that contracts containing vague or imprecise commitments are actually soft. In so doing, these commentators are conflating the legality of agreements with structure (in particular, enforcement features) or substance (e.g., rule precision), or effects with causes (i.e., looking to behavioral effects to demonstrate international law's existence).[6] Both sets of moves elaborate a conceptual category—soft law agreements—that has no compelling basis in state practice or legal theory. I argue instead for a sharp demarcation between pledge and contract. I show why this demarcation makes sense and how it unlocks puzzles in agreement design.

Second, I provide a causal account of the choice between pledges and contracts.[7] States choose on the basis of a combination of functional concerns of credibility and flexibility, the configuration of power, and the demands of domestic interest groups and the structure of domestic institutions. These factors roughly correspond to three theories of international relations: institutionalism, realism, and liberalism. I also argue that pledges, though nonlegal agreements, are emphatically the province of international lawyers: to understand how nonlegal agreements work, one must understand how legal agreements work.[8]

Third, I sketch the relationships between legality, structure, and substance. Prevailing accounts of the choice between pledge and contract focus on a functional trade-off between ex ante credibility and ex post flexibility, and are consistent with two contradictory ways that legality influences the content of substantive obligations. I argue that liberal theory, which privileges domestic political variables and institutions, helps explain when contracts are substantively deep and demanding and when they are shallow and weak. Likewise, legality influences the structure of compliance review, as does the nature of substantive obligations. The core point is twofold. We cannot understand the form or substance of an international accord in isolation because the connections between the various elements shape empirical outcomes. And we cannot understand the connections between form and substance without looking to domestic politics and institutions.

Finally, I conclude with some prescriptive claims about the design of agreements. The central thrust of my analysis—that there are systematic trade-offs between form and substance—suggests that advocates as well as analysts should pay more attention to the complex architecture of international agreements and treat agreement design holistically. In particular, I argue that the widespread preference for contracts often unduly weakens the substance and structure of multilateral agreements when states are uncertain about compliance costs. States often compensate for the risk of their own noncompliance by weakening monitoring or watering down commitments. This tendency can be exacerbated by the need for widespread adherence and the opportunity to exercise power this need creates. Pledges mitigate these tendencies, permitting states to accept more risks in the face of uncertainty. Consequently, although pledges are often

[6] *E.g.*, Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 65 (2000) ("[L]aw's existence is best measured by the influence it exerts.").

[7] This question tracks one that is sporadically investigated in contract law: Why do parties opt out of the legal system? For example, "[t]he diamond industry has systematically rejected state-created law. In its place, . . . the industry [has] developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions . . . ." Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992). However, as Herbert Bernstein and Joachim Zekoll argue, "It is extremely difficult to determine, with any degree of certainty, how widespread the use of permanent 'no-law' agreements is in actual American business practice . . . . [N]o such agreement will ever surface in a court of law unless the parties differ as to its effect." Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. SUPP. 87, 88 (1998).

[8] They are also a central feature of transgovernmental networks, an increasingly important mode of cooperation. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (arguing that governments are increasingly working together through transnational networks, on issues ranging from trade to terrorism, to respond to the challenge of interdependence); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

viewed as second-best alternatives,[9] they can, under some circumstances, be first-best. I suggest why and when this is likely to be true.

I. THREE DIMENSIONS OF INSTITUTIONAL DESIGN

The tripartite conceptual framework in this article is a radical simplification. It does not address important aspects of agreement design, and it dichotomizes those dimensions it does address.[10] This simplicity, however, has a great virtue: it clarifies the interaction of these elements. How these elements relate to each other is the key theme of this article. Because the interaction of design elements has not received systematic attention, even this basic framework illuminates important questions about the architecture of agreements.

Legality

The contemporary international system is suffused with agreements. However, international cooperation need not involve a legally binding or even a written accord. Indeed, many important agreements have been tacit or unwritten.[11] International accords also need not be public. Secret agreements formed a central part of President Woodrow Wilson's critique of the old international order. Less in favor today, they nonetheless were used throughout the twentieth century.[12] "Gentlemen's agreements" also have a long history.[13] Thus, the variety of international agreements is great.[14] Nevertheless, in most cases of interest, written open agreements are drafted to codify and clarify the terms of cooperation. This class encompasses both contracts and pledges. The Vienna Convention on the Law of Treaties defines treaties (contracts) as "international agreement[s] concluded between States in written form and governed by international law."[15] Although treaties are fairly well-defined under international law, if circularly so, the boundaries of soft law are more indeterminate. In practice, usage of the term varies widely. Decisions by international organizations, their internal policies, negotiated agreements between states (or their constituent elements), and even resolutions of the UN General Assembly have all been declared a form of soft law. My focus here, however, is on explicit agreements between states.

Agreements display significant variation in legality. Examples of contracts include the 1945 UN Charter, the 1985 South Pacific Nuclear Free Zone Treaty,[16] the 1989 Convention on the Rights of the Child,[17] the 1995 Convention on Stolen or Illegally Exported Cultural Objects,[18] and the 2001 Convention on Persistent Organic Pollutants.[19] Pledges include the 1975 Helsinki

[9] *E.g.*, Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296, 304 (1977) ("[N]onbinding agreements may be attainable when binding treaties are not . . ."). Schachter "was one of the first promoters of the concept of 'soft law' alternatives to rigid treaty and custom, and perhaps the first to note the potential legal import of 'quasi-legal agreements' and General Assembly resolutions." José E. Alvarez, *In Memoriam: Commemorating Oscar Schachter, the Teacher*, 104 COLUM. L. REV. 556, 558 (2004).

[10] Some of these dimensions have been examined elsewhere. *See, e.g.*, SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). Precision of obligations might arguably merit inclusion as a criterion. I do not focus on precision for reasons discussed below: as the rules-standards literature illustrates, rule precision is not per se advantageous and the significance of precision is closely linked to the structure of review, in particular when institutions are tasked with elaborating standards ex post.

[11] *See, e.g.*, Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495 (1991).

[12] *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 26 (2000).

[13] *See* Hillgenberg, *supra* note 2, at 500; Schachter, *supra* note 9, at 299.

[14] R. R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980).

[15] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 2, para. 1(a), 1155 UNTS 331 (entered into force Jan. 27, 1970).

[16] South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), Aug. 6, 1985, 24 ILM 1440 (1985).

[17] Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (entered into force Sept. 2, 1990).

[18] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 ILM 1322 (1995), *available at* <http://www.unidroit.org/>.

[19] Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 ILM 532 (2001), *available at* <http://www.pops.int>.

Final Act,[20] the 1985 Plaza Accord on Exchange Rates,[21] the 1988 Basel Accord on capital adequacy,[22] the 1992 Non-Legally Binding Authoritative Statement on Forest Principles,[23] the 1997 NATO-Russia Founding Act,[24] and the 2004 pact of the Paris Club of creditor states to forgive Iraqi sovereign debt.[25] Many observers have noted the increased prominence of pledges in international cooperation.[26] While pledges sometimes evolve into contracts, many pledges remain nonbinding permanently.[27] In international monetary affairs, we even observe the reverse: the transformation from contract to pledge.[28]

Substance

Whether pledge or contract, an international accord can vary significantly in its obligations. Substance refers to the substantive commitments the pact contains—for example, does it require a state to refrain from developing nuclear weapons, to restrict fish harvests, or to provide for a twenty-year patent term? Because substance is multifaceted, to simplify my analysis I focus on one key dimension. As others have previously argued, agreements vary widely in depth. Depth is "the extent to which [an agreement] requires states to depart from what they would have done in its absence."[29] Some accords are deep: they require states to make major changes in policy. Others are shallow: they codify what states are already doing or demand only minor changes in behavior. Depth clearly varies for each party to an agreement; what is deep for one state may be shallow for others. Moreover, states may often reserve out of specific provisions, altering the depth of the agreement for them.[30] I put aside these admittedly significant differences and try to capture the overall, or average, depth of an agreement. This is to simplify greatly, but the alternative—to consider the differences among 120 parties, or more—makes analysis impossible.[31]

[20] Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), 14 ILM 1292 (1975) [hereinafter Helsinki Final Act].

[21] Announcement of the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States, Sept. 22, 1985, 24 ILM 1731 (1985), *available at* <http://www.g8.utoronto.ca/finance/fm850922.htm> [hereinafter Plaza Accord].

[22] The International Convergence of Capital Measurement and Capital Standards (Basel Accord), July 1988, and its amendments are available on the Web site of the Bank for International Settlements, at <http://www.bis.org/publ/bcbs04a.htm>. In January 1999, a new capital accord was proposed by the Basel Committee that came to be known as Basel II. International Convergence of Capital Measurement and Capital Standards: A Revised Framework, June 2004, *available at* <http://www.bis.org/publ/bcbsca.htm>.

[23] Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, Aug. 14, 1992, 3 Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26, Annex III (1992) [hereinafter Forest Principles Statement], *available at* <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>.

[24] Founding Act on Mutual Relations, Cooperation and Security, May 27, 1997, NATO-Russ., 36 ILM 1006 (1997), *available at* <http://www.nato.int/docu/basictxt/fndact-a.htm>.

[25] *See* Paris Club Press Release, The Paris Club and the Republic of Iraq Agree on Debt Relief (Nov. 21, 2004), *available at* <http://www.clubdeparis.org/rep_upload/PrIraq21nov04.pdf>; *see also* SC Res. 1483 (May 22, 2003), 42 ILM 1016 (2003).

[26] *E.g.*, Aust, *supra* note 2; Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901 (1999); Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Hillgenberg, *supra* note 2; Edith Brown Weiss, *Introduction* to INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 1 (Edith Brown Weiss ed., 1997); Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50.

[27] Though nonlegally binding, pledges are often connected to the development of customary law. Pledges "sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm." Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law,'* in NON-BINDING NORMS, *supra* note 4, at 1.

[28] Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 661–83 (2000); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573 (2000). Simmons argues that "[i]nternational monetary legalization can be characterized by an inverted 'J' pattern: legalization was nonexistent under the classical gold standard . . . [and] peaked between 1946 and 1971." *Id.* at 600.

[29] George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?* 50 INT'L ORG. 379, 383 (1996).

[30] *See* Vienna Convention on the Law of Treaties, *supra* note 15, Arts. 19–23 (dealing with reservations to treaties).

[31] Individualized assessments require extensive attention to specific national policies—an endeavor that is enormously, even paralyzingly complicated. However, some general claims about the distribution of depth are

The concept of depth does not capture some critical aspects of the substance of agreements. For example, there is a large difference between security alliances and agreements on postal cooperation, even if examples of both require large deviations from prior behavior. But because depth is a variable that cuts across all types of agreements, and because it reflects the degree to which states in the aggregate are committing themselves to change their behavior, depth captures a critical component of cooperation. The World Trade Organization regime[32] is an exemplar of deep cooperation.[33] Extensive rules govern a wide array of trade issues and demand meaningful changes from many parties. Conversely, the Non-Proliferation Treaty[34] and the UN Framework Convention on Climate Change (FCCC)[35] are shallower. The former codified the existing behavior of most states; the latter demanded minor obligations related to reporting and review. I should underscore that codifying behavior can, at times, be significant in that it may prevent change in the status quo—as is certainly true for the Non-Proliferation Treaty. (A sophisticated reading of depth might track agreed obligation against the behavioral trend line, rather than against existing behavior. But I do not engage such subtleties here.)

Again, this concept of depth is a simplification. Yet depth is important because it captures the extent to which states commit themselves to serious changes in behavior.

Structure

Structure refers to the rules and procedures created to monitor parties' performance. An agreement's structure comprises those elements that seek both to provide information about performance and to deter and punish noncompliance. This conception is again purposely limited. Structure does not refer to whether an agreement is "enforced," in the sense that parties in fact are deterred from noncomplying. Structure refers only to the *mechanisms* for monitoring and enforcing performance. Effective enforcement is an outcome that may vary on the basis of a range of other factors: the nature of the parties, the legality and substance of the agreement, the precise sanctions employed, and so forth.

Extensive variation is found in the structure of agreements.[36] Some accords employ third-party dispute resolution accessible only to states, while others grant standing to individuals. Some require only self-reporting, some include on-site inspections, and some penalize violators. Some create no structure of review at all. To simplify this complexity, I again use binary categories: weak and strong. Weak structures are those in which review of performance and sanctions for nonperformance are minimal or nonexistent. In agreements in this category, the parties may self-report, but those reports are not analyzed or are only analyzed collectively. This category also includes systems with no review at all. Strong structures are those in which a central body issues a specific determination about a specific party. Such determinations may concern compliance, based either on the body's own investigations (a "police patrol" system) or on claims of private actors (a "fire alarm" system).[37] Strong structures may, but need not, include sanctions; weak structures never include this feature. Strong review structures add value to raw information about behavior, through publicizing, analyzing, or taking action based on that information. The issuance of party-specific decisions, in other words, constitutes an essential part of strong structures.

plausible. Powerful states are likely to be able to shape commitments to their liking. Consequently, generalized assessments of agreement depth should usually mask the bearing of more depth by weaker states and less depth by stronger states. States whose commitments in an agreement are especially deep are less likely to participate; those whose commitments are especially shallow are most likely to participate.

[32] WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999), *available at* <http://www.wto.org> [hereinafter LEGAL TEXTS].

[33] Downs et al., *supra* note 29, at 391–92.

[34] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161 (entered into force Mar. 5, 1970).

[35] Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 UNTS 108, *available at* <http://unfccc.int/2860.php> [hereinafter FCCC].

[36] *See, e.g.*, ADMINISTRATIVE AND EXPERT MONITORING OF INTERNATIONAL TREATIES (Paul C. Szasz ed., 1999); THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000).

[37] Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 391 (2004).

Scope of the Argument

In advancing this simple tripartite framework, I limit my analysis to agreements between states. I do not analyze the use of agreements between states and nonstate entities or substate units of federal states. While conceptually narrow, this category encompasses the vast majority of major agreements in existence today.

States bargain over international agreements intensively because there are myriad ways to craft an accord. My framework glosses over numerous details, but it is of help in systematically dividing up the many choices states face. Most important, I use this framework to illustrate some basic connections between these three dimensions. By exploring these connections we can improve our understanding of international cooperation and the role of law within it.

