

International Agreements: A Rational Choice Approach

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INTRODUCTION

States frequently make agreements with one another. A fraction of

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these agreements are “legalized” in the sense that they are binding under international law. Such legally binding international agreements are labeled “treaties” by the Vienna Convention on Treaties.¹ Many (and perhaps most) agreements between nations are not legally binding. This category includes (some) memoranda of understanding, nonbinding resolutions, exchanges of notes, joint communiqués, joint declarations, *modi vivendi*, political agreements, administrative agreements, voluntary guidelines, handshakes, verbal promises, unperfected acts, arrangements, letters of intent, statements of intent, statements of principles, declarations of principles, “best practices,” exchanges of letters, unspoken rules, gentlemen’s agreements, and side letters.

The dominant positivistic, “sources of law” approach to international law views these latter “nonlegal” instruments as aberrational or of secondary importance.² But nonlegal agreements are prevalent. This fact raises two important sets of questions for international law theory. First, why do nations use nonlegal agreements? How do nonlegal agreements, which by definition lack the normative pull of treaties, facilitate cooperation among nations? Second, if nations can cooperate using nonlegal instruments, why do they ever enter into treaties governed by international law? What does international law add? This paper sketches answers to these and related questions. Our approach is distinctive in two respects. It applies rational choice theory to the behavior of states, and it does not rely on “normativity,” morality, *pacta sunt servanda*, and related concepts that are standard in the international law literature.

I. CONVENTIONAL WISDOM

The conventional international lawyers’ wisdom about treaties is uncomplicated. Treaties are agreements that are “governed by international law.”³ When states enter agreements that meet certain formalities or that evince a certain intent, they put themselves under an

1. Unless otherwise noted, we use the term “treaty” in this international law sense to include all international agreements governed by international law. Under this international law definition, the term “treaty” can include three types of agreements made under the U.S. Constitution: treaties made with the consent of the U.S. Senate, congressional-executive agreements, and “pure” executive agreements made on the president’s authority alone.

2. The legal literature usually labels nonlegal international agreements as “soft law.” We avoid this label here for two reasons. First, nonlegal agreements are not binding under international (or any other) law, so it seems inappropriate to call them “law,” soft or otherwise. Second, “soft law” typically includes not only nonlegal agreements, but also legally binding agreements that are vague or indeterminate. Our focus here is primarily on the former.

3. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980).

obligation to comply with them. The notion of *pacta sunt servanda* requires that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴ The legalization of an agreement, on this view, creates a special obligation beyond that which is created by a mere nonlegal agreement.

Mainstream international law theory holds that legalization enhances compliance by increasing the normative strength of the agreement and thus a state’s sense of obligation. The mainstream view acknowledges that states sometimes violate treaties when their interests are strong enough to outweigh their sense of obligation.⁵ Desiring to strengthen the international legal system, the more theoretically inclined international lawyers⁶ see their task as that of strengthening the normative obligation created by treaties. These scholars explore the conditions for normativity and urge that these conditions—for example, transparency,⁷ the participation of liberal democracies,⁸ and domestic law penetration⁹—be strengthened whenever possible. They also argue that treaty compliance would be more widespread if treaties were more precise and formal and if more power were given to third party institutions charged with the task of monitoring compliance and resolving disputes.

Conventional wisdom about nonlegal agreements is more varied. At one time, scholars viewed nonlegal agreements as less interesting and less important than treaties, and indeed many viewed them as outside the purview of international law.¹⁰ To some, nonlegal agreements and related quasi-legal instruments were “pathological,” in Weil’s famous description, because their existence supposedly damaged the normative integrity of legal agreements.¹¹ Nonlegal agreements have been studied

4. *Id.* art. 26, at 339.

5. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* 68-87 (2d ed. 1979).

6. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

7. FRANCK, *supra* note 6, at 233-46.

8. See TESÓN, *supra* note 6, at 78-80.

9. Koh, *supra* note 6, at 2645-59.

10. An important exception is Richard R. Baxter. See *International Law in “Her Infinite Variety*, 29 INT’L & COMP. L.Q. 549 (1980) (examining “soft” law).

11. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM J. INT’L L. 413, 416-17 (1983).

and defended more seriously in recent years.¹²

II. NONLEGAL AGREEMENTS VERSUS TREATIES: PRELIMINARIES

A. *Nonlegal Agreements*

Nations cooperate without law all the time. The Strategic Arms Limitation Treaties I (SALT I) extension, the Organization of Petroleum Exporting Countries (OPEC) quota agreements, the understandings that resolved the Cuban Missile Crisis, and the Sullivan Principles are famous examples. More recent examples include the 1994 U.S.-North Korea Nuclear Weapons Framework Agreement and the Joint Strike fighter agreements, a \$200 billion multinational program to develop strike aircraft weapons systems. In addition to these and other high-profile nonlegal agreements, there are thousands of less public nonlegal agreements.

Nonlegal agreements serve different functions and can be modeled in different ways. One model is the iterated prisoner's dilemma. Two states, or perhaps more, under threat of mutual retaliation, reciprocally refrain from activities that would otherwise be in their immediate self-interest in order to reap mutual gains from cooperation. Another model is the coordination game, in which states receive higher payoffs if they engage in identical or symmetrical actions than if they do not. A classic example is driving: all parties do better if they coordinate on driving on the right, or driving on the left, than if they choose different actions. When two or more states can generate joint gains by coordinating their behavior, then their gains can be maintained without threats of retaliation, for the agreement is self-enforcing.¹³

To achieve joint gains under these models, states must know which actions count as cooperation and which count as coordination. This knowledge need not be embodied in a written or verbal agreement, and indeed, there need not be any formal communication between the parties. Cooperation or coordination can emerge spontaneously as long

12. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONF. RESOL. 3 (1998) (examining nonlegal agreements); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991) (defending nonlegal agreements); Kal Raustiala, *Form & Substance in International Agreements* (June 2003) (unpublished manuscript) (on file with author).

13. The points in this paragraph are commonplace in the international relations literature; for a discussion and citations, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

as each state has enough information about the payoffs of the other states. (Spontaneously harmonious behavior might explain the emergence of some elements of customary international law.¹⁴) For example, two states with clearly defined interests and capabilities might, without any communication or agreement, implicitly accept a particular river as the border between territories.

More often, communication is needed to clarify the expectations of each state—or, in the jargon, to describe the actions that will count as cooperative moves, or the focal points at which coordination will occur. Communication and agreement are important because there will frequently be ambiguity. Games of cooperation and coordination usually have multiple equilibria and no single focal point that will provide a basis for decentralized action. When communication facilitates cooperation or coordination, states make oral or written agreements to identify opportunities for joint gains, and to bring into alignment expectations about the actions to be taken in order to achieve the gains. But nothing in the logic of cooperation or coordination requires that such agreements be embodied in a legal, as opposed to a nonlegal, instrument.

The promises exchanged in nonlegal agreements take different forms. Sometimes they are highly detailed, and at other times they are quite vague. Although we have not examined this question systematically, we suspect that the precision of an agreement is not correlated with its legality.¹⁵ Some legal agreements are precise and others are vague; the same is true for nonlegal agreements. Often a vague joint communiqué, or policy guidance, or some such instrument can facilitate thin forms of cooperation. If nations believe there are potential gains from cooperation, even if they cannot strike the appropriate deal after many rounds of negotiation, they might issue a very general or vague statement of principles that is not in itself determinant, but that at least holds open the door for future cooperation. Such vague pronouncements communicate that an agreement is possible but that much more work is needed (rather than that agreement is impossible, for example, because the strategic situation is zero sum).

