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FORM & SUBSTANCE IN INTERNATIONAL AGREEMENTS

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Abstract:

This article presents a conceptual framework for analyzing the design of international agreements. This inquiry is guided by a simple fact: international agreements are rarely crafted to maximize cooperation. They frequently lack provisions, such as monitoring systems, that even the most rudimentary analysis suggests are necessary if agreements are to meet their goals. Using the concepts of form and substance I examine three features of international agreements, two related to form and one to substance. *Legality* refers to the choice between legally-binding and non-legally binding rules; *structure* to an agreement's provisions for monitoring and sanctioning non-compliance; and *substance* to the degree of deviation from the status quo ante that an agreement generally demands. Each of these terms represents a distinct design element, yet there are systematic tradeoffs among these elements. Only by understanding these tradeoffs—and the domestic political factors that often determine them—can we understand why agreements are constructed in the manner that they are. I make four core claims. First, the dichotomy of “hard” and “soft” law is not coherent and obscures more than illuminates. I reject the notion that soft law is an analytically useful category. Legality, I argue, is a binary variable. Second, I provide an account of the choice of legal form. I argue that states choose between legal and nonlegal agreements--what I term contracts and pledges--based on a combination of functional concerns, such as uncertainty and credibility; the configuration of power in a given issue-area; and, most significantly, the demands of domestic interest groups and the implications of domestic institutions. These factors roughly correspond to the three prevailing traditions in IR theory: institutionalism; realism; and liberalism. Third, I analyze the relationships between the legality, structure and substance of international agreements. I argue that the differing domestic politics of different issues--such as trade liberalization or environmental protection--help explain when contracts are substantively deep and demanding and when they are shallow and weak. I also examine how the structure of compliance review influences the substance of agreements. Fourth, I conclude with some normative claims about the design of agreements. The systematic preference for contracts in international cooperation often weakens the substance and structure of agreements when states are uncertain about their ability to comply. Consequently, although pledges are often viewed as second-best alternatives, they can, under some circumstances, be first-best.

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I Introduction

Agreements are the core of contemporary international cooperation. The over 50,000 extant international agreements exhibit a wide range of variation.² Many are negotiated as legal agreements—agreements intended to be legally-binding--while others are only "soft law" accords.³ Some agreements contain substantive obligations that require deep, demanding policy changes on the part of signatories; others require little or simply ratify the status quo ante. And some contain institutions to monitor and sanction noncompliance; others create no review structure at all. Thus there is considerable variation in the form of international agreements—in their legal bindingness, as well as in the range of structural provisions for addressing noncompliance—and considerable variation in the substantive obligations international agreements contain.

This variation in form and substance raises several fundamental questions about the role of law in world politics.⁴ First, what does it mean to say that an agreement among sovereigns is "legally-binding?" Second, what explains variation in legality--in other words, why do states differentiate their commitments into those which are binding and those which are not? Third, what is the significance of this choice for the substantive obligations of an agreement? Fourth, what is the relationship between the legality and substantive provisions of an accord, on the one hand, and the provisions for monitoring and sanctioning violators—such as the use of dispute settlement tribunals or other adjudicatory bodies, on the other? Finally, what difference, if any, do these choices make to the effectiveness of an agreement?

A bedrock assumption of legal scholarship is that law is an independent, distinctive means of social ordering. Yet in the international context there is significant disagreement

² See generally <http://untreaty.un.org/English/overview.asp>. There are roughly 500 multilateral agreements that the UN considers "major agreements." Id.

³ Legally-binding under public international law. I discuss this in Part III below.

⁴ In this article I define form and substance differently than does Duncan Kennedy in his classic study of private law adjudication. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1689 (1976) Several of the factors Kennedy treats as formal (such as generality and formalities) are here treated as substantive. I do this not because I disagree with Kennedy's approach but because of the markedly different nature of international law, in which agreements themselves create adjudicatory institutions and fully determine the legality of their provisions. As a result the category of substance absorbs a greater array of variation here, though in principle it could be further parsed along the lines of Kennedy's

about what falls within the scope of law,⁵ how law influences behavior, and why actors sometimes use law and other times avoid it. International lawyers have noted variation in legality, but have produced few theories of why states choose or avoid legal commitments.⁶ Scholars of international relations (IR) have traditionally exhibited substantial skepticism about international law as a meaningful category. That skepticism is waning as more studies examine the considerable empirical variation in international accords, and the ways in which "legalization" alters world politics.⁷ But as a result, IR theorists, like their legal counterparts, have also only begun to explore the detailed architecture of agreements.

In this article I present a conceptual framework for analyzing the design of international agreements. This inquiry is guided by a simple fact: international agreements are rarely crafted to maximize cooperation. They frequently lack provisions, such as monitoring systems, that even the most rudimentary analysis would suggest are necessary if agreements are to meet their goals. Using the concepts of form and substance I examine three features of international agreements, two related to form and one to substance. *Legality* refers to the choice between legally-binding and non-legally binding rules; *structure* to an agreement's provisions for monitoring and sanctioning non-compliance; and *substance* to the degree of deviation from the status quo ante that an agreement generally demands. Each of these terms

analysis. I avoid this here simply out of concern for analytical tractability and clarity: future work surely can refine these categories further. The title of this article, of course, echoes Kennedy's.

⁵ This is not to imply that these questions are uncontested in domestic law, but only that these issues are far more contested in the international sphere. Indeed, the very notion of "international law" is one that is constantly subject to query and even attack.