II. LAW AND INTERNATIONAL AGREEMENTS

Of the three dimensions discussed above—legality, substance, and structure—legality commands central interest for legal theory because it delimits the scope of law. At bottom, the distinction between contracts and pledges is a distinction between the use of law and the avoidance of law. Contracts create legally binding obligations for states, while pledges create only political or moral obligations.[38] One can loosely analogize this difference to the distinction between law and social norms domestically. Norms are important in many settings; they can produce "order without law."[39] Indeed, society could not function without such norms. But norm-based obligation is not the same as legal obligation, even if the two often overlap. Much recent scholarship aims at unlocking the connection between law and norms—and understanding why actors favor one or the other in specific circumstances.[40]

Though the primary aim of this article is to elaborate the ways that legality, substance, and structure interact, I first parse the meaning of legality in some detail. I do this because of the prominence of the concept of soft law and the significance of legality for state practice.[41] Many scholars argue or assume that the distinction between legally binding and nonbinding agreements is not sharply demarcated—that there is in fact a spectrum of legality.[42] I claim that legality is best understood as a binary, rather than a continuous, attribute. The binary nature of legal obligation gives added force to the argument, developed later in this article, that pledges offer unappreciated benefits under conditions of uncertainty.

The Problem of Soft Law: Continuous and Binary Conceptions of Legality

There is no such thing as "soft law." The concept of soft law purports to identify something between binding law and no law. Yet as an analytic or practical matter no meaningful intermediate category exists. Prior critiques of soft law are generally normative in nature, sometimes focused on the supposed dilution of international law's influence that results from using (or

[38] On the difference, see ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 13–39 (1999); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 121, 157 (1996).

[39] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[40] *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Conference, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998).

[41] Agreements are rarely (if ever) labeled soft law. Instead, analysts claim that they are soft law. The idea goes back decades. Even in 1983 Sir Joseph Gold could write, "The concept of 'soft law' in international law has been familiar for some years, although its precise meaning is still debated." Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AJIL 443, 443 (1983); *see also* Ignaz Seidl-Hohenveldern, *International Economic "Soft Law,"* 163 RECUEIL DES COURS 165 (1979 II).

[42] The categories of substance and structure in my framework are clearly continuous in nature; I only dichotomize them for analytical clarity. The category of legality is different. As Klabbers notes, Hume wrote that "[h]alf rights and obligations, which seem so natural in common life," are "perfect absurdities" when it comes to the law. Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 167 (1996); *see also* Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413 (1983).

talking about) soft law.[43] My critique is more fundamental: soft law agreement is not a coherent concept; nor does it accord with state practice.

The category of soft law has been deployed to encompass two distinct types of agreement. The first is nominally nonbinding but is nonetheless claimed to have soft legal qualities. Many consensus documents that emerged from the wave of UN-sponsored summits in the 1990s are exemplars. The second type, by contrast, is nominally binding but is claimed to be merely soft law owing to deficiencies of the accord, typically in rule precision or enforcement provisions. Under my framework the former is a pledge, and the latter a contract crafted to be shallow and/or to have a weak review structure. This categorical distinction between pledge and contract is more faithful to negotiators' intentions and more useful analytically, because it permits us to evaluate law's relative influence and role. It is this distinction that I defend here.

Consider state practice first. Even a cursory look at state practice demonstrates that international law is a tool that governments employ with care. Thus, perhaps the strongest argument for rejecting the concept of soft law agreements is empirical. Governments, the architects of agreements, behave as if legal agreements are decisively different from nonlegal agreements. They do not accidentally or cavalierly choose between pledges and contracts when negotiating agreements. Nor do they calibrate the legality of pacts in a continuous fashion, designating some softer law, some harder law, some not at all legal, and so forth across a demarcated continuum of legality. Instead, states carefully choose the legal nature of their agreements dichotomously.[44] Only very rarely is there subsequent dispute over the binding quality of an agreement.[45] The negotiation of the Helsinki Final Act, for example, was marked by the importance the parties put on its nonbinding nature.[46] President Gerald R. Ford explicitly declared that "the document I . . . sign is neither a treaty nor is it legally binding on any participating state."[47] A more recent example, also involving the United States and Russia, is the 2002 Moscow Treaty on Strategic Offensive Reductions.[48] The United States sought a pledge, but Russia insisted on a contract.[49] Presidents Vladimir Putin and George W. Bush went publicly back and forth on the issue; Putin's preference for a contract eventually prevailed.[50] State practice, in short, is inconsistent with the continuous or spectrum view of legality in agreements.

[43] For example, Bilder argues that the concept of soft law is dangerous in that it "depreciate[s] the currency of" law. Richard Bilder, *Beyond Compliance: Helping Nations Cooperate, in* NON-BINDING NORMS, *supra* note 4, at 65, 72; *see also* Weil, *supra* note 42.

[44] Negotiators rarely, if ever, label accords "soft law." On the importance of the distinction to governments, see Bilder, *supra* note 43; Weil, *supra* note 42. *But see* Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?* 32 N.Y.U. J. INT'L L. & POL. 591, 661–63 (2000) (suggesting that many government officials are unaware of the hard-soft distinction and, moreover, often do not care about that distinction).

[45] There are occasional hard cases, such as Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 1995 ICJ REP. 6 (Feb. 15) (ICJ holding that an exchange of notes between Qatar and Saudi Arabia and Bahrain and Saudi Arabia constituted a treaty between Qatar and Bahrain). This case is a favorite of those who claim that the line between binding and nonbinding pacts is not always easy to discern. A treaty between states is clearly binding, however, and hard cases like *Qatar* involve highly unusual, even unique, arrangements. And as Klabbers illustrates, the cases in which judicial bodies purportedly apply soft law turn out, on inspection, to show otherwise. Klabbers, *supra* note 42, at 172–77.

[46] *See* DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001); Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?* 70 AJIL 242, 246–49 (1976) (Russell was chief U.S. negotiator); Erika B. Schlager, *A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE, in* NON-BINDING NORMS, *supra* note 4, at 346.

[47] European Security Conference Discussed by President Ford, 73 DEP'T ST. BULL. 204, 205 (1975). The Organization for Security and Co-operation in Europe (OSCE), the follow-on organization for the broader Helsinki process, continues to rely on nonbinding commitments. *See generally* Ratner, *supra* note 44.

[48] Treaty on Strategic Offensive Reductions (SORT), May 24, 2002, U.S.-Russ., 41 ILM 799 (2002), *available at* <http://www.state.gov/t/ac/trt/18016.htm#1>. The U.S. Senate consented to the Treaty on March 6, 2003, and the Russian Duma on May 14, 2003. *See President Putin: Strategic Offensive Reductions Treaty Is Crucial*, PRAVDA, May 13, 2003, *available at* <http://newsfromrussia.com/main/2003/05/13/46889.html>; Merle D. Kellerhals Jr., U.S. Senate Unanimously Approves Moscow Treaty (Mar. 7, 2003), *available at* <http://www.useu.be/Categories/Defense/Mar0703MoscowTreaty.html>.

[49] Peter Slevin, *Ambitious Nuclear Arms Pact Faces a Senate Examination*, WASH. POST, July 7, 2002, at A8.

[50] "This new, legally-binding Treaty codifies the deep reductions announced by President Bush . . . and by President Putin at [the] Summit . . . ." Fact Sheet: Treaty on Strategic Offensive Reductions (May 24, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/05/20020524-23.html>.

Rethinking Soft Law

Scholars continue to be drawn to the concept of soft law agreements despite the weak evidence of state practice. Yet the category of soft law agreements faces conceptual problems as well. To be sure, the notion of soft law accords with a common intuition: in a decentralized, nonhierarchical legal system, some pacts and some rules are clearly more consequential than others.[51] The proliferation of agreements in the postwar era, especially in relation to multilateral public goods-oriented cooperation, has led to numerous accords that lack the traditional indicia of international law. In noting the increased prevalence of pledges, international lawyers have sought to incorporate this development in the discipline by labeling these agreements soft law (rather than treating them as nonlaw). As noted above, some agreements that expressly purport to be contracts are also said to be soft law because they are deficient in precision or enforcement measures. Under the rubric of soft law fall both pledges and those contracts that lack features deemed necessary for an accord to be "hard" law. Some analysts even argue that the soft quality of a commitment does not depend on the nature of the pact that contains it but, rather, on the particularities of the commitment itself.[52] Allegedly, language that is otherwise embodied in a legally binding agreement, yet is vague, hortatory, or heavily qualified, is also soft law.[53] Thus, scholars speak of both soft law agreements and soft law provisions within ostensibly hard law agreements.

For example, Friedrich Kratochwil states that

> highly specific declarations referring to particular controversies are construed as obligations of "hard" law, even if made in unconventional contexts, while certain declarations of principle, or agreements on guidelines, only have a "soft" character, *even if made by formal instruments*. A *soft* construction suggests itself, in that case, precisely because principles and guidelines are of a higher order of abstraction.[54]

Likewise, Christine Chinkin argues that "[t]he use of a treaty form does not of itself ensure a hard obligation. . . . [I]f a treaty is to be regarded as 'hard', it must be precisely worded and specify the exact obligations undertaken or the rights granted."[55] An example in Chinkin's view is the International Covenant on Economic, Social and Cultural Rights (ICESCR),[56] which contains obligations qualified by phrases like "as appropriate." While these writers identify an important fact about many international commitments—that they are intentionally weak or imprecise—dubbing them soft law is not only inconsistent with state practice. It also obfuscates rather than illuminates their character. As these examples suggest, assumptions about precision and flexibility often undergird claims about soft law, especially for putative contracts. Imprecise commitments are declared to be soft because they impart discretion to parties, or use general phrases whose content is open to interpretation. Yet imprecision does not alter the legal quality

[51] Klabbers, *supra* note 42, at 179. This intuition, of course, is equally true of domestic legal norms. Some are influential, some pointless or moot, some very effective, some wholly ineffective. None of this is germane to their status as law.

[52] *E.g.*, FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 200–01 (1989) (noting that "it is highly significant that the hardness or softness of [rules] can no longer be derived simply from the formality or genesis of the instrument"); *see also* Boyle, *supra* note 26, at 906–07; Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 429–30 (1991); Weiss, *supra* note 26, at 3.

[53] "Sometimes the term 'soft law' also refers to the provisions in binding international agreements that are hortatory rather than obligatory." Weiss, *supra* note 26, at 3.

[54] KRATOCHWIL, *supra* note 52, at 203.

[55] Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989); *see also* Ratner, *supra* note 44, at 614–15; Shelton, *supra* note 27, at 4 (referring to the "[r]ecent inclusion of soft law commitments in hard law instruments"). Paul Szasz likewise claimed that soft law includes "hortatory rather than obligatory language contained in an otherwise binding instrument." Paul C. Szasz, *General Law-Making Processes*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 27, 32 (Christopher C. Joyner ed., 1997).

[56] International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, Art. 19, 993 UNTS 3, 10.

of rules. These provisions are better understood as akin to standards, rather than rules.[57] Standards are ubiquitous in domestic law (e.g., "reasonable person," "due process," "good faith"). In fact, many domestic statutes contain language quite similar to that in the ICESCR.[58] In domestic contexts the imprecise nature of standards does not alter their legal character. As the rules-standards debate demonstrates, standards offer many advantages; hence, it is unsurprising that states often choose standards over rules when crafting international agreements.

One might argue that standards in domestic law operate differently from standards in international law because the domestic examples are really forms of delegation to judges. Standards delegate substantial decision-making power to courts; judicial decisions render the vague provision concrete in a specific case. This, however, is an argument about the *structure* of agreements rather than their legality or substance. Conflating the lack of delegation in an agreement's structure with its legal quality thus confuses two distinct issues. International accords can easily be negotiated to provide for an adjudicative body that is delegated the task of interpreting standards ex post. Indeed, the WTO Appellate Body regularly engages in just such interpretation, elaborating ambiguous terms and filling gaps.[59] If the ICESCR created a similar dispute settlement body, the provisions referred to above could likewise be elaborated and adjudicated.[60] In sum, there is nothing inherent in the provisions of the ICESCR that renders them soft; they are standardlike commitments that are *intentionally* unconnected to a structure of authoritative delegated interpretation.

Thus, calling imprecise provisions "soft law" muddles several issues. Obligations in the Covenant are legally binding because the parties intended them to be legally binding. That the Covenant lacks a structure of ex post elaboration does not alter this intent—though it clearly may alter the effectiveness of these obligations. To be sure, international law is likely to be more effective when enforcement is possible—all else equal (below I discuss why all else is rarely equal). But legal obligation can exist even if it cannot be enforced.[61] Declaring all legal rules that are not susceptible of enforcement to be soft law not only misses this fundamental point,[62] but also makes law's definitional qualities dependent on the very effect these qualities are typically claimed to produce. This approach—international law comprises those rules that affect state behavior[63]—becomes circular once any claim about the relative influence of international law is made. Conflating legality and substance thus stymies the study of law's relative influence on state behavior. This reasoning is particularly damaging because, as much interdisciplinary scholarship suggests, international agreements influence behavior through many causal pathways: lowering transaction costs, creating focal points, mobilizing domestic actors, enhancing monitoring, and altering the nature of justification, among others.[64] While legality may render commitments less

[57] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

[58] The Hostage Act, for instance, requires the president to "use such means, not amounting to acts of war and not otherwise prohibited by law as he may think necessary and proper" to obtain the release of a U.S. citizen held hostage by a foreign government. 22 U.S.C.S. §1732 (2005). Likewise, the National Environmental Policy Act requires the use of "all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources." 42 U.S.C. §4331(b) (2000 & Supp. 1 2002).

[59] Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 337–38 (1999). Another example is the arbitral award construing "best efforts" in the U.S.-UK Air Services Agreement. Samuel M. Witten, *The U.S.-UK Arbitration Concerning Heathrow Airport User Charges*, 89 AJIL 174, 176 (1995).

[60] Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AJIL 462 (2004).

[61] Many rules of constitutional law have little prospect of judicial enforcement. Yet we do not consider these rules to be "soft law." There is no jurisprudential reason to treat international legal rules differently.

[62] R. R. Baxter, for example, wrote that some commitments had the "characteristic of not creating legal obligations which are susceptible of enforcement, in whatever sense the concept of 'enforcement' is employed. They are all 'soft' law." Baxter, *supra* note 14, at 554.

[63] Brunnée & Toope, *supra* note 6; *see also* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2621 (1991) ("[A] necessary criterion for the validity of any [legal rule] . . . is the willingness of . . . states and international bodies . . . to enforce it.").