One can put this point differently. Suppose that nations could make a nonlegal agreement of greater or lesser precision measured on a scale from 0 to 1 (with 0 being no agreement and 1 being a detailed, precise, and comprehensive contract). If the nations enter into negotiations not

14. *Id.* at 1113, 1124-29.

15. See Raustiala, *supra* note 12, at 4-5.

knowing where they will end up, even 0.01 can be better than nothing. Many vague nonlegal agreements can still exclude certain activities (though it may not be obvious that they do), even if they do not require particular actions on the part of nations.

Nations can communicate, agree, and cooperate in many ways. The simple point so far is that there has been no need to resort to the concept of law or to legal formalities in order to explain international cooperation. There is nothing to decry in this fact. Nonlegal agreements are not a threat to legal agreements. They are simply an alternate form of international cooperation.

B. Treaties as Mechanisms for Enhancing Cooperation

In our view, treaties operate very much like nonlegal agreements. The primary purpose of a treaty, like the primary purpose of a nonlegal agreement, is to record the actions that count as cooperative moves in an ongoing repeated prisoner's dilemma and similar games involving a mixture of cooperation and conflict, and the actions that will count as coordination in coordination games. In repeated prisoner's dilemmas, when the treaty sets out clearly what counts as a cooperative action, it becomes more difficult for a state to engage in opportunism and then deny that the action violated the requirements of a cooperative game. In coordination games, when the treaty defines the coordinating action, it becomes less likely that a failure of coordination will occur because of error. Both models account for "compliance" with international law without reliance on what international lawyers sometimes call "normative pull." States refrain from violating treaties (when they do) for the same reasons that they usually refrain from violating nonlegal agreements: because they fear retaliation from the other state, or because they fear a failure of coordination, or perhaps because they fear reputational loss.

Some scholars draw analogies between treaties and domestic contracts or statutes.¹⁶ But these analogies have limited value. Unlike statute and contract violations, treaty violations, though sometimes subject to self-help remedies, are not subject to reliable sanctions by independent third parties. A better analogy to treaties is the nonbinding letter of intent, in which individuals exchange promises without consenting to legal enforcement. Letters of intent, which are common, depend for their efficacy on reputation and good faith, not enforcement. Treaties are a formal kind of communication like the letter of intent.

16. See, e.g., Mark W. Janis, *An Introduction to International Law* 9-10 (4th ed. 2003).

Both create a record, rely on more careful language than in everyday speech, and provide a springboard for future cooperation. Neither depends on external enforcement.

If this view is correct, then we must be careful how we interpret treaties and the international behavior that flows from them. When a firm complies with the terms of a letter of intent, it does so because it perceives an advantage in complying. The letter of intent announces a firm's intention to merge with another; subsequently the firms merge. We do not say that one firm merged because of the letter of intent, nor do we say that the letter of intent caused or forced the firm to merge. We say that the letter of intent laid the groundwork—clarified expectations—for the subsequent merger. Similarly, when the United States complies with its duties under the North American Free Trade Agreement (NAFTA), the most plausible explanation is that it perceives an advantage to be gained through a reciprocal reduction in trade and investment barriers. Nothing magical happened when the United States ratified NAFTA; the agreement simply clarified expectations prior to interaction.

Firms might sometimes comply with the terms of letters of intent against their immediate interest so that they can preserve the usefulness of letters for subsequent negotiations. A firm might bend on a particular term for the sake of long-term profitability. So, strictly speaking the firm acts in its interest but takes its reputation into account. Similarly, nations might sometimes adhere to treaties in order to retain the value of the instrument, but this is no different from nations' efforts to act consistently with nonlegal promises to provide aid or other benefits, memoranda of understanding, informal agreements, and so forth.

This understanding of treaties views them as no more "binding" than non-legal agreements. Nothing normative distinguishes treaties from other forms of international cooperation. There *are* differences between treaties and nonlegal agreements, which we discuss in a moment. First, however, we consider two other models for international agreements.

C. Coincidence of Interest and Coercion

In our prior work on customary international law,¹⁷ we identified two strategic models for custom in addition to the cooperation and coordination models. One is "coincidence of interest," which describes the behaviors that result from nations following their immediate self-

17. Goldsmith & Posner, *supra* note 13.

interest independent of the actions or interests of other nations.¹⁸ The other is “coercion,” which results when a powerful state (or coalition of states with convergent interests) forces or threatens to force weaker states to engage in acts that are contrary to their interests (defined independently of the coercion).¹⁹

Both treaties and nonlegal agreements often reflect elements of the coincidence of interest and coercion models. But these models cannot fully capture what the instruments accomplish. Consider coincidence of interest. If each nation would engage in the same action for self-interested reasons regardless of what the other nation does, then there would be no occasion to invest resources to enter an agreement codifying the behavior. The same is true of coercion. If one nation coerces another nation into action that it would otherwise not take, an agreement seems redundant. Unlike many examples of customary international law, nations enter into agreements self-consciously and *for a reason*. That basic reason is that, on balance, they gain more than they lose from the agreement. What, then, do nations gain from agreements when the logic of their situation appears to be coincidence of interest or coercion?

The answer is that agreements premised on these two models always have a cooperative element, however thin. Consider the Strategic Offensive Reductions Treaty (more commonly known as the Treaty of Moscow) signed in May 2002, in which Russia and the United States agreed to reduce their nuclear warheads to no more than 1700-2200 in number by 2012.²⁰ Most observers believe that each nation independently had powerful interests in reaching this result. President Bush had announced his intention to unilaterally reduce nuclear arms result regardless of what the Russians did.²¹ And the Russians were under independent pressure to reach the same result because they had diminished need for the weapons, and could not afford to maintain them. So why make a treaty if both sides would do the same thing without one? Of course there may have been an element of public relations on both sides. However, it is also possible that the apparent coincidence of interest was not real. Each state might have been tempted to reduce their nuclear stockpile less rapidly if it knew that the other

18. *Id.* at 1122-23.

19. *Id.* at 1123-24.

20. Strategic Offensive Reductions Treaty, May 24, 2002, U.S.-Russ., art. I, S. TREATY DOC. NO. 107-8, at 1 (2002).

21. David E. Sanger, *The Bush-Putin Summit: The Accord; Bush and Putin Agree to Reduce Stockpile of Nuclear Warheads*, N.Y. TIMES, Nov. 14, 2001, at A1.

state would be reducing its own stockpile unilaterally, so that it could maintain some nuclear advantage in case of an escalation of tensions. If this is so, the agreement would increase each state's sense of security about the other state's nuclear policy. An apparent coincidence of interest is in fact an example of real but vanishingly thin cooperation.

Coincidence of interest plays a more substantial role in compliance with multilateral treaties. From time to time, states enter multilateral conventions that govern the behavior of dozens of states. These treaties are typically rather vague, and often the final version of the treaty requires many of the parties to do nothing different from what they have done in the past. Human rights treaties have this character. States whose behavior is inconsistent with the treaties sign on for diverse reasons, and occasionally begin to act consistently with the treaty in order to obtain some independent good, such as foreign aid, improved reputation, avoided military intervention, and so forth. The other states that sign on need not change their behavior, so compliance for these states is a matter of coincidence of interest.