⁶ Exceptions include Hartmut Hillgenberg, A Fresh Look at Soft Law, 10 EUR. J. INT'L L. (1999); INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS (Edith Brown Weiss, ed., 1997); Anthony Aust, The Theory and Practice of Informal International Instruments, 35 INT'L & COMP. L. Q 787 (1986);

⁷ See e.g., the special issue of *International Organization* entitled "The Rational Design of International Institutions," 55 *Int'l Org* (2001). and "Legalization in World Politics" (2000); ANTHONY C. AREND, LEGAL RULES AND INTERNATIONAL SOCIETY (1998). An early foray is FRIEDRICH KRATCHOWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989). Recent work by legal scholars extends this literature; see e.g. Andrew Guzman, The Design of International Agreements (draft, 2004); Larry Helfer, Exit, Escape, and Commitment in International Agreements (draft, 2004); Brett Frischmann, A Dynamic Institutional Theory of International Law, 51 BUFF L. REV 679 (2003); Edward Swaine, Rational Custom, 52 DUKE L. J. (2002); Andrew Guzman, The Cost of Credibility, 31 J. LEGAL STUD 303 (2002); Jack Goldsmith and Eric Posner, A Theory of Customary International Law, 66 U. CHI. L. REV 1113 (1999); Laurence Helfer and Anne-Marie Slaughter, Toward a Theory of Effective Supra-national Adjudication, 107 YALE L. J. (1997); John Setear, An Iterative Perspective on Treaties, 37 HARV. INT'L L J (1996)

represents a distinct design element, yet there are systematic tradeoffs among these elements.⁸ Only by understanding these tradeoffs—and the domestic political factors that often determine them—can we understand why agreements are constructed in the manner that they are. Legality receives particular attention. For simplicity I term the choice between legally-binding and non-legally binding accords a choice between *contracts* and *pledges*. This analytic framework also helps to re-orient current research questions. For example, one area where scholarship has recently focused is on compliance with pledges.⁹ But without attention to the relationships among legality, substance, and structure, much of this work is inconclusive.¹⁰ Elsewhere 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 among design features and the political variables that shape them.

I make several descriptive, causal and normative claims about international agreements. First, I describe the variety of accords and clarify the nature of legal-bindingness in international law. The prevailing dichotomy of “hard” and “soft” law is not coherent and obscures more than illuminates. Many accounts of bindingness conflate legality with structure (in particular, with enforcement) or with substance (e.g., the precision of rules) or conflate effects with causes, ie look to behavioral effects to demonstrate international law's existence.¹¹ I reject the notion that soft law is an analytically useful category.¹² Legality, I argue, is a binary variable.

⁸ An early proponent of this approach is Richard Bilder. Bilder looked at “risk management systems” in international treaties, and argued that states choose among and combine different risk management techniques. RICHARD BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* (1981)

⁹ E.g. Daniel Ho, *Compliance and International Soft Law*, 5 J INT’L ECON. L.647 (2002); DINAH SHELTON, ED, *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (2000).

¹⁰ The same can be said about much of the work on compliance with legally-binding accords; see generally Kal Raustiala and Anne-Marie Slaughter, *Compliance, International Law, and International Relations*, in *THE HANDBOOK OF INTERNATIONAL RELATIONS* (WALTER CARLNAES, THOMAS RISSE, AND BETH SIMMONS, EDS., 2002). For example, Edith Brown Weiss argues that “In general, there is a secular trend toward improved compliance [with contracts]...again, the logic suggests that the same would apply to compliance with those soft law instruments negotiated by governments or concluded in the context of an international regime.” Brown Weiss, *Concluding Remarks*, in Shelton, *supra* at 550. A secular trend toward greater compliance in either pledges or contracts—even if true empirically—says little about the impact of these accords. Without knowing the substance and impact of those agreements, compliance *vel non* is not particularly significant.

¹¹ E.g. Brunnee and Toope, 2000 at 65: “law's existence is best measured by the influence it exerts.”

¹² This view has also been championed in JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* (1996); Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J INT’L L 167 (1996);

Second, I provide an account of the choice of legal form in international cooperation.¹³ I argue that states choose between pledges and contracts based on a combination of functional concerns, such as uncertainty and credibility; the configuration of power in a given issue-area; and, most significantly, the demands of domestic interest groups and the implications of domestic institutions. These factors roughly correspond to the three prevailing traditions in IR theory: institutionalism; realism; and liberalism.

Third, I analyze the relationships between the legality, structure and substance of international agreements. Functionalist accounts of legality, which focus on a tradeoff between credibility and flexibility, suggest two contradictory ways that an accord's legality influences its substantive obligations. I argue that the differing domestic politics of different issues--such as trade liberalization or environmental protection--help explain when contracts are substantively deep and demanding and when they are shallow and weak. I also examine how the structure of compliance review influences the substance of agreements. Again, two contradictory accounts are plausible: one suggests that strong review (such as binding dispute resolution) correlates with deep agreements, the other that strong review correlates with shallow agreements. The core point is that we cannot understand form or substance in isolation: the connections among the various elements of the agreement shape empirical outcomes.