[64] See, for example, the instructive table on international norms and institutions from the perspective of regime theorists and international lawyers, *in* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205, 220 (1993).

easily reversed and therefore more credible, it is neither a necessary nor a sufficient cause of change in state behavior. To move forward in our understanding of how international cooperation is organized and sustained, we must carefully distinguish law as an independent variable from behavior as a dependent variable.[65]

One might still argue that the difference between terming a vague, but nominally legally binding agreement a "soft law agreement" vs. terming it, as I do here, "a shallow contract" is semantic. But for several reasons the distinction is not merely semantic. First, legality is important to state officials, as evidenced by the often-considerable debate over whether a proposed pact will be a contract or a pledge. Little, if any, state practice supports the concept of law that is soft, but nonetheless law. Second, as discussed further below, an agreement's legality often has implications for domestic law, which in some cases may explain why states—and private actors—argue over legality. Third, the politics of legal agreement as opposed to political agreement are distinctive. Legalization "mobilizes different political actors and shapes their behavior in particular ways."[66] Thus, the behavioral *result* of a pledge or a shallow contract may be similar or even identical, but the *reasons* for that behavioral outcome are distinct. Indiscriminately lumping any agreement that appears weak or flexible under the rubric of soft law conflates distinct concepts and obscures our ability to tease out the particular influences of law, substance, and structure.

I have devoted considerable attention to legally binding agreements that are nonetheless said to be soft. Let me briefly touch on the opposite: agreements that are avowedly nonlegal yet, it is claimed, are endowed with some soft legal effect. Typically, this claim attaches to declarations and decisions of multilateral conferences, such as the 1995 Beijing Declaration,[67] or similar collective and public resolutions of states. The animating idea is that these declarations are intended to influence state behavior and therefore possess some minimum indicia of international law. This idea conflates intentions with formal qualities. Law does not comprise all efforts to shape state action. And, like the claim that putatively legal commitments are in fact soft law, there is a dearth of state practice in support of the idea that formally nonlegal agreements are actually quasi-legal. No evidence suggests that state actors view commitments that external analysts have labeled soft law, such as the Beijing Declaration and the Basel Accord on Capital Adequacy, as legal commitments at all. Rather, they frequently stress their nonlegal character.[68] This is not to deny that states often negotiate pledges that have the rough look and feel of legally binding texts. But they do not expressly or impliedly claim that these agreements are lawlike accords in disguise. That many nonbinding commitments ultimately influence state behavior illustrates the complexity of world politics, not the legal character of those commitments.

My criticism of the concept of soft law is not meant to imply that nonlegal pacts fall outside the domain of international lawyers. For several reasons, both pledges and contracts ought to be central parts of contemporary lawyers' repertoires. The choice between pledge and contract is a choice between employing and avoiding law. Lawyers have special expertise on the effects of law. This choice is not a simple one, and understanding its fundamental effects is crucial to good agreement design. Moreover, many of the features of pledges are similar—or can be drafted to be similar—to those familiar to lawyers from treaty law. And some of the factors that explain

[65] Likewise, it is essential to recognize that legal and political agreements are quite closely aligned but nonetheless empirically and causally distinct. In this sense my argument draws on the Oppenheimian tradition. *See, e.g.*, Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 403 (2002).

[66] Kahler, *supra* note 28, at 661.

[67] Fourth World Conference on Women, Beijing Declaration and Platform for Action, Sept. 15, 1995, UN Doc. A/CONF.177/20 & Add.1 (1995).

[68] As the Basel Committee, which negotiated the Basel Accord and Basel II, *supra* note 22, makes clear, "The Committee does not possess any formal supranational supervisory authority, *and its conclusions do not, and were never intended to, have legal force*" (emphasis added). The Basel Committee on Banking Supervision (n.d.), *available at* <http://www.bis.org/bcbs/aboutbcbs.htm>.

the operation of contracts, such as reciprocity and transaction costs, apply to pledges as well. Finally, pledges, as many scholars have noted, frequently beget contracts.[69]

States "cooperate without law all the time."[70] As pledges grow in importance in international relations, lawyers must neither ignore them nor attempt to render them quasi law through conceptual redefinition. Rather, legal scholars and political scientists alike must systematically study the two forms of cooperation and the differential effects each produces.

III. THE CHOICE OF LEGAL FORM IN INTERNATIONAL AGREEMENTS

While the pledge-contract distinction is fundamental, few theories have been advanced as to how this choice is made. Until recently, political scientists ignored issues of legal form—and international law itself—entirely.[71] International lawyers have long been interested in the phenomenon of soft law but have generally eschewed theories of why and when states choose to create or avoid legally binding commitments. The few efforts to date have rarely moved beyond more or less ad hoc lists of factors that appear to influence the legality of agreements. These lists are helpful, but—much like multifactor lists in adjudicatory doctrine—they are often unsatisfyingly malleable and indeterminate.

In the existing scholarship on choice of instruments, a core set of arguments appear repeatedly. These arguments are broadly "functionalist."[72] Functionalist explanations assume rational actors; these actors design institutions based on the differing outcomes anticipated. As Robert Keohane explains, "Functional explanations in social theory . . . are generally *post hoc* in nature . . . . [They assume] that institutions can be accounted for by examining the incentives facing the actors who created and maintain them."[73] Effects, in short, are causes. Below I discuss the prevailing functionalist explanation of legality in international agreements, critique that explanation, and offer some additions to it.

Functional Arguments

What desired effects drive states to choose a pledge or a contract? Why do states not always negotiate contracts? One recent, and representative, study suggests the following reasons why states choose pledges over contracts.[74] Pledges (1) offer greater flexibility; (2) are more preliminary, and hence less precedential and public; (3) can be made with parties not diplomatically recognized or incapable of signing treaties; and (4) rarely require ratification and legislative action (hence take "effect" faster). The last reason focuses on domestic law and politics: variables associated with liberal theories of international relations. I return to this approach below. The third flows from doctrinal aspects of public international law. The first two, however, are core elements of the functional approach.

Many functional analyses stress the importance of flexibility to states. For example, Charles Lipson argues that pledges are sometimes preferred because they make fewer informational demands on governments than contracts.[75] As a result, a pledge enables states to adjust or exit

[69] The various human rights conventions arguably build on and extend the Universal Declaration of Human Rights, which is nonbinding. *See* Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

[70] Goldsmith & Posner, *supra* note 26, at 116.

[71] As the late Abram Chayes liked to say, political scientists fear using the "*L* word." That fear is fading. *See, e.g.*, LEGALIZATION AND WORLD POLITICS (Judith Goldstein et al. eds., 2001); Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289, 290–91 (2001).

[72] The functional claims in the literature are remarkably uniform. *See, e.g.*, BILDER, *supra* note 3; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Aust, *supra* note 2; Boyle, *supra* note 26; Goldsmith & Posner, *supra* note 26; Hillgenberg, *supra* note 2; Lipson, *supra* note 11; Weiss, *supra* note 26; *see also* Chinkin, *supra* note 55; Dupuy, *supra* note 52; Mary Ellen O'Connell, *The Role of Soft Law in a Global Order*, *in* NON-BINDING NORMS, *supra* note 4, at 100.

[73] ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 80 (1984).

[74] Hillgenberg, *supra* note 2, at 501.

[75] Lipson, *supra* note 11.

the agreement more easily later on. This flexibility is advantageous when uncertainty is high.[76] Thus, pacts within the Organization of Petroleum Exporting Countries (OPEC) are pledges—oil market conditions change rapidly—whereas arms control accords are usually contracts—underlying changes in weaponry or in the distribution of power are likely to be slow.[77] Pledges also avoid a prominent public commitment, and hence have lower reputational costs. Finally, pledges are faster to negotiate and come into "force" immediately. Kenneth Abbott and Duncan Snidal similarly argue that the major advantage of pledges is flexibility. Pledges, they claim, also produce greater opportunity for compromise when state preferences are deeply divergent.[78] And, as others have noted, pledges do not bring into play the interpretive rules of the Vienna Convention on the Law of Treaties.[79]

Despite these advantages it is obvious that many (if not most) agreements are contracts. Functionalists generally point to the need for credibility of commitments to explain the predominance of contracts. Credibility is a core concern in an anarchic system with no central body to enforce agreements. Unlike pledges, contracts "signal . . . intentions with special intensity and gravity,"[80] and therefore bolster the credibility of commitments. Moreover, as a matter of domestic law, contracts must often be ratified by legislatures. This process adds to the signaling dynamic.[81] Flexibility, while often useful, can be problematic when agreements require states to undertake costly actions that depend on complementary actions by other states. Thus, contracts, with their ex post inflexibility, increase the incentive to make the agreement-specific investment ex ante. Even with a contract, of course, credibility is a problem because states may renege on their commitments. Realists frequently note this en route to casting doubt on the capacity of states to cooperate effectively beyond a few circumscribed areas.[82] Nonetheless, contracts are widely believed to be more credible than pledges, even if analysts may differ over how credible contracts (or pledges) generally are. This is true both because contracts evidence greater seriousness and because, by explicitly using international law, contracts tie the commitment to the body of international legal rules. If states believe that contracts raise the likelihood of compliance by others, they will be more likely themselves to comply. Abbott and Snidal elaborate this argument by claiming that states prefer contracts (or "hard law")[83] under four conditions: when the risk of opportunism is high; when noncompliance is hard to detect; when they may serve as a sorting device to form clubs of like-minded parties; and when executive branches use them as a means of committing other branches of government.[84]

In sum, credibility and flexibility lie at the core of functionalist analysis. Rational states trade off ex ante credibility for ex post flexibility. The central explanatory variables are (1) uncertainty in the underlying cooperative issue; (2) desire for speed or confidentiality; (3) the risk of opportunistic behavior by other states; and (4) diversity in interests and preferences. When the potential

[76] *Id.*; *see also* GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995); Koremenos, *supra* note 71; Beth A. Simmons, *International Efforts Against Money Laundering*, *in* NON-BINDING NORMS, *supra* note 4, at 244, 262 (noting that the use of pledges "may be the most appropriate way to deal with rapidly changing financial practices and market conditions").

[77] Lipson, *supra* note 11, at 519–20; *see also* Koremenos, *supra* note 71; Simmons, *supra* note 76, at 262. There are arms control pacts that are pledges, especially in the areas of technology export controls. David S. Gualtieri, *The System of Non-Proliferation Export Controls*, *in* NON-BINDING NORMS, *supra* note 4, at 467; *see also* Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 420 (1999).

[78] Abbott & Snidal, *supra* note 72, at 423, 438 (stressing the costs associated with delegation); *see also* P. W. Birnie, *Legal Techniques of Settling Disputes: The "Soft Settlement Approach,"* *in* PERESTROIKA AND INTERNATIONAL LAW 177 (W. E. Butler ed., 1990); Dupuy, *supra* note 52, at 429–30; Seidl-Hohenveldern, *supra* note 41, at 193; Szasz, *supra* note 55.

[79] Goldsmith & Posner, *supra* note 26, at 130–32.

[80] Lipson, *supra* note 11, at 508; *see also* Goldsmith & Posner, *supra* note 26, at 124–25; Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002).

[81] Lisa L. Martin, The United States and International Commitments: Treaties as Signaling Devices (2003) (unpublished manuscript, on file with author).

[82] *E.g.*, Downs et al., *supra* note 29.

[83] A category similar to contracts, but with focus on precision and delegation as well.

[84] Abbott & Snidal, *supra* note 72, at 429–30. In the international relations literature, opportunism refers to deliberate noncompliance (or cheating) in a prisoner's dilemma or in other analogous situations.

for opportunism is high, uncertainty low, or preferences broadly aligned, contracts are favored. But when uncertainty is high, opportunism low, preferences highly divergent, or speed or confidentiality of the essence, pledges are favored. And though not stressed by functionalists, functionalism suggests that pledges ought to be relatively common in coordination situations. In coordination situations incentives to violate commitments—once agreed upon—are quite low.[85] Similarly, this functional analysis implies that pledges ought to be relatively more common during the postwar period, as the number of states in the international system increased dramatically and divergences between North and South became pronounced. This functional theory, and its corollaries, is testable and explains a significant portion of state behavior. Yet it suffers from several limitations.

The Limits of Functionalism

A critical question is how the different factors interrelate. If uncertainty is high (predicting a pledge), yet the risk of opportunism is also high (predicting a contract), what happens? How, in short, are these factors traded off?

Empirically, it is not hard to find cases that seem inconsistent with the functional approach, or at least suggest modifications to it. For example, despite the functionalist prediction that states will prefer pledges under high uncertainty, many agreements on subjects of high uncertainty are actually contracts. Thus, climate change is marked by significant uncertainty, yet the 1992 UN Framework Convention on Climate Change[86] and the Kyoto Protocol to the FCCC[87] are both contracts. At the same time as the FCCC was being negotiated, the same set of states was drafting what was to have been a contract on forest management. Instead, it became a pledge, the Non-Legally Binding Authoritative Statement on Forest Principles,[88] even though preference cleavages were quite similar in both cases. Most important, uncertainty about forests is low, not high. Hence, the resulting pattern turned out to be the opposite of that predicted by functional accounts.

The risk of opportunism, however, may be the key causal variable. In climate change the risk is high. Emissions reductions are costly, yet a stable climate is a public good. In forest preservation the risk is low: healthy forests are a quasi-public good, but much of their benefit accrues to the state itself. If opportunism is the key variable, these simultaneous choices among a stable set of states—a contract for climate change, but a pledge for forest protection—make sense. This amended functional approach suggests that pledges will be observed only when the risk of opportunism is low *and* uncertainty high. Even this theory, however, faces anomalies. OPEC commitments are famously plagued by opportunism, yet commonly said to exemplify a pledge.[89] (Path dependence and tradition may also play a role, leading states to favor certain forms of agreement in certain areas simply because of a long history of doing so.) Functional accounts face another problem: they tend to draw the distinctions between contracts and pledges in overly stark terms. For example, considerable flexibility can be built into contracts in the drafting process. Some contracts, such as fisheries regimes, incorporate provisions for ex post adjustments to commitments. Others include escape clauses, reservations, sunset deadlines, or exit

[85] The incentive to defect is not zero. Some coordination games create incentives for one party to defect publicly to move the equilibrium. In general, however, "no incentive exists for surreptitious cheating. Since the point of diverging from an established equilibrium is to force joint movement to a new one, defection must be public." Lisa L. Martin, *The Rational State Choice of Multilateralism*, *in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 91, 102 (John Gerard Ruggie ed., 1993). Coordination games refer to situations in which no party has an incentive to defect surreptitiously from the agreed standard, though there may be disagreement about the choice of the standard. A common example is driving on the right or the left: no party has an incentive to deviate once the standard has been chosen.