Cooperation can also explain compliance with treaties which are mainly the result of coercion. When a victorious party imposes a treaty of peace on a defeated enemy, it sets terms that the defeated party would not accept in the absence of the coercion. But there is still a cooperative element here: the defeated party promises to comply with the treaty in return for good treatment, preservation, or some other benefit, and the rights and expectations of all parties are made clearer than they would have been in the absence of the treaty. In these senses, even the famously onerous Treaty of Versailles contained cooperative elements. It created a new German border, established the criteria for military disarmament, set up a prisoner of war exchange process, clarified allied air travel and waterway rights in Germany, and much more.²² These provisions established what counted as cooperation, and thus made the treaty nations better off than if there had been no treaty.

Agreements, then, achieve goals beyond pure coincidence of interest and brute force. But, as we saw in our discussion of cooperation and coordination, nothing about the logic of agreeing explains why states might prefer treaties to nonlegal agreements, or vice versa. To answer this question, one must examine what legality adds to international relations.

22. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 2 Bevans 43.

III. THE CHOICE BETWEEN NONLEGAL AGREEMENTS AND TREATIES

One way to think about the choice between nonlegal agreements and treaties is to ask, why might a country's executive branch (president or prime minister) choose one or the other? The problem with this question is that the executive's choices are constrained by the domestic constitution, the legislature, and other domestic actors and institutions. Bearing this point in mind—one to which we will return below—we will pursue the original question. We discuss three basic answers. First, executives choose the legal form as a way of involving the legislature. Second, executives choose the legal form as a way of invoking certain international conventions. Third, executives choose the legal form as a way of conveying the seriousness of a commitment.

A. Legislative Participation

In most nations, legislative consent is a condition for national ratification of most legally binding international treaties. Under U.S. constitutional law, the legislature participates in this process in two ways: (1) the treaty process, in which two-thirds of Senators present must consent to the agreement; and (2) the congressional-executive agreement process, in which majorities in both Houses of Congress must approve the agreement.²³

In parliamentary systems the distinction between the executive and the legislature is less important. The executive serves at the pleasure of a majority coalition of the legislature. But the distinction between executive signature and legislative consent remains significant. An executive still might sign a treaty but be unable to persuade the parliament to consent to it. Or, the executive might not want to incur the costs of legislative approval, even if approval would be forthcoming in the end. Even in Commonwealth countries the prime minister will often decide to enter into nonlegal agreements rather than face the costs (political and otherwise) of the legislative approval process that is a prerequisite for legal agreements.

Why might legislative consent be a condition for legally binding international agreements? What does legislative participation add to nonlegal agreements?

Consideration of the above-mentioned Treaty of Moscow should help answer these questions. When George W. Bush announced his intention to achieve significant arms control reductions with the Russians, he

23. See CURTIS BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 409-26 (2003).

initially proposed “sealing the deal” with a handshake with Vladimir Putin. Putin and several U.S. Senators balked at this form of agreement. They insisted that the agreement be written down, consented to by the U.S. Senate and the Russian Duma, and formally ratified.²⁴ Significantly, the agreement has taken the latter form. Bush and Putin signed the Treaty of Moscow in May of 2002, and their two countries ratified the treaty in 2003.

Why a treaty rather than a handshake?²⁵ A naive answer is that Putin wanted the agreement to be formal because the United States would be more likely to comply with a legally binding agreement than with a nonlegal agreement. But this answer cannot be complete. Under international law and U.S. constitutional law, an executive agreement made on the president’s authority alone, without legislative participation, can be legally binding. Indeed, Bush considered making the Treaty of Moscow a pure executive agreement, but Putin and the U.S. Senate balked. Why did they insist on Senate participation? What did legislative consent add?

From the Senate’s perspective, participation in the treaty process is easy to understand. Participation enhances its influence over foreign policy. It is not the only such device. The Senate (and the House) can also influence foreign policy through ordinary domestic legislation (for example, funding the military or imposing sanctions on a foreign nation); by retaliating against a president whose foreign policy it dislikes (for example, not implementing his domestic agenda); by restricting the powers of the president when permitted by the Constitution; by exercising advice and consent power with regard to foreign policy appointments; and, in a parliamentary system, by withdrawing support from the executive. It is not surprising that in democratic states legislatures would insist on formal influence over foreign policy, and that in many written and unwritten constitutions legislatures have a great deal of influence.

This explains why the Senate would want to participate. But why would Putin want the Senate to participate, and what might Bush gain from its participation? The answer is that legislative participation can

24. David E. Sanger and Michael Wines, *Bush and Putin Sign Pact for Steep Nuclear Arms Cuts*, N.Y. TIMES, May 25, 2002, at A1.

25. In this section we use the term “treaty” more narrowly to refer to a treaty in the U.S. constitutional sense (i.e., a legally binding international agreement consented to by two-thirds of the Senators present) rather than a congressional-executive agreement or pure executive agreement. In prior sections, we contrasted “treaty” in the international law sense with agreements that are not legally binding.

have several valuable informational effects.

First, legislative consent to a treaty involves hearings, expert testimony, floor debates, public discussions, questions from Congress to the executive, and amendments (both proposed and actual). This process reveals information about the policy preferences of the legislature and thus (in a reasonably democratic state) of the public and/or the elite.²⁶ The revealed information is a clearer indication to a potential treaty partner about the United States' attitude toward the agreement, and thus its likelihood of compliance, than the word of the president alone. Putin might have demanded a treaty because he wanted to know whether the American legislature and public shared Bush's apparently strong interest in arms reduction. If they did not, Putin would have faced a heightened risk that Congress and subsequent presidents would not comply with the treaty.²⁷

Second, when the legislature consents to a treaty, the act of consent can serve as a commitment that is separate from the commitment that the executive alone can make.²⁸ Bush might keep his promises with the Russians in order to retain his power to make future promises. For that reason, Putin might have believed that Bush would try to reduce American arms while he was in office. But Putin might have worried that Bush's successor would not, or he might have worried that even if Bush's successors remained committed to arms control, Congress would not cooperate. If the Senate (or individual senators) also tries to maintain a reputation for keeping promises (as they presumably do), a separate promise from the Senate (in the form of its consent) would reduce concerns that a future Congress would violate the agreement.

Third, the legislative consent process can send a credible signal about the *president's* degree of commitment to the treaty. A president who sends an agreement to the Senate (or to Congress) for its consent incurs several costs. Executive branch officials must forego other initiatives in order to explain and defend the agreement orally and in writing. In addition, the Senate Foreign Relations Committee can consider only a limited number of treaties each session, and prior to each session the

26. See Kenneth Schultz, *Domestic Opposition and Signaling in International Relations*, 92 AM. POL. SCI. REV. 829, 830 (1998).

27. Note that the informational properties of ratification are weaker than is commonly thought because, in the U.S. system, the president in some cases has the power to terminate certain non-self-executing treaties on his own authority. Consequently, the information provided by the legislature is always diminished to the extent that a subsequent legislature or president might change its (or his) mind and withdraw.