Fourth, I conclude with some normative claims about the design of agreements. The systematic preference for contracts in international cooperation often weakens the substance and structure of agreements when states are uncertain about their ability to comply. States

¹³ This question tracks one that is sporadically investigated in contract law: when and why do parties opt-out of the legal system? Lisa Bernstein, for example, argues that this is the prevalent mode of cooperation in the diamond industry: "The 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, to handle disputes among industry members." Lisa Bernstein, *Opting Out of the Legal System*, 21 J. LEGAL STUD (1992) at 115. Similarly, in Hollywood there are often quite large deals struck without detailed written contracts. Pers. comm., Ken Ziffren of Ziffren, Brittenham LLP; see also Barry Langberg, *Valerie Harper v. Lorimar: Entertainment Industry Customs on Trial*, LOS ANGELES LAWYER (April 1989). Examples of legal opt-out, however, are limited by the difficulty of uncovering these extra-legal systems. 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....no such agreement will ever surface in a court of law unless the parties differ as to its effect." Bernstein and Zekoll, *The Gentlemen's Agreement in Legal Theory and Modern Practice*, 46 AM J COMP L. 87 (1998) at 88. A related question is what work legal rules and institutions actually do in structuring relationships. Extensive study of this question has occurred in the "relational contract" literature. See generally Stewart Macaulay, *An Empirical View of Contract*, WISC. L. REV (1985); Macaulay, *Non-Contractual Relations in Business*, 28 AM SOC. REV. 55 (1963); ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991).

seek to compensate for the risk of noncompliance by weakening monitoring and enforcement or simply ratcheting down the stringency of commitments. This tendency is exacerbated, in certain cases, by the need to include many parties and the opportunity for the exercise of power this creates. Pledges, because they are not legally-binding, mitigate these tendencies and permit states to be more risk-acceptant in the face of uncertainty. Consequently, although pledges are often viewed as second-best alternatives,¹⁴ they can, under some circumstances, be first-best. I suggest when and why this is likely to be true.

II Three Dimensions of Institutional Design

The tripartite conceptual framework I introduce is radically simplifying. It does not address important aspects of agreement design, and it dichotomizes those dimensions it does address.¹⁵ This simplicity has a great virtue, however: it clarifies how these elements interact under political and informational constraints. The importance of interaction among these (and other) design elements is the key message of this Article. Because the interaction of design elements has not received systematic attention previously, even this basic framework illuminates many important questions about the architecture of agreements.

Before introducing the elements of the framework, it is worth pausing to highlight why international agreements exist and what makes them complex. International agreements are attempts to organize cooperation among states. Because states are sovereign, however, these agreements face a major challenge: states cannot bind themselves in the way that private parties generally can in domestic law. When cooperating, states frequently face variants of the familiar prisoner's dilemma: unable to negotiate enforceable accords, their dominant strategy is to defect from cooperation. In practice, of course, states do cooperate frequently. One reason is that in many situations cooperation is indefinite: the "game" is repeated and states stand to gain more, over the long term, from cooperation than defection.¹⁶ Reputational concerns also may lead states to cooperate where narrow rationality might dictate defection.¹⁷ And states may cooperate out of a logic of appropriateness, a sense of the legitimacy of

¹⁴ E.g. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. (1977) : "nonbinding agreements may be attainable when binding treaties are not and [we] should seek to reinforce their moral and political commitments when they serve ends we value."

¹⁵ Some of these have been examined in other studies of treaty design, in particular the level of participation. See e.g. SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT* (2003).

¹⁶ The folk theorem in noncooperative game theory holds that indefinite repeated prisoner's dilemma games can sustain an infinite number of cooperative equilibria.

international law.¹⁸ Not all cooperative situations, moreover, can be broadly characterized as prisoner's dilemmas. Most significant here are coordination games. The classic example of a coordination game is driving: once right, or left, is chosen, no actor has an incentive to defect.¹⁹ Cooperation, not defection, is the equilibrium in a coordination game.

Despite the many ways in which cooperation can be sustained it remains true that international cooperation is extremely fragile: states violate commitments often and agreement is frequently hard to achieve due to fears of cheating, differing preferences, uncertainty about the future, and the like. Agreements are crafted to respond to these varied problems. The myriad of agreement designs reflects both the difficulty of cooperation and the variety of cooperative situations states face. Most importantly, as I argue further below, agreements vary in their design because the political incentives to solve the underlying problems vary.

A. *Legality*

The contemporary international system is suffused with agreements.²⁰ Although treaties are the most prominent form of agreement, international cooperation need not involve a legally-binding or even a written accord.²¹ Indeed, some of the most important instances of cooperation, such as that between the U.S. and the Soviet Union during the Cold War, were largely tacit or at least unwritten.²² International agreements also need not be public. Secret agreements were a mainstay of pre-20th century diplomacy and formed a central part of Woodrow Wilson's critique of the old international order.²³ Less in favor today, they continued to be used throughout the 20th century.²⁴ "Gentlemen's agreements" too have a long history in diplomacy.²⁵ Thus the variety of international agreements is great.²⁶

¹⁷ Guzman, *supra*.

¹⁸ Thomas Franck, *Legitimacy*

¹⁹ [cite]

²⁰ The main sources of international law, as defined in Article 38 of the Statute of the International Court of Justice, are customary law, treaties, and general principles of law. Treaties have a very long history; the oldest known is between the city states of Umma and Lagash in ancient Sumer, dating to 3100 BC. Bilder, *supra* at 5.