[86] FCCC, *supra* note 35.

[87] The Kyoto Protocol is an amendment to the FCCC. It was opened for signature on March 16, 1998, and came into force on February 16, 2005. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, UN Doc. FCCC/CP/1997/7/Add.2, *available at* <http://unfccc.int/resource/docs/convkp/kpeng.html>.

[88] Forest Principles Statement, *supra* note 23.

[89] Lipson, *supra* note 11, at 519–20.

provisions. In short, there are many ways to make an agreement flexible. As a result, we cannot satisfactorily explain the choice to negotiate a pledge simply as the product of a preference for flexibility on the part of negotiators.

Similarly, pledges are not the only solution to preference cleavages. Many contracts grow out of deep divisions. States can use substantive ambiguity to address preference heterogeneity. The recently negotiated Cartagena Protocol on Biosafety[90] graphically illustrates the ability of negotiators to draft contracts that paper over differences.[91] Contracts sometimes span preference cleavages by simply postponing resolution of a controversial issue: the Cartagena Protocol itself grew out of just such a provision in the Convention on Biological Diversity.[92] To be sure, in many instances pledges have been used to bridge cleavages. Yet contracts can be used for the purpose as well. Why was a contract chosen for global human rights cooperation in the International Covenant on Civil and Political Rights[93] but rejected for East-West human rights cooperation during the Cold War?[94] Why was a contract rejected for a forests accord but accepted for a contemporaneous climate accord?

In the last analysis, the choice between pledge and contract is difficult to account for with a purely functional approach. While pledges clearly facilitate compromise between divergent states, contracts are often employed when preferences are heterogeneous. Many pledges can be found between similar states.[95] State choices, moreover, often do not appear to reflect uncertainty; and since flexibility can be built into a contract directly, governments need not, and frequently do not, resort to pledges when faced with high levels of uncertainty. One way to strengthen the explanatory power of functionalism is to focus on opportunism. However, this revision also meets with some empirical anomalies: pledges have been used in situations where opportunism appeared likely (e.g., OPEC, the "30% Club" in the nitrogen oxides agreement in Europe, the Paris Club of creditor states[96]) or have been strongly proposed in such situations, even if not adopted (the Bush-Putin arms negotiations). But these problems are fewer, suggesting that the risk of opportunism may be central to the choice between legal and nonlegal agreement.

The fact that flexibility can be readily produced in contracts may explain yet another problem with functional accounts: the apparent lack of pledges in many key areas of cooperation. While functionalists do not predict a particular quantity, the theory suggests that pledges should be very common. Uncertainty is endemic in world politics; and many cooperative situations are not plagued by opportunism, either because the level of cooperation is low or because the situation is a coordination game. Yet it is difficult to argue that pledges dominate major multilateral negotiations. Admittedly, pledges are not uncommon. But they do not constitute the primary mode of agreement in areas such as the environment and human rights, where uncertainty is arguably highest and, at least for human rights, the risk of opportunism low. They are unusual—some say nonexistent—in arms control.[97] They are similarly scarce in trade, investment, and intellectual property. They do not necessarily predominate even in areas characterized by coordination

[90] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 ILM 1027 (2000), *available at* <http://www.biodiv.org/>.

[91] Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AJIL 606, 628 (2002).

[92] Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79, *available at* <http://www.biodiv.org/>.

[93] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

[94] In part, the choice of a contract for the ICCPR may reflect the prior existence of a pledge, in the form of the 1948 Universal Declaration of Human Rights. *See* note 69 *supra*.

[95] Transgovernmental networks of regulators, for instance, frequently employ pledges and tend to be most active among states that are broadly similar in preferences and regulatory approaches. Raustiala, *supra* note 8.

[96] On the "30% Club," see text at notes 195–96 *infra*. On the Paris Club, see its Web site, <http://www.clubdeparis.org>.

[97] *See* Richard L. Williamson Jr., *International Regulation of Land Mines*, *in* NON-BINDING NORMS, *supra* note 4, at 505, 517. Pledges in the arms control area are concentrated in the export control arena, which Williamson considers distinct. Williamson notes that "there are no non-binding instruments negotiated by the relevant parties that would constitute a soft law arms control instrument." *Id.* at 517; *see also* Gualtieri, *supra* note 77 (discussing export control regimes and noting that the Non-Proliferation Treaty and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163, are binding, but that supplier group arrangements such as the Zannger Committee and Nuclear Supplier Group are not).

games, such as air traffic control.[98] Moreover, pledges appear concentrated in distinct areas, such as international monetary affairs.[99] This is not to claim that pledges are rare, but rather to claim that functionalism implies that pledges should be quite common.

In sum, functionalism explains much about the design of agreements. But it faces a twofold problem: the alleged advantages of either pledges or contracts are much more contingent in practice than the theory suggests, and the relative frequencies of the two choices are imbalanced: pledges appear to be less common than a reasonable reading of functional theory suggests. Those pledges that do exist are clustered in certain areas of cooperation.

The Domestic Politics of International Cooperation

In this section I look to the role of domestic politics and institutions as a means to supplement and amend functional accounts.[100] This approach draws on liberal international relations theory.[101] Because on its own liberal theory says little about whose preferences get realized in world politics, I also look to realist premises about power.[102] These premises carry particular weight when examining endogenous change in agreement features.

The liberal framework. Liberal international relations theory makes three core assumptions. First, individuals and private groups are the fundamental actors. Second, these actors use the state as a means to their preexisting ends. Third, the configuration of interdependent state preferences ultimately determines state behavior. Liberal theorists recognize the importance of realist conceptions of power but stress that liberalism provides a unique understanding of power: one rooted in a society's "willingness to pay" for certain ends.[103] I make three further assumptions. First, I assume that states care moderately about compliance with international law. This concern is not overwhelming—states, to be sure, violate their legal obligations—but it is present. This assumption is realistic rather than heroic: substantial evidence indicates that many states try seriously to comply with international law,[104] and that they seek to ensure, when negotiating agreements, that they can comply with them. Second, I assume that states are moderately risk averse.[105] They are cautious about undertaking commitments in the face of uncertainty. Third, as a starting point I assume that the respective choices of the legality, substance, and structure of an agreement do not influence one another. This assumption is not realistic, but it is useful for laying out the basic argument. I later relax this assumption and show how these choices interrelate. Supplementing functional accounts with liberal insights helps illuminate how and why legality, substance, and structure interact in the design of agreements.

I consider three explanatory factors: domestic preferences, domestic institutions, and relative state power. Domestic preferences refer to the demands of domestic constituencies for or against cooperation. My first hypothesis is that governments negotiate agreements—and negotiate agreements in a particular form—not primarily in hopes of solving functional problems but in response to demands of domestic constituencies. Failure to satisfy the preferences of these "constituencies for cooperation" gives rise to domestic costs for governments.[106]

[98] For example, the Chicago Convention on International Civil Aviation is a contract. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295, *available at* <http://www.icao.int/cgi/goto_m.pl?icao/en/takeoff.htm>.

[99] *See* Plaza Accord, *supra* note 21; Basel Accord & Basel II, *supra* note 22.

[100] Hence, I am not claiming that functional accounts are fatally flawed. Rather, "domestic politics complements . . . functionalist explanations for legalization by supplying an explanation for government preferences." Kahler, *supra* note 28, at 667.

[101] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[102] "States first define preferences—a stage explained by liberal theories of state-society relations. Then they debate, bargain, or fight to particular agreements—a second stage explained by realist and institutionalist (as well as liberal) theories of strategic interaction." Moravcsik, *supra* note 101, at 544.

[103] *Id.* at 523–24.

[104] BILDER, *supra* note 3, at 7–10; ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 1–28 (1995); Raustiala & Slaughter, *supra* note 5.

[105] DOWNS & ROCKE, *supra* note 76, at 16.

[106] Kahler, *supra* note 28, at 675, uses a similar concept of "compliance constituencies."

What are these preferences? Preferences about cooperation obviously vary widely. Some domestic actors will strongly oppose a pact, while others will demand one. But there is little evidence that demandeurs prefer pledges as a first-best choice. Rather, as many commentators have noted, they almost always favor contracts.[107] For example, the recent land mines convention[108] was spearheaded by an alliance of nongovernmental organizations (NGOs). These NGOs did not seek a pledge: they demanded a contract.[109] Likewise, the pharmaceutical and entertainment industries in the United States did not demand a pledge when they sought to strengthen intellectual property protection in the 1980s; they demanded, and received, a contract, the Trade-Related Intellectual Property Agreement of the WTO, or TRIPS.[110] The systematic preference for contracts accords with the prevailing view that pledges are weak, ineffective, and inferior to contracts.[111] (A similar belief underlies the claim that contracts are more credible than pledges, though this claim can have a self-fulfilling quality.) In many areas of cooperation—such as the environment, arms control, trade, and human rights—the preference for contracts is pervasive. Indeed, in these areas negotiations that end in a pledge are often dubbed failures, while those that produce contracts, though subject to criticisms about substance or structure, are largely considered successes.[112] For example, as Dinah Shelton states regarding international labor law, "It is notable that here, as in other contexts, non-state actors favor binding instruments . . . ."[113] Elsewhere she argues similarly that "[i]t was clear at the Rio Conference on Environment and Development that [NGOs] had a strong preference for a binding Earth Charter over the ultimately-adopted Rio Declaration, and that states were unwilling to accept a legally binding text because of the consequences flowing from legal obligations."[114] Likewise, Douglass Cassel claims:

> The long-term question may be not whether human rights hard law is, in fact, more likely than soft law to induce compliance, but whether it is so perceived by NGOs, issue networks, elites, the media, and even governments. It seems that the binding nature of the norm is significant. Human rights hard law tends to be perceived as raising the moral, political, and, of course, legal stakes of non-compliance.[115]

Correctly or incorrectly, many domestic groups demand contracts when they favor cooperation.[116] Liberal theory suggests that this bias helps explain why contracts are so common. I do not claim that domestic constituencies always favor contracts (indeed, they may oppose any

[107] *See* Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, *in* NON-BINDING NORMS, *supra* note 4, at 393; O'Connell, *supra* note 72; Shelton, *supra* note 27, at 9–10; Williamson, *supra* note 96; *cf.* Christine M. Chinkin, *Normative Development in the International Legal System*, *in* NON-BINDING NORMS, *supra* note 4, at 21, 31 (arguing that nongovernmental organizations "view the soft/hard law distinction as carrying little weight").

[108] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997), *available at* <http://www.icrc.org>.

[109] Williamson, *supra* note 97.

[110] MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY (1998); *see* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *reprinted in* LEGAL TEXTS, *supra* note 32, at 321.

[111] *See, e.g.*, Ratner, *supra* note 44, at 653 (arguing that there is "an implicit assumption that hard law will affect behavior more than will soft law").

[112] *See* William K. Stevens, *Lessons of Rio: A New Prominence and an Effective Blandness*, N.Y. TIMES, June 14, 1992, §1, at 10 ("Environmentalists attacked the [nonbinding forest principles] as hopelessly weak, even a step backward . . ."). This view has changed little over the intervening decade. *See, e.g.*, Maria Adebowale et al., Environment and Human Rights: A New Approach to Sustainable Development (Int'l Inst. for Env't & Dev., May 2001), *available at* <http://www.iied.org/docs/wssd/bp_envrights.pdf> (noting that "('soft law') treaties such as the Rio agreements are an inadequate basis for effective control of [globalization]").

[113] Dinah Shelton, *Commentary and Conclusions*, *in* NON-BINDING NORMS, *supra* note 4, at 449, 458. That said, pledges are common in the International Labour Organization system.

[114] Shelton, *supra* note 27, at 9–10.

[115] Cassel, *supra* note 107, at 401.

[116] Domestic preferences are asymmetric in another dimension. There are always domestic actors that oppose cooperation as well as those that prefer it. Those that prefer a new agreement to the status quo (which may or may not be "no agreement") generally demand a contract. But it does not follow that domestic actors that prefer the status quo therefore demand pledges. Rather, there are three relevant choices: pledges, contracts, and no agreement. While there is little empirical evidence, it appears to be rare for domestic actors to demand pledges as a first-best choice. And domestic actors opposed to new cooperation generally oppose any pact at all, though they may ultimately prefer a pledge to a contract.

agreement at all). I claim only that domestic actors that prefer cooperation exhibit a decided tendency in favor of contracts. This preference skews the supply of agreements away from what a pure functional theory would predict. The result is more contracts, and fewer pledges.

Domestic institutions and the approval of agreements. Liberal theory stresses the preferences of private actors. But it also looks to domestic institutions as important intervening variables. Typically, international accords—especially contracts—must be approved by some domestic process. In democratic states the executive branch often negotiates agreements and presents them to the legislature—or part of the legislature—for formalized consent prior to ratification. In parliamentary democracies such as the United Kingdom, the executive controls the legislature and thus the process of legislative approval may be largely pro forma. In presidential systems the legislative role is more profound.[117]

The choice between pledge and contract is not unrelated to these domestic procedures. Unlike a contract, a pledge in the United States is not subject to congressional action. The Case Act mandates that "any international agreement . . . other than a treaty" be transmitted to Congress "as soon as practicable . . . but in no event later than sixty days thereafter."[118] The Act refers to sole executive agreements—those subject to no congressional approval—and congressional-executive agreements, which go before both houses of Congress. The implementing regulations of the Case Act, however, do not require the transmittal of nonbinding agreements. For the Act to apply, "[t]he parties must intend their undertaking to be legally binding . . . . Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements [for the purposes of this Act]."[119] This fact may help explain both why the U.S. government (and, by analogy, that of other states) sometimes prefers pledges and why domestic actors rarely do. Pledges favor the executive branch. They are more confidential and less prominent; members of Congress are less likely to hold hearings on pledges; debate is likely to be rare; and negotiations can take place more quickly.[120] These claims should not be overstated—congressional hearings were held on the Helsinki Final Act—but pledges rarely attract high levels of political attention.[121] The lack of applicability of the Case Act with regard to pledges, even in comparison to sole executive agreements, lessens the likelihood that Congress—and domestic interest groups—will be aware of an agreement or able to capitalize politically on criticism of it.[122] Of course, the Case Act and the dynamics it spawns do not apply to other governments. But the preceding illustrates how domestic institutions influence preferences over legal form.