28. For a recent statement of this view, see LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* 36-47 (2000).

president must inform the Committee of his treaty priorities. Every treaty considered by the Senate thus comes at the cost of neglect of other treaties or laws that could further the president's agenda. In these and other ways, legislative participation sends a credible signal about the seriousness with which the president views the treaty.²⁹

Returning to the Treaty of Moscow, Bush might have understood that Putin would not make a commitment unless he received more information than Bush by himself could credibly provide—information about the attitudes and preferences (and intensity of preferences) of Senators (and their constituents), and of Bush himself. In addition, in light of a threatening letter that the Bush administration received from both Senators Biden and Helms,³⁰ he might have understood that the costs of a possible Senate retaliation would be greater than the costs (minus the informational benefits) of a Senate confirmation process. Some combination of these reasons probably explains why Bush agreed to use the Senate consent process.

One reason that the U.S. president asks for Senate consent is that there are constitutional norms that require him to do so. Although executive agreements are used frequently, Senate consent remains the

29. A related strand of thinking in the political science literature holds that political participation in the treaty process increases the bargaining power of the executive when he negotiates international agreements. *See id.* We think this idea rests on a confusion. The idea seems to be this: The president and a foreign leader are negotiating over an agreement worth, say, 100. The president's reservation price is 1, and his personal bargaining power (patience and so forth) would get him 40. The legislature's reservation price, however, is 60. So when the foreign leader offers 41, the president says truthfully, "Congress will not go along with anything less than 60." The president's hands are tied, and as a result he will get a larger share of the surplus than he would if Congress was not involved. The problem with this theory is that if Congress is the principal, its bargaining power is not enhanced. Congress is just getting its reservation price. The president gets more than his reservation price, but in other situations—where Congress's reservation price is 70 and the foreign leader's is 65—the president gets nothing, whereas he would get something if Congress were not involved. (This point is clear in formal models. *See, e.g.,* Keisuke Iida, *When and How Do Domestic Constraints Matter? Two-Level Games with Uncertainty*, 37 J. CONFLICT RESOL. 403 (1993); Helen V. Milner & B. Peter Rosendorff, *Democratic Politics and International Trade Negotiations: Elections and Divided Governments as Constraints on Trade Liberalization*, 41 J. CONFLICT RESOL. 117 (1997)). Putnam, who popularized the hand-tying argument (relying on Schelling's earlier formulation), makes clear that this tradeoff occurs, as do the authors of subsequent articles. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988). Whatever one thinks about the argument, it cannot be (without further refinement) an explanation for why an executive would benefit from legislative participation in international agreements. The authors may have in mind some premises that they have not made explicit.

30. Letter from Senator Jesse Helms, Ranking Member, & Joseph R. Biden, Jr., Chairman, Senate Committee on Foreign Relations, to The Honorable Colin L. Powell, Secretary of State (Mar. 15, 2002), at <http://www.armscontrolcenter.org/2002summit/a7.html>.

pattern for certain types of agreements, for example, in the security area. A brief explanation for this norm is that legislative participation in the international agreement process serves an additional role analogous to the constitutional requirement that Congress declare (or authorize) war: It reduces the agency costs of presidential action. The legislature ensures that the agreement negotiated by the president is aligned with the principal whose interests he purports to represent—U.S. voters. Of course, the president might in some contexts more accurately represent voter preferences than legislators—especially when one considers the aggregation and related collective action difficulties that attend the legislative process. But this just shows that the U.S. Constitution is biased against international agreements, just as it is biased against war. The requirement of dual executive-legislative consent promotes compliance by increasing the likelihood that the United States enters into only those agreements that increase national welfare. But this benefit comes at a cost of interfering with some agreements that would have enhanced national welfare, either because the president failed to negotiate, or because the legislature failed to consent. This is a defensible tradeoff because treaty compliance depends on both executive and legislative support.³¹

Finally, legislative participation can render a treaty enforceable by domestic courts in one of two ways. The treaty can by its terms be self-executing, or, if it is not, the legislature can enact implementing legislation. By rendering international agreements enforceable in independent domestic courts, legislatures can create domestic institutional obstacles to reneging on international promises, and thus strengthen the credibility of the treaty commitment. These effects should not be overstated. In the United States and many other countries, many (and probably most) treaties are non-self-executing and thus not enforceable by courts. In addition, courts pay special deference to the politically informed views of the executive branch in interpreting treaties.³² This means that later executive branches can influence the content of the treaty, thereby lessening the impact of independent courts. And finally, a commitment to judicial enforcement is always reversible (at some cost) by the legislature. Thus, courts play a limited role in strengthening the commitment of the government. Their main role is that of coercing private actors to comply with a treaty.

For these reasons, an executive wishing to foster successful

31. On the relationship between foreign policy and the division between Congress and the president, see Milner & Rosendorff, *supra* note 29.

32. See BRADLEY & GOLDSMITH, *supra* note 23, at 102-05.

international cooperation will, all things being equal, choose a treaty with a domestic ratification process that includes legislative participation. But of course, all things are not equal. Legislative participation can be a lengthy, expensive, and risky process. The executive has to commit important resources to securing consent that could be used for other purposes. If the executive does not accurately determine the policy preferences of the legislature, he might fail to obtain the desired consent, as was the case when the Senate refused consent to the Test Ban Treaty and the Treaty of Versailles. Or perhaps the president will obtain consent, but only after a lengthy and costly delay, as occurred with the Panama Canal Treaty in 1977. Moreover, the president might have to make political payoffs to legislators with opposing foreign policy objectives.

The executive can avoid these costs by entering into a nonlegal agreement that does not require legislative consent. Nonlegal agreements are, on the whole, less costly for they can be negotiated and concluded more quickly, and they are usually less public than legal agreements. These advantages, of course, all come at the price of a reduction of the information and commitment benefits that flow from legislative participation, as described above.³³

To summarize, executives will tend to opt for legalized agreements, and thus for legislative participation, when (1) the other nation demands a strong or lasting commitment; (2) the president's foreign policy goals converge sufficiently with the legislature's that consent can be obtained; and (3) immediate action is not required. By contrast, an executive will tend to choose nonlegal agreements, thus avoiding the legislative process, when one of these three conditions is not satisfied, and when a nonlegal agreement will otherwise bring benefits. In choosing the route of nonlegal agreements, the president must consider, among other things, whether any divergence in objectives with the legislature will invite costly legislative countermeasures.

It is important to note that these tradeoffs can be described without reference to the concept of normativity. There is nothing about the legality of an international agreement *per se*, or a nation's preference (or lack of preference) for complying with international law, or the normative pull of international law, that informs this decision. Internationally binding agreements are the name we give to instruments that emerge from processes that are motivated by factors mostly related

33. See Lipson, *supra* note 12, at 500-01.

to information conveyance. The strength of a nation's commitment to a legalized agreement is not a function of its legality, but rather of the number of political officials and institutions whose reputations are harmed by its violation, and of the strength and uniformity of public and elite preferences.