²¹ The regimes literature in IR, though usually interested in regimes that, in practice, have a legal agreement at their core, also has explored less explicit modes of international cooperation. ROBERT KEOHANE, *AFTER HEGEMONY* (1984); *REGIMES* (STEPHEN KRASNER, ED, 1983).

²² See e.g. Charles Lipson, *Why are Some International Agreements Informal?* INT'L ORG. (1989)

²³ As reflected in Wilson's Fourteen Points. See <http://www.yale.edu/lawweb/avalon/wilson14.htm>

²⁴ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2000)

²⁵ Schachter *supra* at 300; Hillgenberg 1999, *supra* at 500.

In almost all cases of interest, however, written, open agreements are drafted to codify and clarify the terms of cooperation. Within this class of written agreements there are both legally-binding instruments, generally known in public international law as treaties²⁷ and in this article as *contracts*, and a wide variety of non-binding agreements, often referred to as "soft law" agreements or political agreements and here termed *pledges*. Many observers have noted the increased prominence of pledges in international cooperation.²⁸ Treaties (contracts) are defined in the Vienna Convention on the Law of Treaties as "international agreement[s] concluded between States in written form and governed by international law."²⁹ Treaties are fairly well-defined under international law, if circularly so, but the boundaries of soft law are more indeterminate. In practice, the usage of the term soft law varies. Decisions by international organizations, their internal policies, and even resolutions of the UN General Assembly have all been declared a form of soft law, though my focus here is on explicit agreements among states.³⁰

Empirically, there is significant variation in legality within the class of inter-state agreements. Examples of *contracts* include:

- the United Nations Charter
- the World Trade Organization Agreements
- the Basel Convention on International Trade in Hazardous Wastes
- The Convention on the Law of the Sea
- the International Covenant on Civil and Political Rights and
- the Chemical Weapons Convention

Pledges include,

²⁶ Richard R. Baxter, International Law in "Her Infinite Variety," 29 INT'L & COMP L. Q. 549 (1980)

²⁷ In US foreign relations law the term treaties has a different meaning, generally referring to agreements that are submitted to the Senate for consent under Article II of the Constitution.

²⁸ E.g. Hillgenberg, *supra*; AE Boyle, Some Reflections on the Relationship of Treaties and Soft law, 48 INT'L & COMP. L. Q. 901 (1999); Edith Brown Weiss, Introduction, in INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS (Edith Brown Weiss, ed., 1997). Aust [book] argues that a very large fraction of international agreements are non-binding (what he refers to as "memoranda of understanding") though little is known about them since most are confidential or simply not published.

²⁹ Article 2(1)a.

- the Helsinki Final Act
- the Louvre Accord on monetary exchange rates;
- the Basel Accord on capital adequacy,
- the Non-legally Binding Agreement on Forest Principles;
- The London Club's Guidelines for Nuclear Transfers;
- the NATO-Russia Founding Act,
- the Financial Action Task Force Money Laundering Recommendations

While pledges sometimes “evolve” into contracts,³¹ many pledges remain non-binding permanently.³² In the case of international monetary affairs, we even observe the reverse: the transformation from contract to pledge.³³ As in domestic contract law, the guiding principle that determines whether an agreement is legally-binding or not is the intent of the parties to be bound.³⁴

B. Substance

Whether pledge or contract, an international accord can vary significantly in its commitments. I use the term *substance* to refer to the substantive obligations the accord contains—for example, does it require a state to refrain from developing nuclear weapons; to restrict fish harvests to maximum sustainable yield estimates; or to provide for a twenty-year patent term. Because substance is multifaceted, to simplify my argument I focus on one key dimension. As others have previously argued, agreements vary widely in terms of the *depth* of cooperation.³⁵

Depth is “the extent to which [an agreement] requires states to depart from what they would have done in its absence.”³⁶ Some accords are deep: they require states to significantly

³¹ Jon Birger Skaereth, in Victor, Raustiala, and Skolnikoff, *supra*.

³² “Soft law may be ‘pre-droit’ in the sense that it leads to treaty obligations. This is, however, generally far from being its purpose.” Hillgenberg *supra* at 502. There are analogies here to letters of intent in domestic bargains; see e.g. Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Fair Negotiations*, 87 Colum L. Rev (1987).

³³ Beth Simmons, *The Legalization of International Monetary Affairs*, and Miles Kahler, *The Causes and Consequence of Legalization*, both in Goldstein et al, *supra*.

³⁴ See Aust, [book], *supra*. To be sure, intent to bound is not always clear even in the domestic setting; one thinks of the famous case of *Hamer v. Sidway* (holding that a promise by an uncle to a nephew made a wedding was an enforceable contract). 124 NY 538 (1891)

³⁵ George Downs, David Roake, and Peter Barsoom, *Is the Good News about Compliance Good News About Cooperation?* 50 INT'L ORG (1996)

³⁶ *Id.*

change existing policies. Others are shallow: they codify what states are already doing or demand only small changes from the status quo ante. Depth clearly varies for each party to an agreement; an agreement that is deep for one state may for others be shallow. Moreover, states may reserve out of certain provisions, altering the depth of the agreement for them.³⁷ I put aside these admittedly significant differences and try to capture the overall, or average, depth of an agreement. This is radically simplifying, but the alternative—to consider each agreement in light of the differences among perhaps 150 parties, or more—makes analysis impossible.³⁸

The concept of depth does not capture some critical aspects of the substance of agreements. For example, there is a large difference between agreements focused on security alliances and agreements related to postal cooperation, even if examples of both may require large deviations from prior behavior. But because depth is a variable that cuts across all types of agreements, from national security to mail delivery, and because it reflects the degree to which states are changing their behavior, depth captures a critical component of cooperation.