Governments may also prefer pledges because they fear that the political prominence of contracts will increase domestic scrutiny in the future. For example, Richard Cooper has argued that one reason monetary regimes are commonly pledges is that

> the world economy is very asymmetric in its functioning. For technical reasons, it is both likely and desirable that one or a few currencies will emerge with special status in market transactions. Even when this fact is fully known and acceptable, it cannot always be formally acknowledged and sanctified in treaties, in part for reasons of status . . . . There thus emerges a discrepancy between what governments say in formal negotiations and what they do, or are willing happily to accept, in day-to-day operations . . . .

[117] According to David Sloss, some 25% of global treaties, as opposed to bilateral or regional treaties, submitted to the Senate between 1993 and 2000 were rejected. David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1984–85 (2003).

[118] Case-Zablocki Act, 1972, 1 U.S.C.S. §112b(a) (2005). The United Kingdom has a similar rule: pledges do not have to be published, whereas contracts do. Aust, *supra* note 2, at 789–90.

[119] U.S. Dep't of State, International Agreements, Coordination, Reporting and Publication of International Agreements, 22 C.F.R. §181.2(1) (2005).

[120] A set of states may also choose to negotiate a pledge so as to avoid registration with the United Nations, pursuant to Article 102 of the UN Charter.

[121] THOMAS, *supra* note 46, at 91–156.

[122] This phenomenon is similar to, but distinct from, what Lisa Martin has called the "evasion hypothesis." That is the claim that the president uses sole executive agreements or congressional-executive agreements to circumvent Senate involvement. Martin finds that there is little empirical support for that claim. *See generally* LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000).

> Formal arrangements induce sovereign states to insist on formal symmetry in status, partly to cater to nationalist sentiment at home. Informal arrangements carry no such compulsion.[123]

In other words, pledges usefully insulate governments against domestic political pressures.

Domestic institutions thus create some incentives for government officials to favor pledges over contracts. The degree to which domestic institutions actually explain the choice between pledge and contract is a topic for further research. Some pledges do become politically prominent, and unless an agreement is classified interest groups or legislators will have no difficulty finding out about it. More important, the lack of legislative attention to pledges is a double-edged sword. When states need to signal seriousness about a commitment, a contract will serve them better than a pledge. But a contract has another signaling advantage irrespective of its legal quality on the international plane: it typically requires some domestic action before ratification. By involving legislatures in approval, a contract indicates widespread domestic support and is therefore more credible.[124] By the same logic pledges are easier to reverse by future governments. In the United States, for example, as a constitutional matter the president can terminate a contract as easily as a pledge.[125] But politically it is harder because the contractual form carries a stronger signal of intent and because the Senate has bought into the agreement through its advise-and-consent role. Likewise, courts construe statutes that facially contradict binding treaty commitments as consistent with the international obligation whenever possible.[126] Pledges, which do not create the legal obligations the interpretive canon seeks to protect, are thus more liable to be held as reversed by legislative action and may therefore be less valuable to the executive ex ante.

Constitutional systems differ in many respects, and I have focused here on U.S. law and practice. But it seems reasonable to assume that, where domestic constitutions provide for a legislative consent process, that process likely applies more frequently to contracts than to pledges.[127] Domestic institutional differences create incentives that help account for and accentuate the contractual bias of domestic interest groups. Because they often want new agreements, and because contracts typically provide greater access to the policy process, these groups will favor contracts above and beyond whatever preference for them already exists. Thus, domestic actors may prefer contracts for at least two reasons. One is perceptual: the belief that contracts are more effective than pledges at shaping state behavior. The second is tactical: domestic institutions in many states, especially democracies, require more process for contracts and therefore create more opportunity for influence by private actors. Contracts are likely to correlate with the preferences of strong domestic constituencies for a third reason. The stronger the domestic support, the more likely a state is to comply with its commitments. All else equal, a state with strong domestic support for an agreement will want to signal its reliability through a contract. Government officials will sometimes favor pledges (because they seek to keep the agreement on a low profile politically) but will often favor contracts, because they need to signal credibility. And they will often favor contracts because they want to satisfy the demands of politically powerful domestic actors. The predicted result is an oversupply of contracts.

Power, public goods, and club goods. Individual states generally cannot unilaterally determine whether an accord will be a contract or a pledge. But realist theory suggests that the preferences of powerful states dominate the determination of legal form—and they often do. However, otherwise-weak states sometimes have significant contextual power that can influence the terms

[123] Richard N. Cooper, *Prolegomena to the Choice of an International Monetary System*, 29 INT'L ORG. 63, 95–96 (1975); *see also* Gold, *supra* note 41.

[124] Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829 (1998).

[125] The dominant view is that the president may terminate treaties without the Senate's consent. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 211–12 (2d ed. 1996).

[126] In the United States, this is due to the "*Charming Betsy*" canon of construction. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

[127] I say "likely" advisedly, since the various studies on national reception of treaties typically do not discuss pledges at all.

of an agreement. This is sometimes termed veto power, referring to the power to withhold agreement. Veto power depends crucially on the nature of the good in question. In issue-areas that produce club goods veto power is nonexistent or trivially weak. Club goods are goods that are nonrivalrous in consumption. However, the benefits of cooperation regarding club goods are by definition excludable.[128] Only members of the "club" can enjoy the good; hence, others face an incentive to join the club to gain access to that good. Consequently, a threat to remain outside the club is rarely credible.[129] Indeed, the opposite holds true: numerous states outside, say, the European Union or the WTO are eager to enter; few are eager to exit. The advantages of cooperation flow only—or at least predominantly—to participants. Conversely, veto power is strong with regard to public goods.[130] Public goods create incentives to free ride. States that desire an agreement find themselves vulnerable to the exercise of veto power by potential free riders. The provision of side payments to satisfy these hold-out states is one result of the exercise of veto power; change in the legality, substance, and structure of agreements is another. A third potential result of veto power—no agreement—is important, but its measurement encounters severe methodological obstacles.

Consequently, while pledges truly are "often a compromise between those States which did not favor any regulatory instrument and those which would have preferred the conclusion of a treaty,"[131] this claim rests critically on the type of problem under consideration. When governments desire wide participation in a public goods regime, whether because of fears of leakage, relative gains, or free riding, the threat to remain outside the regime is credible, and recalcitrant states can force the negotiation of a pledge rather than a contract—or can scuttle the pact altogether.

A Liberal Analysis of Legality

Let me summarize the argument so far. Liberal theory posits that states channel and respond to the demands of domestic actors. Many of these groups favor contracts—in part because of the structure of domestic institutions and in part because of the prevailing belief that contracts are more credible and more effective than pledges. This preference provides one potential explanation of the observed bias toward contracts. Yet states plainly care about other factors as well, such as flexibility in the face of uncertainty or confidentiality, and these factors militate toward pledges. How do states respond to these varied pressures?

We lack good answers, but we know that contracts prevail in international cooperation. Liberal theory suggests that domestic demands for contracts ought to outweigh concerns over uncertainty (which push toward pledges). There are two reasons why domestic pressures may outweigh the desire for flexibility. First, state officials tend to have short time horizons: they are known to discount future events.[132] While they may care about flexibility in the face of uncertainty, the need for flexibility arises ex post. Domestic pressures frequently exist ex ante. Second, the tendency to discount flexibility is accentuated because implementation (and perhaps noncompliance) will often be a problem for a later government, not the negotiating government. Both of these factors can be subsumed under the rubric of time preference. If governments exhibit time preference, and there is good reason to believe that they do, domestic pressures may reasonably be expected to operate prior to functional variables such as flexibility.[133]

[128] *See generally* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996).

[129] Unless the state in question has preponderant power. *See, e.g.*, Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

[130] GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999).

[131] Chinkin, *supra* note 55, at 861.

[132] The implications of discounting have been heavily addressed in the literature on the European Union. *See, e.g.*, KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); Paul Pierson, *The Path to European Integration: A Historical Institutional Analysis*, 29 COMP. POL. STUD. 123, 135–36 (1996).

[133] The concern for credibility, however, is a functional variable that operates ex ante, but also tends to push governments toward the negotiation of contracts rather than pledges.

Another observable implication of this argument is that the mix of pledges and contracts should vary according to the level of domestic demand for cooperation. All else equal, we should observe a higher percentage of contracts when domestic constituencies for cooperation are politically powerful, and a lower percentage when they are weak. Moreover, liberal analysis predicts that contracts will be relatively favored when legislative approval is needed to signal credibility—perhaps because the obligations in question require legislative action to be implemented. Where credibility is less important, or governments possess other means to enhance credibility, or the obligations in question can be implemented by the executive branch, pledges become more attractive.

The empirical evidence is generally, though not entirely, consistent with these broad claims. Absent good data on international agreements, much of this evidence is impressionistic.[134] Pledges appear comparatively uncommon in agreements on the environment, human rights, and trade—areas that exhibit active domestic constituencies known to favor contracts. There are exceptions, notably the aforementioned Helsinki Final Act, but also the many nonbinding agreements of the International Labour Organization.[135] But aside from the last, these pledges are exceptional. Indeed, the Helsinki Final Act and the Forest Principles Statement both illustrate veto power. In each, the power of certain states—those essential to the viability of the agreement—led to the negotiation of pledges rather than the contracts desired by many other states and domestic pressure groups.

By contrast, pledges appear most common in areas of technocratic cooperation where domestic interest groups are relatively inactive. This result is consistent with the foregoing analysis. Where domestic pressures are weak, states appear to have greater latitude in the choice of legality and, as a result, more frequently negotiate pledges. Situations where pledges appear especially common include securities regulation, antitrust enforcement, sovereign debt restructuring, and monetary cooperation. In these areas transgovernmental networks of government officials are particularly active and often employ nonbinding "memoranda of understanding" on an agency-to-agency basis.[136] Because these agreements engender so little political attention, they are rarely documented.[137] Such accords are frequently seen as extensions of domestic regulatory activities, which are already within the purview of the executive branch. Often these agreements address coordination problems, for which standards need to be agreed upon, but once so agreed are self-enforcing. That much of this cooperation employs pledges is consistent with the functional claim made earlier that pledges ought to be most common in coordination situations.

In these more technocratic and arcane areas, the available empirical evidence suggests that the prevalence of pledges roughly, if inconsistently, rises as uncertainty rises—as functional theory predicts. For example, as international capital and foreign exchange markets have grown and intensified, monetary agreements have declined in legalization.[138] Exchange rate pacts such as the Plaza and Louvre Accords[139] addressed issues of high uncertainty—governments have only limited control over the fundamentals that determine exchange rates—and were pledges. Similarly, the *Forty Recommendations* on money laundering of the OECD's Financial Action Task Force (FATF) is a pledge, as are the Basel Accord on Capital Adequacy and the Paris Club agreements on sovereign debt.[140] These examples are consistent not only with the functional

[134] Several efforts are under way to create extensive data sets of international agreements and their provisions. However, these data sets are nearly always focused on contracts.

[135] The ILO has sponsored more than two hundred pledges and approximately the same number of contracts. *See* Database of International Labour Standards, *at* <http://www.ilo.org/ilolex/english/recdispl.htm>.

[136] SLAUGHTER, *supra* note 8; Raustiala, *supra* note 8, at 22.

[137] Aust, *supra* note 2, at 791–92. Aust also argues that pledges are most likely in such technocratic areas of cooperation. *Id.* at 789, 791.

[138] Simmons, *supra* note 28, at 598–600.

[139] The Plaza and Louvre Accords of 1985 and 1987 were attempts at exchange rate and macroeconomic policy coordination. For more on the Plaza Accord, see *supra* note 21. For more on the Louvre Accord, see YOICHI FUNABASHI, MANAGING THE DOLLAR: FROM THE PLAZA TO THE LOUVRE (2d ed. 1989).

[140] *See, e.g.*, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (June 20, 2003), *available at* <http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf>; Basel Accord and Basel II, *supra* note 22. On the recent Paris Club Iraqi debt decision, see Paris Club Press Release, *supra* note 25; Craig S. Smith, *Major*

expectation that uncertainty will influence the form of commitments, but also with the liberal claim that pledges are most common in areas of low domestic salience—or, as Cooper suggests, in areas in which governments seek to keep domestic salience low.

The framework advanced in this article also helps clarify when pledges or contracts will be used to bridge preference cleavages. It sheds light on why, for example, the Helsinki Final Act was cast as a pledge, whereas other contemporaneous human rights accords were contracts. Unlike the global human rights conventions, the Helsinki Accords were fundamentally about East-West cooperation. Thus, the United States and the USSR each had enormous veto power—the implied threat to stay out of any pact mattered because the exercise was pointless without them. For universal human rights accords such as the International Covenant on Civil and Political Rights, no single state or group of states possessed sufficient veto power to succeed in demanding a pledge.

As these arguments illustrate, liberal theory does not produce fully accurate predictions of state behavior. But it usefully supplements functional arguments. This richer analysis can be fruitfully extended by systematically considering the interactions between form and substance in international agreements.

IV. Pledges, Contracts, and the Substance of Agreements

Governments are the architects of agreements; they collectively determine the substantive terms of their obligations. I define the substance of an agreement as the depth or shallowness of the commitments.[141] Deep agreements require significant changes from the status quo; shallow agreements require little or no change. Examining variation in depth through the lens of liberal theory can illuminate when and why states choose pledges or contracts. Most important, it can show how legality influences substantive obligations and vice versa. Legality and depth are interactive, not independent, variables.

Deep and Shallow Multilateralism

Many scholars have noted the variety in depth of international agreements. Environmental accords, for example, are often shallow. Trade agreements are generally thought to be deeper, as are many arms control accords.[142]

Is there a connection between agreement depth and legality? Functional theory suggests two contrasting arguments: that contracts are likely to be associated with shallow commitments and that contracts are likely to be associated with deep commitments. Both are broadly consistent with functional premises. Because functional arguments cannot distinguish when one or the other should occur, they pose a puzzle.

The logic of the first argument about depth and legality is as follows. Credibility reflects expectations about performance. The more shallow the commitment, the more likely performance will be, and therefore the more credible the commitment ex ante. Negotiating commitments as contracts should lead to a reduction in the depth of those commitments, all else equal, because states seek a "compliance cushion" or large margin of error.[143] Likewise, pledges are preferred if commitments must be deep because they do not raise acute compliance concerns. A pledge "enables states to adjust to the regulation of many new areas of international concern without fearing a violation (and possible legal countermeasures) if they fail to comply."[144] Legality and depth, in sum, are negatively correlated.