B. International Conventions

Thus far we have proceeded on the assumption that legalized agreements require legislative participation. But this is not always true. International law does not insist that nations have legislatures, and thus does not require legislative consent as a condition of making legal agreements. Indeed, each state has constitutional mechanisms for making international agreements without legislative participation. In the United States the most prominent such method is the "pure" executive agreement—a legally binding agreement made on the president's own authority without legislative consent. The president's power to make pure executive agreements is much narrower than the (domestic) treaty power or the power to make congressional-executive agreements,³⁴ but it is an important power nonetheless. The 1981 Algiers Accord³⁵ that ended the Iran Hostage crisis and the 1933 Litvinov Agreement³⁶ recognizing the Soviet Union are two famous examples.³⁷

Pure executive agreements are a puzzle for the traditional view and for our theory. Because the traditional view identifies legality with increased compliance pull, it cannot explain why the executive would ever choose to make a nonlegal rather than legal executive agreement. If the choice of instruments lies in the president's discretion, he would presumably always want the more binding agreement, at least for agreements where he cared about compliance. For our theory, the puzzle

34. Although treaties and executive agreements are theoretically interchangeable, in fact the choice between the two instruments is determined almost exclusively by custom and quasi-constitutional considerations, and not by concerns about ease of ratification. The president does have some leeway when deciding between a sole executive agreement and one of the two processes with legislation participation, but not much. The power to make sole executive agreements is much narrower than the treaty or congressional-executive agreement power; many agreements must, as a matter of constitutional law, have legislative approval. Indeed, there are very few "pure" executive agreements; the vast majority of executive agreements negotiated by the president have some authorization or related basis in a statute. BRADLEY & GOLDSMITH, *supra* note 23, at 424-26.

35. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran, DEP'T STATE BULL., Feb. 1981, at 1, *reprinted in* 1 IRAN-U.S. CL. TRIB. REP. 3.

36. 28 AM. J. INT'L L. 1, 1-11 (Supp. 1934).

37. BRADLEY & GOLDSMITH, *supra* note 23, at 424-26.

is what the president gets from “legalizing” the agreement. We have suggested that legislative participation, which is associated with legality, conveys information that enhances the credibility of the commitment. But the pure executive agreement becomes legalized without the information conveyed by the legislative process. In this context, what does legalization add?³⁸

An important difference between treaties and nonlegal agreements is the existence of a formal law of treaties, as codified in the Vienna Convention. By entering a treaty, a state provokes a special set of expectations about how the agreement will be interpreted, understood, and enforced. A nonlegal agreement does not create the same expectations, because technically the Vienna Convention does not govern such agreements.³⁹ To understand how the treaty creates these expectations, we must look first at the Vienna Convention.

The Vienna Convention (in large part) codifies the customs and practices concerning the interpretation of treaties. Many of these customs and practices originated in customary international law. One reason why codification of customary international law occurs is that such law is often vague and contestable. The Vienna Convention clarified and modified the customs by which some agreements were determined to be treaties and others were not, the various mechanisms by which states consented to treaties and took reservations to certain treaty provisions, the common rules of treaty interpretation, the effect of treaties on third states, the process of treaty modification and termination, and so forth.

The Vienna Convention tells us what qualifies as a treaty and what does not. This is important, because the rules of treaties that it lays out only apply to treaties, and not to nonbinding agreements. The Vienna Convention also specifies the various ways that a nation can consent to

38. Some answers to this question are suggested by the analysis above. In the United States, all (legal) executive agreements must be reported to Congress, and thus made public, under the Case Act. 1 U.S.C. § 112b(a) (2000). Therefore, if the president wants to keep secret the agreement with the other head of state, or wants to minimize publicity, he will prefer to call it a nonlegal agreement. On this view, the choice not to legalize an agreement is a response to Congress's effort to monitor the president's foreign policy; the choice comes at the cost of foregoing the informational benefits of congressional participation. The president also might legalize the agreement to incorporate the terms of the Vienna Convention. By making an agreement legal, the parties invoke a special set of expectations about their obligations under the agreement. If the parties do not make an agreement legal, then less precise background expectations will prevail.

39. Vienna Convention on the Law of Treaties, *supra* note 3, art. 2(1)(a), at 333.

a treaty.⁴⁰ Sometimes the representative's signature suffices, sometimes an exchange of instruments is necessary, and other times ratification is required. Each of these methods has a different significance for the subsequent duties and expectations of each state. It is important that each nation has the same expectations about the significance of these acts. The Vienna Convention clarifies these different expectations.

The same is true for the Vienna Convention's rules of interpretation. Many sources potentially inform the meaning of a treaty, including text, context, the treaty's purpose, negotiation records, and legislative hearings. When a dispute arises, it is important that the parties agree on how to interpret the treaty, so they can determine the meaning of the treaty and cooperate under its terms. The Vienna Convention's rules of interpretation facilitate this process. They say that the treaty shall be interpreted in "context and in the light of its object and purpose," and they exclude consideration of "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," unless the presumptive sources "leaves the meaning [of the treaty] ambiguous or obscure," or "leads to a result which is manifestly absurd or unreasonable."⁴¹

As a final example, let us consider the rules on reservations.⁴² A reservation is essentially a refusal to consent to a particular treaty term. Reservation rules are simple for a bilateral treaty. A reservation is like a counteroffer—both parties to the treaty must agree to every reservation before the treaty becomes valid. For multilateral treaties, matters are more complex. Under the traditional rule, a reserving state was not a party to a treaty unless every other party to the treaty accepted the reservation. With the expansion of multilateral treaty-making after World War II, the unanimity rule came to be viewed as insufficiently flexible. In its famous 1951 advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice (ICJ) held that a reserving state could be a party to the Genocide Convention even if some parties to the Convention objected to the reservation. The ICJ stated, however, that if a state makes a reservation incompatible with the object and purpose of the Genocide Convention, the state "cannot be regarded as being a party to the Convention."⁴³

40. *Id.* art. 11, at 335.

41. *Id.* arts. 31-32, at 340.

42. *Id.* arts. 19-23, at 336-38.

43. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 29 (May 28).

This holding, and the problem of multilateral treaty reservations more generally, raised several difficulties that the Vienna Convention aimed to solve. Article 19 of the Convention allows a party to formulate a reservation to a treaty unless “the reservation is incompatible with the object and purpose of the treaty.”⁴⁴ Articles 20 and 21 then establish rules for acceptance or rejection of reservations and the consequences that follow acceptance or rejection.⁴⁵ When a contracting nation accepts another nation’s reservation, the reserving nation becomes a party to the treaty in relation to the accepting nation.⁴⁶ A reservation is deemed accepted by any nation that does not raise an objection to the reservation within twelve months of notification or “by the date on which it expressed its consent to be bound by the treaty, whichever is later.”⁴⁷ An objection to a reservation does not preclude entry into force of the treaty between the reserving and objecting nation unless the objecting state says so definitively.⁴⁸ Rather, the provision to which the reservation relates is simply inapplicable between the two nations to the extent of the reservation.⁴⁹ In sum, the Vienna Convention’s reservation rules specify the meaning of silence and objection in the face of a reservation, and outline the consequences. Once again, the aim is to facilitate cooperation.

The Vienna Convention and the customary rules that it codifies clarify general expectations about what actions count as cooperative moves in treaties.⁵⁰ These rules are, in the parlance of contract theory, default rules or interpretive presumptions—the rules to which states appeal when they advance interpretations of contested language in a treaty. The default rules created by the law of treaties are sometimes vague, as the “object and purpose” test for reservations shows. But they are more precise than, and distinct from, the more general intuitions that inform moral evaluation of a violation of an agreement. One important reason why states enter into a legally binding treaty, then, is to inform each other that the default rules set forth by the law of treaties will apply if a dispute arises, and not the more general intuitions that apply to

44. Vienna Convention on the Law of Treaties, *supra* note 3, art. 19(c), at 337.

45. *Id.* arts. 20-21, at 337.

46. *Id.* art. 20(4)(a), at 337.

47. *Id.* art. 20(5), at 337.

48. *Id.* art. 20(4)(b), at 337.

49. *Id.* art. 21(3), at 337.