The GATT/WTO regime is a common exemplar of deep cooperation.³⁹ Extensive rules govern a wide array of trade issues and demand meaningful changes from many parties. The Montreal Protocol on Substances That Deplete the Ozone Layer is also arguably an example of deep cooperation: major classes of useful but dangerous chemicals have been phased out in a rapid process. Conversely, the Non-Proliferation Treaty and the Framework Convention on Climate Change are examples of more shallow cooperation. The former codified extant behavior for nearly all states; the latter demanded mainly minor obligations related to reporting and review. Again, the concept of depth is greatly simplifying. Yet depth is important because it captures the degree to which states in the aggregate are committing to

³⁷ Much more could be said about the connection between reservations and treaty design. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM J. INT'L L. 531 (2002).

³⁸ Depth in the way I define it here is an aggregate variable that is relatively insensitive to state-level differences. While this criticism is apt, depth even in the aggregate reflects an important aspect of an agreement, and individualized assessments of depth require extensive attention to the specifics of national level policies—an endeavor that is greatly, even paralyzingly complicating analytically. However, some general claims about the distribution of depth seem plausible. For example, powerful states are most likely to be able to shape commitments to their liking. Consequently, individualized assessments of agreement depth should usually mask more depth for weaker states and less depth for stronger states. Those states for whom an agreement is especially deep are less likely to participate; those for whom it is especially shallow are most likely to participate.

³⁹ See Downs et al, *supra*. Goldsmith and Posner contend that the WTO is not in fact a deep agreement, though they believe there are no—or are precious few—deep agreements in existence. JACK L. GOLDSMITH AND ERIC POSNER, *A THEORY OF INTERNATIONAL LAW* (forthcoming, 2004).

actual changes in behavior. If international agreements are purposive tools for ordering behavior, a deep agreement--successfully implemented and complied with--alters behavior. Even if riddled with violation a deep agreement may, by demanding significant policy adjustment, lead to meaningful change. A shallow agreement, conversely, can not meaningfully order behavior, even if it is perfectly implemented and complied with. A shallow agreement may forestall future changes in behavior, but by definition it never requires significant change from the status quo ante.

C. *Structure*

I use the term *structure* to refer to the rules, bodies, or procedures created to monitor and sanction the performance of parties to an agreement. An agreement's structure is thus those elements that aim both to reduce uncertainty about state performance and deter noncompliance. This is a limited conception of structure; there are several other elements which I do not discuss here for reasons of analytic tractability.⁴⁰ I focus on monitoring and enforcement provisions because of their evident importance for the effectiveness of international commitments. Structure does not refer to whether an agreement is "enforced" in the sense that parties in fact comply or are deterred from noncomplying by the fear of sanctions. Structure refers only to the *mechanisms or procedures* for monitoring and enforcing party performance. Effective enforcement is an *outcome* that may vary based on a range of other factors: the nature of the parties, the legality and substance of the agreement, the precise sanctions employed, the configuration of power, and so forth.

Empirically, there is significant variation in the structure of agreements. Some accords employ third-party dispute resolution accessible only by states, while others permit claims by individuals. Some use only national self-reporting, some have reporting requirements with monitoring by a central body or reporting tied to on-site inspections, and some create no structure for the review of performance at all. Some sanction violators, but many do not. To simplify this complexity, I divide the category of structure into two classes: weak and strong. *Weak* structures are those in which review of performance and sanctions for nonperformance are minimal or nonexistent. This includes cases in which parties self-report on performance

⁴⁰ Chief among these are delegation--the degree to which an accord delegates decisionmaking powers to an international institution--and capacity-building--the degree to which an accord incorporates measures that enhance the ability of parties to meet their obligations. Delegation receives substantial attention in the Legalization volume, *supra*; capacity-building has been less studied by scholars of agreement design.

but in which those reports are not analyzed, or are only analyzed collectively; it also includes systems with no monitoring or review provisions at all. *Strong* structures are those in which a central body issues a specific determination to a specific party in the case of a violation. This may include a determination about individual party performance, either based on the body's own investigations (a "police patrol" system), based on self-reports, or based on claims of private actors (a "fire alarm" system).⁴¹ Strong structures may include sanctions, such as trade measures, but they need not; weak structures never include this feature. Strong review structures hence add value to the raw information about violations, either through publicizing, analyzing, or taking action based on that information. The issuance of party-specific analyses or enforcement decisions in other words, is an essential part of strong structures.

D. Scope of the Argument

In advancing this framework I limit the scope of my analysis to multilateral agreements between states. Multilateral denotes agreements that involve three or more states. However, most of the agreements used as examples below involve very large numbers of states. I do not analyze the use of pledges or contracts when domestic constitutional rules, or international law itself, preclude the negotiation of one or the other. In short, my analysis focuses on the construction of agreements in the wide array of situations where either choice—contract or pledge—is possible. While conceptually narrow, this scope encompasses the vast majority of major agreements in existence today.

States bargain over international agreements at great length because there are myriad ways to craft an accord.⁴² My tripartite framework inevitably glosses over many details, but helps systematically divide up the many choices states face. Most importantly, I use this framework to illustrate the connections between these three dimensions. By thinking systematically about how design features interact we can improve our understanding of international cooperation and of the role of law within it.