Creditors Agree to Cancel 80% of Iraqi Debt, N.Y. Times, Nov. 22, 2004, at A6. The Paris Club agreements are nonbinding, though the creditor nations then typically negotiate binding bilateral accords, based on the Paris Club agreement, with the debtor state.

[141] Following the definition in Downs et al., *supra* note 29.

[142] *Id.*

[143] As Simmons argues, "[G]overnments are hesitant to make international legal commitments if there is a significant risk that they will not be able to honor them in the future. . . . [C]ommitment is associated with conditions that one can reasonably anticipate will make compliance possible." Simmons, *supra* note 28, at 599.

[144] Steven R. Ratner, *International Law: The Trials of Global Norms*, Foreign Pol'y, Spring 1998, at 65, 68.

This dynamic implies that we should observe high levels of compliance with contracts. This implication follows from the initial premises: if contracts are deliberately rendered shallow, then they are easy to comply with by definition. While measurement of compliance is challenging, most international lawyers believe that contracts do exhibit high compliance. Louis Henkin stated in his famous aphorism that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[145] Substantial numbers of scholars have seconded Henkin's claim. Whatever the merits of this claim, it corresponds with the argument I have described, as well as with the oft-noted phenomenon of lowest-common-denominator treaties. Indeed, the major reason Henkin was right is not that international law is powerful but that international agreements are often shallow and codify what states would do anyway. States build compliance cushions into contracts, making the commitments credible—yet also shallow.

The second argument asserts that legality and depth are positively correlated. Functionalists assert that states fear the prospect of cheating by other parties, especially when they negotiate deep commitments.[146] Deep commitments are costly to implement; hence incentives to defect are high. Casting such commitments as contracts raises the costs of nonfulfillment. Thus, the deepest, most costly commitments are contracts to maximize the probability of compliance by other parties. This prediction of a positive correlation is consistent with the experience of the WTO, the North American Free Trade Agreement, and many arms control agreements, which are often deep and legally binding.

One way to think about these contrasting functional arguments is in terms of risk. Are states more concerned about the risk of *their own* noncompliance, or the risk that *other parties* will fail to comply? The first is illustrated by a negative correlation, the second by a positive correlation. Both correlations are logically plausible, and both are consistent with functional theory. Both also enjoy some empirical support. Liberal theory, however, suggests that differing domestic political dynamics explain when negative or positive correlations are likely to be observed.

In proffering a liberal explanation for this puzzle, I highlight two factors, both focused on domestic politics. The first is the organizational structure of the relevant domestic constituencies, understood in Olsonian or collective action terms.[147] The second is the degree to which domestic actors are directly affected by the consequences of noncompliance and hence have continuing incentives to monitor compliance. Both of these factors in turn influence the credibility of political demands (threats) by domestic actors for agreement features, and therefore, in the liberal paradigm, both influence the choices of governments. Differences in these factors help explain who prevails in the interest-group politics of cooperation. Consequently, they help explain when depth and legality are positively correlated and when they are negatively correlated.

Organizational structure refers to the distribution of gains and losses associated with cooperation. As Mancur Olson noted decades ago, concentrated benefits and diffuse harms produce political power for those who benefit and weakness for those harmed. Olson's claims imply that interest groups that are concentrated and stand to gain from cooperation, such as export interests in the trade context, can credibly demand that unless their governments negotiate the accords they desire—in most cases, deep contracts—they will withhold political support.[148] Similarly, domestic actors that lack these attributes will be less likely to see their political demands met. Direct impacts refer to the degree to which domestic actors are directly harmed by violations in other parties. Harm creates incentives for extensive and persistent monitoring of compliance by domestic actors. To continue the example of economic accords, exporters are directly harmed by violations of trade agreements. Moreover, information about market access in other states is an inherent by-product of their normal business. When violations occur, these groups know immediately and apply pressure on governments; indeed, they often fashion the political and

[145] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979).

[146] *E.g.*, Abbott & Snidal, *supra* note 72, at 429.

[147] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

[148] *See also* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000).

legal claims that states bring against other states.[149] Rational governments anticipate this continual monitoring and the resultant political pressures it may raise. The likelihood of continuing pressure from domestic actors—resulting from the direct impacts they experience—helps make domestic demands credible (or, alternatively, raises the domestic costs of failure to satisfy those demands).

Contrast the situation of export groups in trade with human rights or environmental NGOs. The latter may also desire deep contracts. But these groups lack the political power of export interests. Because they will not be directly affected by noncompliance in other states, it is less credible that they will closely monitor implementation over the long term.[150] And, at least in the environmental arena, there is only modest evidence that they do so.[151] Human rights NGOs do place a high premium on monitoring, but in practice can address only a small range of potential violations.[152] Environmental and human rights NGOs clearly pressure states to produce the agreements they desire, but the political leverage at their command is comparatively weak. Most important, they lack the organizational advantages of firms in the trade arena. The benefits from human rights and environmental accords are typically diffuse. The costs, by contrast, are usually concentrated, leading (often) to strong opposition by other domestic actors. As a result, states are more likely to negotiate shallow contracts here than in areas like trade.

In short, the pattern of agreement design—the varied balances struck between form and substance—can be more easily explained once we examine the domestic political underpinnings of cooperation. Environment and human rights accords are generally shallower than trade, investment, and arms control accords, in part because of the differential political power of the domestic groups that demand cooperation in these areas. We generally observe a positive correlation between depth and legality when the domestic demandeurs of cooperation are politically privileged, and a negative correlation when they are not. This claim may seem obvious, but the functional approach to agreement design, with its focus on unitary state actors, does not make it.

This line of argument raises the question why governments supply shallow contracts rather than deep pledges when they face relatively weak or conflicting pressure from domestic actors. As an empirical matter, deep pledges are uncommon.[153] Another way of posing the question is to ask, why do many domestic actors put such a high premium on contracts?

I have already offered some answers to this question. Domestic actors may prefer contracts because of the domestic process advantages they offer: greater opportunities for notice, comment, and influence. Domestic actors may believe that contracts are simply more effective than pledges—which, all else equal, they generally are. And it may be that agreement form is more politically salient, hence more valuable to domestic groups, than substance. That an accord is legally binding may be readily understood by the public, donors, and members. That an accord is deep and demanding is often a much more complicated assessment that may be realized only over time. A contract, however shallow, may also insulate state officials from the charge that they ignored a politically salient problem. Singly or in conjunction, these factors create incentives for states to supply shallow contracts rather than deep pledges.

Let me briefly consider an alternative functional approach to the connection between legality and depth. As noted earlier, incentives for cooperation vary, depending on the nature of the

[149] GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION (2003).

[150] "Many international NGOs strongly identify with the norms of environmental and human rights regimes but often experience no direct, material harm from their violation." Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 120 (1998).

[151] Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659 (David G. Victor et al. eds., 1998) [hereinafter IMPLEMENTATION AND EFFECTIVENESS].

[152] THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING, *supra* note 36. Oona Hathaway's argument about human rights treaties rests critically upon relaxation of pressure by nonstate actors on states that sign and ratify agreements, leading, in some cases, to backsliding in behavior. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002); *cf.* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).

[153] One exception is the 1988 Toronto declaration on climate change. Environment Canada Conference Statement, The Changing Atmosphere: Implications for Global Security? (1988) (available from World Meteorological Organization); *see* IAN H. ROWLANDS, THE POLITICS OF GLOBAL ATMOSPHERIC CHANGE 190–92 (1995).

good at stake. So, too, do incentives to penalize noncompliers. In a club good situation, parties can punish noncompliant states with exclusion, including such limited forms of exclusion as those practiced in the WTO.[154] In a public good situation, exclusion is counterproductive and unlikely. To see this, consider a state that violates an air pollution treaty. Other parties gain nothing by forcing the noncomplier to exit the regime.[155] Indeed, they are made worse off. That is one reason many such agreements contain "managerial," rather than enforcement-based, noncompliance systems.[156]

How might this difference affect the relationship between legality and depth? Casting a pact as a contract raises the costs of noncompliance, all else equal. Thus, all else equal, contracts ought to be relatively *less* likely for club goods than for public goods because alternative ways of deterring noncompliance—namely, (partial) exclusion—can be applied to club goods. Contracts, in other words, are less necessary in club good situations. This reasoning may help account for the bias toward contracts in some public goods cooperation, such as the environment. But it fails to account for the fact that trade accords are almost all contracts as well. And so are other reciprocity-based accords, such as the Geneva Conventions.[157] Indeed, contrary to this hypothesis, pledges appear even less common for trade than for the environment. While the role of sanctions in agreement design is important, there is little support for this functional claim.

Power

The liberal approach to form and substance can be extended by considering the role of power. A negative correlation between legality and depth can be exacerbated when state preferences diverge. States that desire a contract may have to coerce or compel other states to agree. The degree to which such pressure is necessary also depends on the distinction between club and public goods. Public goods create veto power. States with veto power may demand a shallow agreement or side payments to cooperate (or both). At the limit, they may abandon the negotiations altogether. These demands can decrease the depth of the accord and, as I discuss below, may also weaken its review structure.

On the other hand, veto power rarely attaches to club goods. One might expect this feature to mitigate a negative correlation between legality and substance, and, as noted previously, trade agreements typically evidence a positive correlation. Human rights accords present some unique qualities. States acquire weaker veto power than in the public goods setting, but it is not as weak as with club goods. Human rights accords do not depend on universal adherence to be effective in any state. They can readily be implemented unilaterally, and are often seen as primarily expressive rather than regulative.[158] The degree of veto power that states wield regarding such accords flows largely from the desire to have near-universal participation. In general, human rights agreements exhibit a special pattern: they are riddled with reservations at a high rate. Reservations operate to reduce the depth of the accord, and in this sense the limited veto power states wield in human rights cooperation manifests itself much as veto power does in public goods settings: as a constraint on the depth of agreements, and occasionally as a constraint on their legality.

[154] The WTO permits suspension of benefits by a wronged party in the event of noncompliance with an Appellate Body ruling. This is tantamount to exclusion from a subset of the regime's benefits, i.e., market access in the wronged state.

[155] This point is true of trade regimes as well. But as a political matter, rather than an economic one, it has little traction.

[156] Downs et al., *supra* note 29, at 380–81.

[157] I consider the Geneva Conventions to be reciprocity based in a structural/political, rather than a legal, sense. Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

[158] *E.g.*, Hathaway, *supra* note 152, at 2004–11.

V. THE STRUCTURE OF AGREEMENTS

I use the term "structure" to refer to rules, procedures, and institutional bodies for the collective monitoring and enforcement of parties' performance. Structure is central to international agreements; international relations theorists have long stressed that a primary function of accords is to disperse information and allow strategies of reciprocity to operate efficiently.[159] Like legality and substance, agreement structure varies widely. Some accords create courts or tribunals. Sometimes these courts can impose sanctions. Other agreements do not provide for sanctions, or often any structure of review at all. In between these extremes lie many alternatives. Scholars have frequently folded the structure of review into a hard law–soft law spectrum, treating it as one more factor that determines whether a pact is hard or soft. But structure is a distinct design feature, one that may influence the effects of agreements regardless of whether they are contracts or pledges.

Types of Structures

The most familiar type of review structure is a court. Third-party adjudication strikes many lawyers as an essential component of a legal system. Yet the international legal system is distinguished by the rarity of courts and the weakness of those that exist. In practice, most agreements neither create courts nor employ sanctions as enforcement tools.[160] The dispute settlement clauses in many of the agreements that do contain them have never been invoked. In addition, international courts clearly lack the authority and coercive bite of domestic courts.[161] Yet the number of international courts is rising.[162] International accords also provide for a wide array of noncourt review structures.

For clarity I dichotomize the category of agreement structure into strong and weak. Strong review structures render individualized decisions about state performance. These decisions may, but need not, be accompanied by sanctions. They also need not address particular disputes; they may be statements about individual actors and their performance. Weak review structures either make no such evaluations or make evaluations only about collective party behavior. In either case, the evaluation does not specify any tangible sanction. Structure, as I define it, should not be conflated with whether an agreement is effectively enforced, in the sense of deterring or punishing violations. These are outcomes. Structure refers only to the specific *mechanisms or procedures* for monitoring the parties' performance and meting out penalties. Like the choices of legality and substance, the choice of agreement structure is endogenous; in practice, states trade off structural provisions against legality and substance.

The Consequences of Different Structures

Different structures of review create different incentives for state behavior. Functional theory predicts that these incentives will explain the choice of structure in particular cases; liberal theory predicts that domestic political institutions and preferences (related, in many cases, to perceived consequences) will explain the choice of structure; and realist theory predicts that relative power will translate whatever preferences states have into outcomes. No matter which theoretical

[159] *See, e.g.*, Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986); Lisa L. Martin, *The Political Economy of International Cooperation*, *in* GLOBAL PUBLIC GOODS, *supra* note 130, at 51.

[160] Andrew Guzman argues that sanctions are rare in part because they represent "a net loss to the parties—one party faces a cost that is not recovered by the other." Andrew T. Guzman, *The Design of International Agreements*, 17 EUR. J. INT'L L. (forthcoming 2006). The theoretical puzzle of why states do not generally provide compensation mechanisms within their international agreements remains to be explained.

[161] "A fundamental (and frequent) criticism of international law is the weakness of mechanisms of enforcement." Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 19 (1997).

[162] Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?* 14 LEIDEN J. INT'L L. 267 (2001); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679–933 (1999).

approach one favors, the empirical impact of different structures should be understood. Yet the dearth of research on this topic makes any such claims tentative.

Unsurprisingly, strong structures, particularly courts, are believed to be more likely to promote compliance. However, the probable impact of international courts qua courts—as seats of legal discourse—should be separated from the enforcement powers that courts may be presumed to have in the domestic context but rarely possess internationally. Even in the WTO, where the Appellate Body can determine noncompliance and authorize withdrawal of trade concessions by a "wronged" state against a noncompliant state, the court itself does not wield the power to enforce directly or even to authorize other centralized enforcers; it merely plays a gatekeeping role with regard to what is fundamentally a self-help process. Thus, even the strongest international court does not actually have the power to enforce its decisions at all like that of a domestic court.