50. We do not claim that every Article in the Vienna Convention serves this purpose. Rather, we simply claim that many of the Vienna Convention’s terms serve the function described in the text.

disputes about nonlegal agreements.

So a treaty does not create obligations that are necessarily “more binding” than those of a nonlegal agreement. The treaty creates a *different* kind of obligation: a legal obligation rather than a promissory obligation. The legality of the obligation has nothing to do with its normativity, or as a matter of theory the extent or likelihood of compliance; it is instead a mutual acknowledgment that a special set of default rules or interpretive presumptions will be used if a dispute arises. The rules presumably reflect the most common interpretive and enforcement practices of states when they have disputes about treaties.⁵¹

C. *Seriousness*

A final explanation for the decision to legalize an international agreement is that legalization is a means of conveying the seriousness of a state’s intent to be bound. In domestic affairs, legality conveys bindingness; it seems natural to transport this meaning to international affairs as well. The useful analogy, as we discussed above, is the letter of intent, which is a nonbinding agreement that conveys a greater level of commitment than a mere handshake. An executive agreement is to a nonlegal international agreement as a letter of intent is to a handshake. Each reflects a different level of commitment, but not the presence or absence of an external force or normative pull that will guarantee obedience.

On this view, the legalization of agreements may serve a channeling function similar to that served by the consideration doctrine and other

51. Our view of the Vienna Convention contrasts with John Setear’s rational choice “iterative perspective.” John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996). Setear argues that the Vienna Convention facilitates iteration between treaty parties, which in turn can promote cooperation in relationships modeled as prisoner’s dilemmas. It does so, according to Setear, by setting forth at least two iterations—signature and ratification; by requiring notice of treaty termination and dispute resolution procedures; by permitting parties to withdraw only in narrow circumstances; by preserving the right to retaliate in order to deter cheating; and in other ways. We fail to understand how the Vienna Convention promotes iteration beyond the iteration contemplated in the underlying treaty itself. A state that violates a treaty without providing notice to the other party does not incur any extra sanction or reputational loss, over and above the underlying violation, because it also violated the Vienna Convention’s notice provision. It is thus hard to see how the Vienna Convention itself affects a state’s cost-benefit analysis in assessing whether to comply with the underlying treaty, and thus it is difficult to see how the Vienna Convention increases the number of iterations beyond what would occur in its absence. States might indeed design a treaty to promote iteration by, for example, providing that every year each state must reduce its emissions by *p* percent, with each state’s obligation conditional on the other state complying with its own obligation. The Vienna Convention does not, in our view, add to this iteration beyond its general clarification of expectations, as described in the text.

conventional legal formalities in domestic contract law.⁵² In domestic law as in international law, individuals have a choice between making legal and nonlegal commitments. Under the consideration doctrine, a promise made in exchange for another promise or performance is presumptively a legal obligation, but the promisor can avoid legalizing the agreement by explicitly disclaiming any intention to make it legally binding. Under older law, a gratuitous promise was presumptively not legally binding, but the promisor could convert the promissory obligation into a legal obligation by putting it under seal. Outside contract law, a promise to bequeath an estate to an individual is not legally effective, but a person can convert the promise into a legally effective will by signing a document in front of witnesses and adhering to other formalities. In all of these cases, legal form provides a device by which an individual communicates to the court his desire to create or avoid a legal commitment. Additionally, as Lon Fuller emphasized, the channeling function of formalities communicates intention not only to courts, but also to other parties who carry on business extrajudicially.⁵³

The channeling function of formalities in international law is similar though more complex. There are certain formalities associated with legal and nonlegal agreements. Generalizing, legal agreements tend to use the terms “agree,” to speak in terms of obligation, to be organized in terms of a preamble and articles, and to talk about entering into force. Nonlegal agreements, by contrast, tend to use the terms “decide,” “determine,” or “understand;” to speak in terms of responsibility rather than obligation; to be organized in terms of an introduction and section (as opposed to preamble and articles); and to enter into effect rather than force.

When a president thinks about entering an agreement with another leader, his decision whether to use legalistic conventions determines whether the agreement will count as a legal treaty or a nonlegal agreement. One reason for using legalistic conventions is to convey the strength of the parties’ commitments to comply. Over time the use of legalistic language, perhaps because of the analogy to domestic arrangements, has come to signal that the commitment is especially serious, and the state is less likely to violate it than a non-legal agreement, all things equal. Legalistic language is avoided when the state wants to retain flexibility—when it wants to make an “agreement to agree,” or provide some rough guidelines as a platform for further

52. See Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-02 (1941).

53. *Id.* at 801.

negotiations. This weaker form of nonlegal agreement is not without significance, for states suffer reputational and retaliation losses from violating a nonlegal agreement just as corporations suffer reputational and retaliation losses from violating non-enforceable letters of intent. The point is that in both contract law and international law, the use of legal or nonlegal language can serve as a convention to convey to other parties the degree of seriousness with which the parties view the agreement.

Thus, a president legalizes an agreement as a conventional way of signaling that the probability of future violation is lower than it would be without legalization. The signal is effective as long as the state has a reputation for complying with legal agreements, and would lose that reputation (in whole or in part)—and thus the benefits of existing treaties as well as the ability to enter treaties in the future—if it were to violate a treaty in a sufficiently flagrant way.

D. Summary

When the executive seeks to make an international commitment, he can choose to legalize it or not to legalize it. Legalization in the American system usually (but not always) requires legislative participation, and thus is politically costly, but for that reason it can be used to signal the depth of political support for the commitment. Legalization of an agreement is also a useful way to invoke a host of international conventions—gap-fillers that facilitate cooperation and minimize the time and cost needed to negotiate the obligations on each side. Finally, even when legalization does not require legislative participation, it is by diplomatic convention a way that the executive shows that a commitment is serious rather than tentative or preliminary.

IV. OTHER ISSUES

A. Reputation and Compliance

There are many theories about compliance with treaties. Compliance theories can be divided into two schools. The first school views compliance as a function of normativity and related factors. This is the view of international lawyers and some in the “legalization” camp in political science. We have already provided reasons for thinking that there is no intrinsic connection between legality and compliance, and that self-interest and the logic of the strategic situation do a much better job of explaining the behaviors associated with international law. It is

true that *sometimes* we see “compliance” with precise treaties that delegate decision-making power to third parties. But the traditional view gets the causation backwards. Compliance does not follow from legality, specificity, and third-party arbitration. Rather, nations choose the legal form for instrumental reasons, as the best way to achieve a cooperative outcome made possible by the strategic environment. So, precise treaties with third party adjudicators can bring parties real joint gains. But the presence of a precise treaty with third-party arbitrators by itself, abstracted from strategic context, tells us nothing about the efficacy of the treaty.

The second school of compliance theorists views compliance in prudential terms and emphasizes the importance of reputation. Nations comply with international law to the extent that doing so is cost-justified, and one important cost of noncompliance is a diminution of reputation that will hinder future cooperation. There are intermediate positions between the two schools. Some international lawyers talk loosely about the reputational effects of noncompliance⁵⁴ and some law and economics scholars build up a prudential theory on an assumption of special reputational costs from non-compliance with legal norms.⁵⁵

Reputation surely plays an important role in understanding patterns of “compliance,” and we are firmly in the prudential school. But the account of compliance based on reputation is invoked promiscuously, and often serves as a substitute for analysis. A typical argument in this school runs as follows: if a state violates its obligation to reduce tariffs under a free trade pact, other states will retaliate by refusing to lower their own tariffs or taking some other aggressive action.⁵⁶ Little effort is made to explain the logic and limits of retaliation. If tariff reduction were simply a matter of multilateral retaliation against anyone who violated a trade treaty, then why is cooperation not possible in many other contexts? Why not a world peace treaty that would be maintained by reputational sanctions?