⁴¹ Kal Raustiala, *Police Patrols & Fire Alarms: Informational Provisions in International Agreements* (draft, 2004)

⁴² As Fearon puts it, "Regardless of whether the specific domain is arms control, trade talks, exchange-rate coordination, or environmental regulation, there will almost invariably be *many* possible ways of writing the treaty or agreement that defines the terms of cooperation, and the states involved will surely have conflicting preferences over some subset of these various possibilities." James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG (1998) at 274, emphasis in original.

III Law & International Agreements

Of the three core dimensions I have discussed--legality, substance, and structure— *legality* is of central interest for legal theory because it delimits the scope of law. The distinction between contracts and pledges is, at bottom, a distinction between the use of law and the rejection of law. Contracts create legally binding obligations on states, while pledges create only political or moral obligations.⁴³ One can loosely analogize this distinction to the distinction between law and social norms domestically. Norms are important in many settings; they can produce "order without law."⁴⁴ Indeed, society could not function without such norms. But norm-based obligations are not the same as legal obligations, even if they often overlap. The key for legal scholarship is to unlock the connection between law and norms, and understand how they relate--and why actors favor the use of one or the other in specific circumstances.⁴⁵

The significance of legal bindingness at the international level is of course highly contested. Some would claim that all international law is "soft" law. Many realists argue that the entire notion of legality is mistaken, because the international system lacks a centralized authority capable of enforcing law.⁴⁶ Yet international law suffuses international relations. Declaring an agreement to be legal ties that agreement to the corpus and history of international legal rules. In so doing, states may be visibly staking reputation in order to make credible their commitments.⁴⁷ To be sure, states may violate specific commitments and hence the effect of the tie between legality and credibility is not always apparent. But when states do

⁴³ On the difference see Klabbers, 1996, chapter 5; Arend, *supra*; Goldsmith and Posner, *supra*.

⁴⁴ ELLICKSON, *SUPRA*.

⁴⁵ Hence the burgeoning literature on norms. See e.g. Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 Ohio St. L. J. (2003); Ann Carlson, *Recycling Norms*, 89 Cal. L. Rev. 1231 (2001); ERIC POSNER, *LAW AND SOCIAL NORMS* (2000); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEG. STUD. 537 (1998); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 352 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1019, 1025 (1995). See also Arend, *supra* at Ch 1 (on international law and norms).

⁴⁶ See generally Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. L. REV. 1293 (1985). What exactly law is is a fascinating question but one I do not systematically address here.

⁴⁷ The role of reputation in international law has a long history; for recent arguments see Guzman, *A Theory of Compliance*, *supra*; Guzman, *The Design of International Agreements*, *supra*. The credible commitments literature in IR is long; see generally Lisa Martin, *Credibility, Costs, and Institutions*, 45 World Pol. (1993); Peter F. Cowhey, *Domestic Institutions and the Credibility of International Commitments: Japan and the United States*, *International Organization* 47, 2 (Spring 1993); Barbara Walter, *The Critical Barrier to Civil War Settlement*, Int'l Org (1997).

violate commitments they almost always justify their actions in terms of the law itself, which further strengthens the concept of international law.

Though my primary aim is to elaborate the ways in which legality, substance, and structure interact in international agreements, I first parse the meaning of legality in some detail. I take this detour because of the prominence of the concept of “soft law.” Many international lawyers argue that the distinction between a legally-binding and a non-binding agreement is not a sharply demarcated one, and that as a result there is a spectrum of legality. The notion of soft law (in contradistinction to “hard law” or “no law”) explicitly flows from this spectral conception of legality. The categories of substance and structure are clearly spectral in nature: I only dichotomize them for analytical clarity. The category of legality is different. Contrary to the prevailing view, legality in the international context is a binary, rather than spectral, attribute.⁴⁸

A. Spectral & Binary Conceptions of Legality

Soft law cannot exist if international law is binary rather than spectral.⁴⁹ The concept of soft law necessarily rejects the idea that law is binary, since it purports to identify something between hard law and no law. While entire agreements are said to be “soft,” at times even different provisions in a particular international accord are said to vary in legality. Some scholars even refer to “non-binding international legal accords”.⁵⁰

I argue that legality is better conceptualized as a binary attribute.⁵¹ In other words, an agreement either is, or is not, legally-binding: there is no in-between, nor is it analytically helpful to refer to “soft law.” Existing critiques of soft law are generally normative in nature, sometimes focusing on the supposed dilution of international law's influence that results from

⁴⁸ For support of this view see Klabbers; *supra*; Prosper Weil, *Toward Relative Normativity in International Law?*, AM J INT'L L (1983); Arend, *supra* at 25. My concern with bindingness is distinct from the concept of legalization discussed in Goldstein et al, *supra*. They propose a definition of legalization that has three components, of which legality is but one.

⁴⁹ While soft law is a widely-used phrase today, it does not generally appear in official documents: in other words, agreements or resolutions are rarely if ever explicitly labeled as soft law instruments. Instead, analysts *ex post* claim they represent instances of soft law. The idea goes back decades. Even in 1983 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 Law of Exchange Agreements, 77 AM J INT'L L. 443 (1983). See also Ignaz Seidl-Hohenveldern, International Economic “Soft Law”, RECUIL DE COURS, (1979)

⁵⁰ Wolfgang Reinecke and Jan M. Witte, Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords, in Shelton, 2000 *supra*.