Nevertheless, this deficiency does not render international courts useless. Regardless of the extent of their enforcement powers, courts of all stripes are widely believed to be institutions of principle, rather than power; they force actors to be more reasonable.[163] For example, Joseph Weiler has argued that "when governments are pulled into [an international] court and required to explain, justify, and defend their decision, they are in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle, and where states are meant to live by their statements."[164] This claim reflects the view that legal discourse is by nature, if not antithetical to assertions based on power, at least in tension with the brute use of power. Justification is commonly thought to be a necessary element of judicial decisions.[165] Simply by channeling state claims—by requiring justification—courts are said to induce more compliant behavior by parties. The implicit assumption here is that word and deed can only diverge so much before countervailing pressures arise: while word can shift to match deed, if legal proceedings constrain the kinds of arguments that can validly be made, deed may shift as well. Some constructivist arguments go further and claim that engagement in legal processes changes state identity and thus state interests and actions, further promoting cooperation and compliance.[166]

Courts may also enhance reputation and reciprocity. Social scientists have long noted the importance of both in sustaining cooperation, particularly in situations characterized by suboptimal equilibria (such as the prisoner's dilemma) where the parties cannot enter into enforceable contracts. Centralized dispute settlement fosters cooperation by enhancing the flow of information about the parties' behavior. In the process it deters noncompliance, whether or not the dispute settler can enforce its decisions coercively.[167]

The medieval law merchant is a famous example. The law merchant system adjudicated disputes and retained information about prior behavior by long-distance traders. The system "succeeds even though there is no state with police power and authority over a wide geographical realm to enforce contracts. Instead, the system works by making the reputation system of enforcement work better."[168] By similarly highlighting and deterring violations of commitments, international courts may promote compliance even if they lack—as indeed they typically do lack—coercive powers of enforcement. For this process to work, however, states must fear being excluded from the pact or from acquiring desired goods. For agreements involving club goods this is a reasonable assumption. For public goods it is less plausible. Dispute settlement can also

[163] ALTER, *supra* note 132, at 211–32.

[164] J. H. H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 519 (1994).

[165] "According to the requirements of most, if not all legal systems, a judgment not only has to contain at a minimum the 'decision' reached but has also to provide reasons in support of the particular choice made by the judges." KRATOCHWIL, *supra* note 52, at 212.

[166] *See* AREND, *supra* note 38, at 129–33; Jutta Brunnée, *The Kyoto Protocol: Testing Ground for Compliance Theories?* 63 HEIDELBERG J. INT'L L. 255, 261 (2003).

[167] Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

[168] *Id.* at 19; *see also* James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 138 (2000) (asserting that legalized dispute settlement in trade accords "tends to improve compliance by increasing the costs of opportunism").

clarify legal rules, which in turn may promote compliance. Managerial theory, for example, argues that noncompliance is partly due to ambiguity of commitments.[169] Courts, by adjudicating disputes, refine ambiguous obligations and hence stimulate future compliance. The important point is this: all these arguments suggest that strong review structures, *even if they lack enforcement powers like those of domestic courts*, can promote compliance with international agreements. To the degree that they possess enforcement powers, compliance is even more likely to be promoted.

Unlike strong structures of review, weak structures do not make individualized determinations. As a result, they are at least presumptively less likely to influence state behavior. Three reasons support this view. First, because determinations of performance are collective (or nonexistent), reputational signals are highly attenuated. Second, the normative pressure to engage in justificatory discourse, emphasized by so many theorists of courts, is nonexistent or highly diluted because states need not defend their own policies or actions. Third, by definition weak review structures cannot authoritatively endorse even self-help enforcement measures by states.

Despite these relative deficiencies, weak review structures do not wholly lack impact. By prodding governments to report on implementation, they may stimulate more bureaucratic attention to international commitments. They may also disseminate information to other states and increase transparency.[170] Some studies of weak review structures suggest that they can help states to "learn," collectively, how to implement complex collective commitments, thus promoting compliance.[171] Finally, they may empower domestic actors interested in the accord. Over time these effects may promote better compliance and a more effective agreement. These causal chains are long, however, and contingent. In general, weak structures generate only limited influence over state behavior.

Structure and Legality

Contracts are negotiated with a wide array of review structures, some strong, many weak. The review structure of some agreements is set forth in separate, optional protocols. Pledges present a more striking pattern. Pledges rarely include strong review. The paradigmatic strong structure—the court—does not appear to be included in any existing pledge. One partial exception to the lack of strong review is the above-mentioned FATF *Forty Recommendations*, aimed at money laundering. The FATF uses a system of review in which each state's legislation and activities are evaluated by the others, "compliance" being enforced by reputational concerns and the threat of expulsion.[172] Similarly, the Helsinki process involved regular follow-up meetings aimed at a "thorough exchange of views . . . on the implementation of the provisions of the Final Act."[173] These meetings played an important role in the effectiveness of the Act.[174] The OSCE process, which builds on Helsinki, extends this model even further, with extensive and continuous discussion of implementation by the parties and continued use of pledges rather than contracts.[175] Though important, these examples are the exceptions that prove the rule.

Why is strong review so rare in pledges? From a functional perspective there are good reasons to expect the opposite: if strong monitoring procedures raise the costs of noncompliance, then states ought to be more willing to embrace them when the standard is not legally binding. (Put differently, when rules are binding, states may seek weak review as a way of ensuring that

[169] CHAYES & CHAYES, *supra* note 104, at 1–28.

[170] Mitchell, *supra* note 150.

[171] CHAYES & CHAYES, *supra* note 104; Raustiala & Victor, *supra* note 151.

[172] Simmons, *supra* note 76, at 261 ("The key to the FATF's success seems to flow from the serious and sustained attention the organization gives to monitoring and assessment."); *see also* note 140 *supra*.

[173] Helsinki Final Act, *supra* note 20, Follow-up to the Conference, 14 ILM at 1325, para. 2(a).

[174] Schlager, *supra* note 46, at 355.

[175] The official OSCE *Handbook* notes that "the fact that OSCE commitments are not legally-binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law." OSCE SECRETARIAT, THE HANDBOOK OF THE ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE) 3 (3d ed. 2002), *available at* <http://www.osce.org/>.

their own noncompliance is not discovered or addressed.) Indeed, as Beth Simmons states in her analysis of the FATF, "it is less likely that mechanisms for mutual monitoring and surveillance would have been agreed to in a binding legal context."[176]

Yet the FATF is aberrational. While contracts contain a myriad of structures both weak and strong, pledges nearly always have weak ones. One explanation for this pattern is that pledges may be largely symbolic: if states did not intend to implement pledges, they would not include institutions for monitoring or enforcement in them. This argument, however, raises several problems. Empirically, states often do implement pledges, and some appear quite effective (I discuss this further below). But even if pledges are merely symbolic, what explains their prevalence? Both states and domestic audiences have plenty of experience with pledges. If pledges are meaningless, we would not observe them in equilibrium.[177] Moreover, if pledges are simply cheap talk, why do states expend so much effort in bargaining over their terms?[178] Symbolism alone cannot explain the prevalence of pledges. Perhaps pledges are crafted with weak structures because they are seen as stepping-stones to "real" treaties—permitting the structure of review to be added later when the contract is struck. Many pledges, however, remain pledges forever. While the causal story is unclear, the empirical pattern is clear: pledges typically lack strong review. Yet, as I argue below, pairing pledges with strong review structures may be an optimal cooperative approach under certain circumstances.

Structure and Substance

Does the choice of review structure affect the substantive obligations contained in an accord? As with legality and substance, a functional view of structure and substance leads to two contradictory predictions. The first is that strong review structures correlate with deep agreements; the second, that strong review correlates with shallow agreements.

The first rationale should now be familiar. Strong review structures disperse information, enhance the influence of states' reputations, clarify rules, and force states to justify their actions. They also may employ coercive enforcement measures. All these features improve compliance. Consequently, strong review serves to dampen the likelihood of opportunism, rendering cooperation more robust. States that prefer a deep agreement will construct strong review structures to ensure that violations are deterred or revealed. For example, a comprehensive study of regional trade pacts claims that "the more ambitious the level of proposed integration, the more willing political leaders should be to endorse legalistic dispute settlement."[179] In short, substance and structure are positively correlated.

The second line of reasoning reverses this logic. The deeper the agreement, the *less* likely it will be to feature strong review. Faced with a deep set of commitments, states fear the ramifications of noncompliance but recognize that it is possible, even likely. Hence, the effects of strong review are precisely what leads states to eschew it. British diplomat Patrick Széll finds "an inevitable correlation between the strictness of a treaty's compliance and enforcement regimes and the stringency of its substantive obligations. One should expect countries to be ready to undertake tougher commitments if they see that supervision will be light, and vice versa."[180]

[176] Simmons, *supra* note 76, at 262.

[177] Realists might argue that pledges are simply what political scientists call "cheap talk": symbolic, costless action. Cheap talk can become a self-perpetuating equilibrium outcome; for example, all job applicants claim to be hard-working since, if they failed so to state, it would make them stand out. In such a "pooling equilibrium" all actors behave the same way, by engaging in cheap talk pledge-making. But this is unlikely in the case of multilateral pledges. They are too costly, both in transaction costs and in risking the incitement of political action, to be negotiated simply to avoid not negotiating them.

[178] Chinkin, *supra* note 56, at 860; Dupuy, *supra* note 52.

[179] Smith, *supra* note 168, at 148.

[180] Patrick Széll, *The Development of Multilateral Mechanisms for Monitoring Compliance*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 97, 107 (Winfried Lang ed., 1995); *see also* Shelton, *supra* note 27, at 15 ("It may even be possible that some stronger monitoring mechanisms exist in soft law precisely because it is non-binding and states are therefore willing to accept the scrutiny they would reject in a binding text."); Simmons, *supra* note 76.

Which claim is most consistent with the evidence? Empirically, both find some support. Széll provides several examples of the latter dynamic from environmental agreements, whereas trade, investment, and arms agreements tend to exemplify the former. As with the legality-substance relationship, liberal theory helps clarify this pattern; the substance-structure connection also varies according to the type of agreement. This variation derives from differences in domestic politics and interest group power. As noted, private actors in trade are both organizationally privileged and likely to monitor implementation and compliance over time because noncompliance affects them directly. Private actors in other areas, such as environmental protection, are weaker on both counts and hence wield less political power. Thus, trade accords such as the WTO Agreements feature deep structure and strong review because the domestic actors that favor these accords are politically privileged. By contrast, the environmental agreements that Széll refers to feature weak review structures, especially as their substance becomes deeper and deeper. Environmental organizations may prefer a strong review structure but, lacking the organizational advantages of firms in trade, they cannot exert enough influence to achieve their aims. Rather than negotiate agreements with strong review structures—what one would expect if states really wanted to ensure compliance—states choose weak review to be able to manage the uncertainty of complying with those commitments. These agreements are designed to be weak.

Although human rights accords are similarly characterized by a negative correlation between structure and substance, there is a twist: while most provide for weak review, the various optional monitoring protocols permit those states—and only those states—that desire strong review to opt for it. This is consistent with the unusual nature of human rights pacts, in which no true collective dilemma exists. Arms agreements present yet another pattern: extensive and often strikingly intensive monitoring but little formal dispute settlement. States clearly want to know whether other parties are complying and accordingly design stringent review provisions far more elaborate and intrusive than those found in other types of accords.[181] Like trade accords, arms accords are marked by a positive correlation between depth and structure of review. But judicial settlement of disputes over compliance with arms agreements, unlike those concerning trade pacts, offers little: states will much prefer to respond to another party's violation by breaching than to seek a neutral judgment about it. The empirical patterns of agreement design, in short, are driven by the structure of domestic politics and interests, as well as by functional concerns about credibility and flexibility.

In the preceding sections I have endeavored to highlight, using the tripartite framework advanced in this article, some of the basic connections between form, substance, and structure in international agreements. Several key points emerge from this discussion. First, trade-offs are endemic and agreement features cannot be understood in isolation. Second, these trade-offs cannot simply be explained by functional logic—though functionalism is a powerful explanatory approach. In an interdependent world international cooperation spawns, and is spawned by, domestic politics; hence it is unsurprising that domestic politics and institutions affect the patterns of cooperation we observe.

Finally, this article's positive analysis of the design of international agreements also leads to policy prescriptions. Advocates as well as analysts of international accords must pay more attention to the complex architecture of agreements and treat their design holistically. For example, if an increase in the depth of substantive obligations in an agreement is offset by weaker monitoring and review, the agreement may be rendered no more effective, and possibly, even less so. In general, the analysis here suggests that concerns about reputation, credibility, and uncertainty often lead states to negotiate international commitments that may be legally binding but are shallow and lack strong review structures. As a result, compliance with these commitments may be high, but their impact on actual behavior is low.[182]

[181] Kenneth W. Abbott, *"Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 36–38, 53–54 (1993).

[182] Raustiala & Victor, *supra* note 151.

VI. THE UNDERSUPPLY OF PLEDGES

How can more effective agreements be created? Greater reliance on pledges offers a potential, though limited, solution to the dilemma of high compliance but low effectiveness that often results from the choice of a shallow or weakly structured contract.[183] By minimizing concerns about legal compliance, pledges may permit states to negotiate more ambitious and deeper agreements that are tied to stricter monitoring and review provisions. This approach holds special promise for conditions of uncertainty, where rational governments seeking credibility may choose to ensure that international accords will produce compliance by decreasing their depth and the severity of review. Pledges do not eliminate this problem, but they may limit it enough in particular circumstances to justify greater reliance on them.

While the advantages of pledges are deductively plausible, empirical evidence suggests that pledges may promote deeper commitments than comparable contracts, and are equally, if not more, effective at changing state behavior. I do not mean to imply that pledges are more effective tools for cooperation than contracts, all else equal. Rather, the central point of this article is that in agreement design all else is rarely equal. Consequently, pledges, which may more effectively influence behavior in situations of uncertainty, deserve more serious attention.

Compliance vs. Effectiveness

The argument in favor of pledges rests on the now well-understood conceptual distinction between compliance and effectiveness. Compliance refers to conformity between behavior and a specified rule. Compliance has many causes, and can be inadvertent, coincidental, or an artifact of the legal standard. Consequently, the sheer fact of compliance with a given commitment tells us little about the impact of that commitment. Effectiveness refers to observable changes in behavior that result from a specified rule. Thus, to say an accord is effective is necessarily to make a causal claim, whereas to say that a state is in compliance with an agreement entails no causal claim.