The prudential concerns of states will often give them reasons to comply with treaties—sometimes reputational, sometimes not. As an example of a non-reputational reason, consider a state’s incentive to comply with a treaty that sets up time zones. The treaty solves a

54. E.g., HENKIN, *supra* note 5, at 52-3.

55. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1860-65 (2002).

56. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002).

coordination problem, and the state complies with the treaty just because it does better by coordinating than by failing to coordinate. If it changes its time zone without giving notice to other nations, it will disrupt its own commerce. Neither reputation nor the desire to comply with international law is needed to explain this simple case of compliance.

Another reason for treaty compliance is more closely related to reputation, but is better kept separate. Often a state will comply with a treaty because it fears retaliation if it fails to comply. A treaty that establishes a border between two states is one example. Incursions across the border will likely be met with military retaliation. Scholars sometimes say that the state that retaliates wants to establish a reputation for toughness in order to deter future treaty violations. The underlying strategic interaction is one of repeated play. Depending on the situation, it can be modeled as a repeated prisoner's dilemma, a game of chicken, or a similar game that mixes conflict and cooperation.

The core reputational argument is that states have private information that they seek to reveal or conceal through compliance with treaties and other international agreements. A useful characterization is as follows. All states have political institutions that do a better or worse job of translating the public interest (or the interests of powerful groups or elites) into a foreign policy, and keeping this "state interest" constant over a period of time. The "state interest," then, is a cluster of preferences about the state of the world (economic, environmental, and so forth), including a time preference. Better political institutions will result in a more constant and far-sighted state interest than political institutions that generate arbitrary, cyclical, or fragile foreign policy preferences. The states with better political institutions have an interest in revealing this information to the world, for those states are more reliable cooperative partners. One way to convey this information is to comply with promises, agreements, and treaties.

On this view, every time a state must decide whether to comply with a treaty, it weighs the immediate benefits from violation and the long-term consequences to its ability to enter and maintain cooperative relationships in the future. We should not be surprised, then, that states "automatically" comply with hundreds of low-level agreements in which the benefits from violation are minimal—although we think that in many of these instances compliance is consistent with short-term coordination benefits—or are simply not costly at all. The question, then, is whether the retaliation or information stories can explain robust international cooperation.

Some doubts follow. First, it is not clear how much private information states really have. Most states these days are open, or do a poor job of keeping their secrets (and those insulated states, like North Korea, are for that reason assumed to be “bad types,” in an example of the classic unraveling result in games of asymmetric information), and one can obtain a fair indication of a state’s political stability by consulting the market’s valuation of its bonds.

Second, it is not clear how much the violation of one treaty says about the state’s propensity to violate other treaties. A state might have a good record complying with trade treaties and a bad record complying with environmental treaties. This might result from the differential performance of the state’s political institutions—perhaps political coalitions for trade policy are more stable than coalitions for environmental policy. But then reputation must be disaggregated, and it makes no sense to talk about a state’s general propensity to comply with treaties.⁵⁷

Third, a nation has multiple reputational concerns, many of which have nothing to do with, or even are in conflict with, a reputation for international law compliance. As Robert Keohane⁵⁸ has observed, a reputation for compliance with international law is not necessarily the best—and certainly not the only—means of accomplishing foreign policy objectives. States can benefit from reputations for toughness or even for irrationality or unpredictability. Powerful states, like the United States, cannot be punished effectively when they violate international law, so they may do better by violating international law when doing so shows that they will retaliate against threats to national security. Weak states with idiosyncratic domestic arrangements, like Iraq or North Korea, may benefit by being unpredictable or irrational. As Schelling⁵⁹ has shown, one cannot coerce a person by threatening him if that person is irrational. One might conclude that all things being equal, nations will strive to have reputations for compliance with international law, but reputations for compliance will not always be of paramount concern because all things are not equal.

57. See George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002).

58. Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 496-99 (1997).

59. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 130-31 (1963).

B. Multilateral Treaties and International Organizations

Treaties are either bilateral or multilateral. Bilateral treaties are generally easy to understand, as we have argued. For the most part, they enable states to coordinate on actions, and to clarify the terms of cooperation in a repeated bilateral prisoner's dilemma and similar strategic interactions. States comply with them as long as the discounted value of the cooperative benefits exceeds the immediate gains from breach.

Multilateral treaties are more of a puzzle. The last sixty years have witnessed an explosion of multilateral treaties with near-universal assent. Many multilateral treaties establish free-standing international organizations, some of which are well known (such as the United Nations, the World Trade Organization, the International Atomic Energy Agency, and the North Atlantic Treaty Organization), and some of which are not (such as the International Seabed Authority, the International Civil Aviation Organization, and the Food and Agriculture Organization).

Game theorists have shown the logic of bilateral cooperation can be extended to any number of agents.⁶⁰ Suppose that n states must cooperate in order to preserve a commons like an ocean fishery. If each state adopts the right strategy—for example, I will not overfish in the first period, and in subsequent periods I will overfish if someone else overfished in an earlier period—then in theory the commons can be preserved. But for reasons we explain below, we doubt that this type of interaction is a normal occurrence. Our view is that most multilateral treaties that are not purely hortatory are based on some form of embedded bilateral cooperation. What little genuine multilateral cooperation we might see is thin, in the sense that it does not require nations to depart much, if at all, from what they would have done in the absence of the treaty.

Take the example of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). One could imagine n -state enforcement of free trade in the following way. Whenever one state raises tariffs or engages in some other prohibited action, *all* states could retaliate by raising their tariffs vis-à-vis the violator (or all states could launch a military attack on the first state, or expel its ambassadors). The benefits of such a convention are easy to imagine: it would make it difficult for one state to take advantage of another state that is currently experiencing political problems. Even if the target

60. *E.g.*, ROGER B. MYERSON, *GAME THEORY: ANALYSIS OF CONFLICT* 334-35 (1991).

state's importers resist retaliation through the raising of tariffs, the participation of all states would reduce the burden of retaliation in any particular instance, and allow a reaction that is more closely calibrated to the needs of deterrence. But this is not the system that we observe. Instead, only the target state (or other states directly affected) has the "right" to retaliate against the aggressive state. The treaty system in this way depends on bilateralism, and only by endorsing pre-treaty practice, according to which states would unilaterally retaliate when other states raised tariffs.