⁵¹ It is also an attribute that applies to an agreement as a whole.

using (or talking about) soft law.⁵² My critique is more fundamental. Soft law is not a coherent concept, nor does it accord well with state practice. What is typically identified as soft law is better understood as one of two things: a pledge; or a contract crafted to be substantively shallow and/or to have a weak structure of review. This categorical distinction is more faithful to negotiators' intentions and more useful analytically, because it permits us to evaluate law's relative influence and role.

Even a cursory look at state practice demonstrates that law is a tool that governments employ sparingly in their interactions with each other, and with great care. Thus perhaps the strongest argument for treating legality as binary is empirical. Governments, the architects of agreements, behave as if a legal agreement is decisively different from a non-legal agreement. They do not accidentally or cavalierly choose between pledges and contracts. Nor do they calibrate the legality of agreements in a continuous fashion, designating some softer law, some harder law, some non-legal at all, and so forth across a demarcated spectrum of legality. States instead carefully choose the legal nature of their agreements in a dichotomous fashion. They sometimes demand contracts, sometimes pledges.⁵³ For example, the negotiation of the Helsinki Final Act, perhaps the most famous pledge, was marked by the importance the parties put on its non-binding nature.⁵⁴ President Ford explicitly noted that "the document I sign is neither a treaty nor is it legally binding on any particular state."⁵⁵ A recent example, also involving the US and Russia, is the 2002 Moscow Treaty on Strategic Offensive Reductions. The US explicitly sought a pledge, but Russia insisted on a contract. Putin and

⁵² Bilder argues that the concept of soft law is dangerous in that it undermines and "depreciates the currency of" law. Bilder, *supra*, in Shelton [book] at 72. See also Weil, *supra*; Klabbers, 1996 at 170. As Klabbers notes, Hume wrote that "half rights and obligations, which seem so natural in common life" are "perfect absurdities" when it comes to the law. Klabbers, 1996 at 167.

⁵³ An excellent example was the debate over a forest treaty in the run-up to UNCED in 1992. I discuss this further below. On the importance of the distinction to governments see Bilder, *supra*. Dupuy notes, drawing on his own intergovernmental experience, that "it is extremely interesting to observe in practice, as the author has had the opportunity of doing in his capacity as legal advisor to the OECD Transfrontier Pollution Group (1974-80), that Member States' delegations approach the negotiation of [soft law] provisions with extreme care, just as if they were negotiating treaty provisions. Such behavior suggests that States do not view such "soft" recommendations as devoid of at least some political significance, if not, in the long term, any legal significance." Dupuy, *supra*, at 429.

⁵⁴ See Harold Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AJIL 242 (1976). (Russell was chief US negotiator); DANIEL THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* (2001); Schlager in Shelton, 2000. Schlager argues that the US was the main proponent of pledge form, though others, such as Russell, imply that the Soviets were. Schlager at 350.

⁵⁵ Arend, *supra* at 24. Aust notes another example of explicitness on this point: the US-Israeli Declaration on Trade in Services of 1985, which declares in the preamble that "the principles set forth below shall not be legally binding." Aust, 1986 at 802.

Bush went publicly back and forth on the issue; Putin's preference for a contract eventually prevailed.⁵⁶ Empirical evidence shows that states reject the spectral view of legality, but there are serious conceptual problems with the claim of soft law as well.

B. *Rethinking Soft Law*

Despite the weak evidence of state practice, scholars continue to be drawn to the concept of soft law. The concept is perhaps attractive to scholars in part because it accords with a common intuition: in a decentralized, non-hierarchical legal system, some rules are clearly more consequential than others.⁵⁷ But this intuition is misleading. There is no question that in practice some rules have greater influence than others. This does not render the weak rules "soft" law, however. Nor, as argued above, do we observe states explicitly labeling agreements soft law. Undaunted by this problem, many analysts claim that soft law exists, and some go further and argue that the soft quality of a commitment does not depend on the nature of the accord it is contained in, but rather turns on the particularities of the commitment itself.⁵⁸ In other words, they claim that language which is otherwise embodied in a legally-binding agreement, yet which is vague, hortatory, or heavily qualified, is also soft law.⁵⁹ Thus there are, it is said, both soft law agreements and soft law provisions. 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 texts, 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."⁶⁰ Likewise,

⁵⁶ The White House press release states "This new, legally-binding Treaty codifies the deep reductions announced by President Bush during the November 2001 Washington/Crawford Summit and by President Putin at that Summit." See <http://www.whitehouse.gov/news/releases/2002/05/20020524-23.html>

⁵⁷ Klabbers, 1996 at 179. This is of course 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.

⁵⁸ Eg Kratochwil, *supra*, at 200-1: "...it is highly significant that the hardness of softness of [rules] can no longer be derived simply from the formality or genesis of the instrument." See also AE Boyle, *Some Reflections on the Relationship of Treaties and Soft law*, 48 INT'L & COMP. L. Q. 901 (1999) at 906-7; Brown Weiss *supra* at 3; Dupuy, *supra*, at 429-430.

⁵⁹ As Edith Brown Weiss notes, "sometimes the term 'soft law' also refers to the provisions in binding international agreements that are hortatory rather than obligatory." Brown Weiss at 3.