Even when defined in this modest manner, many international rules are not effective. The critical issue is the relationship between the stringency of the legal standard and the baseline of behavior. When the legal standard mimics the behavioral baseline—whether intentionally or coincidentally—compliance is high (because the accord is shallow) but effectiveness low. Yet the converse is also possible: rules can be effective even if compliance is low. All else equal, more compliance with a well-crafted standard is better. Yet rules that are not broadly observed can still be effective if they induce desired changes in behavior that otherwise would not have occurred.

This statement carries special weight given the nature of international law. Because treaties are an endogenous cooperative strategy of states, rather than an externally imposed set of rules, the parties themselves largely determine the levels of compliance. Collectively setting the legal standard at a low level is one way states can ensure compliance with their commitments, make those commitments credible, and safeguard reputations for future bargains—all the while providing the contracts that many domestic groups demand. But this approach does not ensure that these agreements will be effective. Instead, it often ensures that they will be ineffective.[184]

Pledges, Contracts, and Effective Agreements

Why do we observe so many ineffective agreements? One reason, I have argued, is that faced with future uncertainty states will often build in compliance cushions—altering the substance and

[183] For another view in this issue on the effectiveness of nonbinding agreements, see Steven A. Mirmina, *Reducing the Proliferation of Orbital Debris: Alternatives to a Legally Binding Instrument*, 99 AJIL 649 (2005).

[184] A completely shallow agreement—one that simply ratified the status quo ante—would not be effective at all, since it would not change state behavior. As I noted earlier, this claim can be challenged by the fact that an accord may be aimed at forestalling future backsliding; an example would be the Non-Proliferation Treaty. But aside from this, shallow agreements, even when perfectly complied with, are by definition ineffective (or have little effectiveness) since they do not demand that states deviate from prior behavior. If such a shallow agreement induced overcompliance for some reason, that agreement would plausibly be called effective.

structure of accords to increase the probability of compliance over time. The fear of noncompliance ex post results in shallower substantive rules ex ante. The exercise of veto power by recalcitrant states can augment this tendency. When public goods are at issue, veto power is common and shallow agreements should be even more likely. The end result has been noted by many lawyers and political scientists alike: numerous shallow, ineffective international agreements.

A converse set of concerns may also exist. In some areas of international cooperation, deep contracts may prevail and actually be too effective at changing behavior. The power of domestic actors in the trade context, for example, may lead to contracts that are too deep. Such contracts create risks for state credibility and for compliance; they are brittle rather than flexible. Some analysts have suggested that the WTO faces just such a problem.[185] I call these twin sets of concerns the "overly shallow" and "overly deep" problems. The overly shallow problem appears to be far more common, and hence I address this first.

One way to counteract the overly shallow problem is to use pledges rather than contracts.[186] By sidestepping concerns about legal compliance, pledges reduce—though they do not eliminate—the incentives to weaken substantive commitments or the structure of review in situations of uncertainty. The downside of this strategy is that pledges create weaker incentives to implement shared commitments, though they do not eviscerate all such incentives. As discussed throughout this article, several factors drive states' behavior vis-à-vis their international commitments. These factors relate to legality but are not dependent on the legality of commitments.[187] Pledges can trigger many of these processes in much the same way—albeit more weakly—than contracts. As Judith Goldstein and Lisa Martin argue, "Mechanisms that deter [noncompliance] include domestic costs of violations, enforcement provisions, and reputational concerns. These mechanisms are identical to those identified in standard theories of international institutions, suggesting that extensive international cooperation does not always require legalization."[188] In short, the factors that push states to comply with contracts often apply, albeit more weakly, to pledges as well. Yet pledges break the ex ante concern to ensure ex post legal compliance, reducing the incentive for states to weaken the substance of their commitments at the negotiating phase.

Again, all else equal a contract will be more effective than a pledge. But the crux of this article is that all else is rarely equal. In view of the high transaction costs of negotiating contracts, even a finding that pledges are nearly as effective as contracts, under certain conditions, is significant from a policy perspective. The opposing argument, of course, is that pledges will be largely empty: states may negotiate deep pledges but do little or nothing to implement them. This is the chief reason pledges are criticized as a tool of cooperation. But what matters most from the perspective of effectiveness is whether the losses associated with the increased propensity to violate pledges are outweighed by the gains from deeper, clearer, more ambitious, or more effectively monitored commitments. While one needs to read the evidence carefully—and more research is needed—there are good reasons to believe that such losses will not necessarily overshadow the gains.

A few studies posit that the gains from using pledges rather than contracts can be marked. The Helsinki Final Act is the most widely noted example; another is the Basel Accord on Capital Adequacy.[189] "The fact that [the] Helsinki agreements were not cast in the form of legally binding treaties," Erika Schlager argues, "ultimately permitted more ambitious norms to be adopted, best illustrated by the 1990 Copenhagen Document . . . . Many of the significant provisions of the Copenhagen Document would have been unacceptable to legal advisors as *treaty obligations*

[185] Goldstein & Martin, *supra* note 148, at 631–32.

[186] I owe much to the perceptive thinking of David Victor on this issue.

[187] Goldstein & Martin, *supra* note 148; Raustiala & Slaughter, *supra* note 5.

[188] Goldstein & Martin, *supra* note 148, at 622.

[189] *See, e.g.*, Ho, *supra* note 4; David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 282, 287–92 (1998).

without clearer definitions . . . ."[190] Clare Shine suggests that pledges can be more specific, ambitious, and innovative—thus ultimately more useful.[191]

Similarly, in several environmental cases states have been more willing to adopt international commitments that are clear and ambitious when presented in the form of pledges rather than contracts. These pledges have led to observable change in behavior, change that appears greater than it probably would have been under a politically feasible contract. In the case of the North and Baltic Seas, pacts to address marine pollution have been made in both contract and pledge form.[192] The pledges emerged from a high-level political process, aided by scientific assessment and collective, periodic reviews of implementation. The pledges were more ambitious than the contracts, and because commitments were drafted more clearly—specifying percentage cuts of major pollutants—they were more easily assessed in the review process and proved fairly effective in changing behavior.[193] In another case, the Protocol Concerning the Control of Emissions of Nitrogen Oxides and Their Transboundary Fluxes to the Long-Range Transboundary Air Pollution Convention,[194] a contract, called for a freeze on emissions. A group of states went further and agreed to cut emissions by 30 percent, but designed that commitment to be a pledge.[195] The evidence suggests that, thanks to the pledge, states participating in the "30% Club" cut emissions more than they probably would have done otherwise and made more meaningful regulatory efforts to meet the stricter target.[196] And in the aftermath of the GATT *Tuna/Dolphin* controversy of the early 1990s, the La Jolla Agreement, a pledge aimed at protecting dolphins in the Pacific, was negotiated. The La Jolla Agreement "proved extremely effective," reducing the dolphins' mortality in the region by 75 percent in six years.[197]

Pledges are likely to be most effective when states are cooperating in a novel area of high uncertainty, leading governments to be especially cautious. In addition, some studies (as well as theory and common sense) suggest that pledges work better when they are tied to strong structures of review.[198] Yet, as I noted earlier, such pledges are rare. The FATF system is a partial exception; other exceptions include the Helsinki review process, the OSCE system, the Paris Club system of sovereign debt restructuring, and the Marshall Plan system for allocating aid in the wake of World War II.[199] As Thomas Schelling argues, the Marshall Plan experience suggests that regularized review can be quite effective even in the absence of binding rules. Indeed, Schelling claims that the "multilateral reciprocal scrutiny" under that system probably had greater effect than a more regularized, rule-bound system would have had.[200] This kind of multilateral scrutiny is likely to work best when the states involved cooperate extensively on many other matters, and thus have greater concerns about reputation and more elaborate and entrenched policy

[190] Schlager, *supra* note 46, at 353–54; *see also* Ratner, *supra* note 44, at 610 (arguing that the OSCE experience suggests that soft law commitments may be more valuable and effective than commonly believed).

[191] Clare Shine, *Selected Agreements Concluded Pursuant to the Convention on the Conservation of Migratory Species of Wild Animals*, *in* NON-BINDING NORMS, *supra* note 4, at 196, 222; *see also* Edith Brown Weiss, *Understanding Compliance with International Environmental Law: A Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555 (1999).

[192] *See* Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, *in* IMPLEMENTATION AND EFFECTIVENESS, *supra* note 151, at 327.

[193] *Id.*

[194] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides and Their Transboundary Fluxes, Oct. 31, 1988, *available at* <http://www.unece.org/env/lrtap>.

[195] Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, *in* INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 75 (Peter M. Haas et al. eds., 1993).

[196] Jørgen Wettested, *Participation in NOx Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches but Similar Results?* *in* IMPLEMENTATION AND EFFECTIVENESS, *supra* note 151, at 381.

[197] INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 999–1000 (David Hunter et al. eds., 2d ed. 2002). For the text, see La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, Apr. 1992, *available at* <http://www.oceanlaw.net/texts/lajolla.htm>.

[198] Raustiala & Victor, *supra note* 151, at 659–707.

[199] On the Marshall Plan as a model, see Thomas C. Schelling, *The Cost of Combating Global Warming*, FOREIGN AFF., Nov./Dec. 1997, at 8, 10–12.

[200] *Id.* at 10.

linkages. It may also be true, though it is untested here, that liberal states are more likely to cooperate successfully through pledges than nonliberal states or mixed groups of states.[201]

Pledges are by no means a panacea. But the conventional wisdom—that contracts are always superior to pledges, and that pledges are decidedly second-best options—is not backed by conclusive empirical evidence or theoretical conjecture. Empirical examples, while limited, support the idea that pledges can be quite effective. Moreover, the political incentives facing states often induce them to make contracts weaker (more shallow, and with weaker structures of review) than they ought to be by any objective standard of effectiveness. This article has attempted to show that states can and do trade off substantive obligations against the legality and monitoring of agreements. When states must contend with abundant uncertainty about the costs of commitments or the best way to organize cooperation, pledges may be especially useful. Under these conditions, pledges may be first-, rather than second-, best options.

The Danger of Deep Contracts

While pledges may be useful when concerns with compliance lead to contracts that are too shallow, agreements can also be too deep. If an agreement is overly deep, the danger is not that effectiveness is sacrificed for legal compliance. Rather, the difficulty of complying with overly deep commitments may lead to numerous violations, which could undermine future credibility or create political backlash against international cooperation.[202] When deep contracts are tied to a strong structure of review, such as third-party dispute resolution, these dangers are magnified.

The WTO constitutes the leading example of an overly deep contract. The WTO embodies depth of substance, contractual form, and strong review. As Goldstein and Martin observe, the unintended effects of this combination

> could interfere with the pursuit of progressive liberalization of international trade. . . .
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> . . . .
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> . . . Reducing the ability of governments to opt out of commitments has the positive effect of reducing the chances that governments will behave opportunistically by invoking phony criteria for protecting their industries. On the other hand, tightly binding, unforgiving rules can have negative effects in the uncertain environment of international trade. When considering the realities of incomplete information about future economic shocks, we suggest that legalization may not result in the "correct" balance between these two effects of binding.[203]

The dangers of overdepth are magnified by strong review, particularly when independent tribunals adjudicate compliance.[204]

Clearly, claims of overdepth, like claims of underdepth, are contestable normative judgments. Observers will disagree about the optimal depth of any agreement. Nonetheless, as Goldstein and Martin argue, increasing depth is not always beneficial, and indeed can have detrimental consequences. Obligations that demand too much from the parties and lack the ex post flexibility to respond to unanticipated problems or new developments may lead to an unraveling of the treaty as parties withdraw their participation (to the degree that states can anticipate these problems, they may simply not sign the accord ex ante). Though overly deep contracts are rare, the WTO is probably not unique. The International Monetary Fund's structural adjustment accords,

[201] *See, e.g.*, Raustiala & Victor, *supra* note 151, at 689–97. For a skeptical take, see José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 246 (2001).

[202] *See, e.g.*, Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

[203] Goldstein & Martin, *supra* note 148, at 603–04.

[204] Nevertheless, international courts often show themselves to be politically astute. In the context of the WTO Appellate Body, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004).

the European system of human rights, and perhaps the Rome Statute of the International Criminal Court represent other examples of agreements whose depth may exceed the optimal level.[205]

VII. CONCLUSION

Agreements form the core of contemporary cooperation. While the nineteenth century was the heyday of customary international law, the twentieth century witnessed a dramatic increase in the use of international agreements—both contracts and pledges. The twenty-first century may usher in a cooperative system based on transgovernmental networks and increasing reliance on pledges and unwritten understandings.[206] But even a networked world will require explicit agreements. Hence the need to understand the architecture of international agreements.

The recent flourishing of interdisciplinary work in law and international relations provides an increasingly powerful base from which to tackle these questions. My central claim here is that the tripartite framework of legality, structure, and substance clarifies the design of agreements and, most significantly, illuminates the trade-offs states encounter as they craft bargains in an anarchic world. I have also critiqued the prevailing approach of international relations scholarship to the design of agreements, which is functional analysis. Though useful, functional accounts in themselves cannot solve persistent puzzles of design that liberal theory can elucidate. A focus on the domestic underpinnings of international cooperation is consistent, moreover, with the increasing recognition that the domestic and the international spheres are no longer hermetically sealed—if they ever were.

To be sure, the foregoing analysis has raised as many questions as it has answered. But the purpose of this approach is to promote more systematic analysis of agreement design, not to propose a definitive explanation of the construction of agreements. Carefully breaking down the architecture of agreements furthers the design of more effective and robust international accords. Though this article is primarily positive and conceptual, it suggests some prescriptions as well. Scholars, statesmen, and activists alike have too often assumed that contracts are the best choice for cooperation, and pledges a feeble substitute. But pledges can have surprising power. And while pledges represent the avoidance of legal entanglement, they are critically important for international lawyers to understand. The existence of trade-offs between form and substance necessitates a holistic comprehension of agreement design. International lawyers need to know when circumstances are propitious for the use of law, and when, conversely, effectiveness instead dictates nonlegal agreement. Only by grasping when law ought to be avoided can we effectively counsel when law ought to be employed.

[205] The withdrawal by the United States of its signature of the Rome Statute is an example of a state's decision not to participate because of ex ante concerns about overlegalization.

[206] SLAUGHTER, *supra* note 8; Raustiala, *supra* note 8.