GATT and the WTO, to be sure, have many multilateral elements. The nondiscrimination rule, which requires members to offer identical concessions to all other members, is a standard example.⁶¹ But, this system harks back to nineteenth century bilateral trade treaties that contained "most favored nation" (MFN) clauses (as do many purely domestic contracts today).⁶² In these treaties, the two contracting parties would agree to reduce tariffs and the MFN clause provided that if one of the parties agreed to an even lower tariff for the same goods with respect to a third nation, then that lower tariff would apply to the goods of the other contracting party as well. Although the purpose of the MFN clause is still debated, its popularity shows that a contracting state considers itself injured—no doubt from trade diversion—if the other contracting state turns around and reduces tariffs further in a trading relationship with a third party. Under GATT, the nondiscrimination rule gives a state the right to retaliate if it is harmed by the failure of another state to extend a trade concession to it that this other state extended to a third state. Although the injured state might or might not retaliate, it is clear that uninvolved states—states that are not injured by the discrimination—will not retaliate. Thus, enforcement is bilateral, not multilateral. The simple point is that, as the nineteenth century experience shows, a state that has a tariff agreement with another state will (by its own lights) be injured if that other state enters a more favorable agreement with a third state. Thus, states that are injured by trade diversion will retaliate under GATT to the same extent that they did in the nineteenth century. The contribution of GATT was to allow for multilateral negotiation, not to enable a stronger system of

61. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I:1, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

62. Robert Pahre, *Agreeable Duties: The Tariff Treaty Regime in the Nineteenth Century*, in *INTERNATIONAL TRADE AND POLITICAL INSTITUTIONS* 29, 71 (Fiona McGillivray et al. eds., 2001).

compliance.

Generalizing, we hypothesize that agreements between a large number of states occur as a way of avoiding duplicative effort in negotiating terms of agreements that, because of the similarity of the interests of the states, would not vary much if each pair of states separately negotiated a bilateral agreement. Compliance, however, is a different matter. States comply with the terms of multilateral agreements not because they fear multilateral enforcement—either in the sense of all other contracting parties retaliating against the violator by subjecting it to trade barriers, or in the sense of acquiring a reputation for disregarding international law. States comply with the terms of multilateral agreements because they fear that a particular trading partner who would be injured by a violation will take retaliatory measures. In a phrase, negotiation can be multilateral, but enforcement is always bilateral. As a result, the behavior of states that are members of a multilateral treaty regime will diverge a great deal, depending less on the formal rules of that regime than on the reactions of other particular states that take an interest in the kind of behavior that the regime regulates.

C. Hortatory Treaties, Opt-Out Clauses, and Renegotiation Clauses

One reason that treaty compliance is common is that treaties tend to be weak. Many treaties are so vague that it would be difficult to violate them definitively. The recent nuclear arms reduction treaty signed by Bush and Putin is an example. It does not set limits, but aspirations, and vague ones at that. This treaty is further weakened by a generous “opt-out” clause, whereby either state can withdraw from the treaty with just three months’ notice.⁶³ Opt-out or withdrawal clauses are fairly common in treaties. If events change so that a treaty stops serving a state’s interests, the state can usually avoid its obligations without violating the treaty. There are many treaties that are purely hortatory, but many more apparently substantive treaties have such vague terms, and are so generous in their withdrawal provisions, that they could probably be classified as hortatory as well.

The fact that states frequently enter treaties and then decline to withdraw from them is evidence for our minimalist view about the role of treaties in international cooperation. Unlike a contract, which bars each party from engaging in opportunistic behavior, a treaty with an

63. Strategic Offensive Reduction Treaty, *supra* note 20, art. IV, at 3.

opt-out clause simply requires that one state give notice before acting opportunistically (in the sense of refusing to cooperate, if such is the case). The causal role of the hortatory treaty is not the same as that of the contract. It does not create the conditions for cooperation by creating a sanction for opportunism. The states are already in a position to cooperate; the treaty simply clarifies the terms of cooperation.

Hortatory treaties lie somewhere between pure talk, on the one hand, and relatively specific and obligatory treaties, on the other hand. Like talk, hortatory treaties can serve strategic purposes. They can clarify intentions and create focal points for coordination. The difference between a unilateral avowal and a hortatory treaty is that the communication is joint, thus ensuring that a focal point is the same for two or more states. The difference between a hortatory treaty and a more substantial treaty is that much is left vague for future negotiation. As a practical matter, hortatory treaties often follow a failure of negotiations originally intended to produce a substantive agreement. The hortatory treaty is a way of saying that the states' interests are not so divergent that further negotiations in the near future would be futile.

V. CONCLUSION: THE NORMATIVITY QUESTION

The standard international law view, recently adopted by some political scientists as well,⁶⁴ is that international law has what one might call "normative pull." A state complies with a treaty not because of its self-interest, short or long term, but because of a normative obligation to comply with the treaty. As many international scholars have pointed out, a rational choice theory of international law does not by itself show that international law does not have normative force. Indeed, these scholars argue that international law does have normative force, and for that reason rational choice cannot provide a satisfactory theory of international law and behavior.⁶⁵

Here we do not have the space to address this challenge fully, but a few comments will be helpful in defining the scope of our inquiry. First, we agree that a rational choice explanation cannot show that states do not obey a moral obligation to comply with international law. Our goal is to use rational choice methods to explain the behavior of states as much as possible. Because of the weakness of most international law,

64. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

65. See, e.g., TESÓN, *supra* note 6, at 83-85.

compliance rarely forces states to rise far above their narrow self-interest. When they do, simple rational choice explanations seem to be adequate. If there is an unexplained residuum of behavior, it is so small that normative motivations cannot be credited with a great deal of influence on states' behavior.

Probably the best evidence for international law scholars is the importance that states attach to rhetoric. In other work, we have offered a rational choice explanation for the rhetorical practices of states.⁶⁶ But even if one rejects our explanation there, the implications for the standard international law view remain narrow. It could be that leaders have a moral commitment to comply with international law and follow it even in the face of public opposition. Or (more plausibly) it could be that publics internalize international legal norms, and that leaders feel that they must not only support these norms with rhetoric, but bring international behavior in line with their rhetoric, lest they be accused of hypocrisy or disloyalty by their constituents. But before rejecting the rational choice approach as irrelevant, or endorsing the international law view, one must take a position on the magnitude of the effects.

There are several reasons for skepticism. First, the history of international relations has been one of pervasive hypocrisy. Leaders and diplomats profess their commitment to international norms, ideals, and legal standards, and then violate them. Violations are always rationalized but the rationalizations do not fool experts, and if they fool the public, then this just shows that the public's commitment to international norms is not deep or sophisticated enough to constrain the behavior of leaders. One might argue whether in marginal cases the state's behavior is motivated by a desire to comply with international law (whether or not derived from the prior commitments of the public), but most behavior seems straightforward.

Second, leaders are never completely constrained by the desires of constituents. They usually have some space to exercise discretion, and leaders with strong moral sensibilities might use this space to achieve moral goals. Citizens, as well, usually have strong moral commitments about a range of issues affecting foreign policy. But there is a difference between these sets of moral commitments and the set of obligations that are established by international law. Often, they conflict. Kosovo is only the most recent example where humanitarian concerns shared by American citizens and leaders prevailed over international legal

66. Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115 (2002).

restrictions on military intervention. We treat such moral and humanitarian concerns as part of the “interest” of a state, and if it were the case that the public and leaders had an additional moral preference for complying with international law, the rational choice explanation would collapse into the international law view. But we do not believe that this is the case, and indeed international law scholars have long had trouble explaining why states do have a moral obligation to comply with international law.

Third, the normative view of international law scholars has never received a satisfactory justification. The most common idea is that states have a moral obligation to comply with international law because they have consented to it, but this idea is vulnerable to powerful criticisms. More ambitious theories that explain the difference between international law that states have an obligation to obey and international law that states do not have an obligation to obey have little explanatory power.⁶⁷ Much of the work, in fact, surrenders in the face of the explanatory challenge and criticizes states for failing to adhere to an independent ethical standard.⁶⁸

67. See Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1910-16 (2003).

68. See, e.g., TESÓN, *supra* note 6, at 14-16.

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