⁶⁰ Kratochwil, *supra* at 203 [emphasis in original]. See also Bilder, *supra* [book] at 26: "In practice, the distinction between between 'legal' and 'nonlegal' obligations is not a sharp line but a gradual

Christine Chinkin argues that "the use of a treaty form does not of itself ensure hard obligation...if a treaty is to be regarded as 'hard,' it must be precisely worded and specify the exact obligations undertaken or rights granted."⁶¹ An example in Chinkin's view is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains obligations qualified by phrases such as "as appropriate." While these scholars identify an important fact about many international commitments—that they are intentionally weak or imprecise—terming them "soft law" obfuscates rather than illuminates their character.

Undergirding the notion of soft law are assumptions about precision and flexibility. Imprecise commitments are said to be soft because they impart discretion to parties. It is undeniable that some international commitments impart significant discretion to the parties, or use general phrases whose precise content is open to interpretation. But these provisions are akin to standards, rather than rules.⁶² Standards are of course ubiquitous in domestic law. ("Reasonable person," "due process," "good faith" are but a few examples). Yet the imprecise nature of standards does not alter their legal character.⁶³ In fact, many US statutes contain language quite similar to that in the ICESCR. The National Environmental Policy Act, for instance, requires the use of "all practicable means...to improve and coordinate federal plans, functions, programs and resources..."⁶⁴ Similarly, under the US Sustainable Fisheries Act management plans must contain measures deemed "necessary and appropriate for the conservation and management of the fishery..."⁶⁵ As the domestic rules-standards debate

continuum." Bilder's point is not conceptual, however: he argues that the impact of pledges is often quite similar to contracts and in that sense concurs with many of the arguments I make in this article.

⁶¹ Chinkin 1989 at 851. Other examples include Dinah Shelton, *Law, Non-Law, and the Problem of Soft Law*, in Shelton, 2000, *supra* at 4 (referring to the "recent inclusion of soft law commitments in hard law instruments"); and Szasz: one manifestation of soft law, he states, is "hortatory rather than obligatory language contained in an otherwise binding instrument..." Paul Szasz, *General Law-Making Processes*, in CHRISTOPHER C. JOYNER, ED, *THE UNITED NATIONS AND INTERNATIONAL LAW* (1997), cited in Arend, *supra* at 24.

⁶² Louis Kaplow, *Rules vs. Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992); Cass Sunstein, *Problems with Rules*, 83 CAL L. REV. (1995)

⁶³ An example in the international context is the arbitral award construing the phrase "best efforts" in the US-UK Air Services Agreement. See Samuel Witten, *CURRENT DEVELOPMENT: THE U.S.-UK ARBITRATION CONCERNING HEATHROW AIRPORT USER CHARGES*, 89 AJIL 174 (1995). To be sure, domestic courts occasionally overturn statutes as "void for vagueness," but that is because vagueness violates other legal principles and thus the statute is not valid, not because the statutory language itself fails to rise to the status of law.

⁶⁴ [42 USC s 4331(b)(3)].

⁶⁵ [16 USC x 1853(a)].

demonstrates, standards offer many advantages over rules, and hence it is unsurprising that states often choose to create standards rather than rules.⁶⁶

One might argue that standards in domestic law operate in a different manner than standards in international law because the domestic examples are really forms of delegation to judges or other dispute-settlers. Standards delegate substantial decisionmaking power to judges; judicial decisions render the vague provision in an agreement concrete in a specific case.⁶⁷ This, however, is an argument about agreement *structure* rather than its legality or substance. Conflating the lack of delegation in an agreement's structure with its legal quality confuses two distinct issues. Moreover, international accords can easily be negotiated with an adjudicative body that is delegated the task of interpreting standards. Indeed, the WTO Appellate Body engages in interpretation of just this kind, elaborating ambiguous terms and filling gaps.⁶⁸ If the ICESCR was similarly structured, the provisions referred to above could be elaborated and adjudicated just as analogous language in domestic statutes is interpreted by domestic courts. There is nothing inherent in the ICESCR provisions that render them soft; they are standard-like commitments that are, by design, unconnected to any structure of authoritative delegated interpretation.

In short, calling imprecise provisions international agreement "soft law" muddles several issues. Legality should not be conflated with substance or with structure. Obligations in the ICESCR are legally-binding because they are contained in an agreement—a contract—intended to be legally-binding by the parties. Yet from Richard Baxter onward many scholars have argued that international obligations which purport to be binding are somehow not binding. In an influential article,⁶⁹ Baxter 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.'"⁷⁰ Baxter also argued that many provisions contained in human rights treaties are "so ambiguous or vaguely states that they will do little or nothing to control the conduct of States, unless they are fleshed out by the decisions of courts or other agencies."⁷¹ This claim is similar to but distinct from the

⁶⁶ Kaplow, *supra*.

⁶⁷ Sunstein, *supra* at 998.

⁶⁸ Joel Trachtman, *The Domain of WTO Dispute Resolution*, HARV. INT'L L J (1998); Susan Esserman and Robert Howse, *The WTO on Trial*, FOR. AFF. (2003).

⁶⁹ Baxter, *supra*

⁷⁰ *Id.* at 554.

⁷¹ *Id.* at 560.

claim that imprecision can make otherwise-binding commitments soft. Here the claim is that imprecision necessarily entails a lack of influence on behavior.

As an empirical matter this latter claim--that ambiguous or imprecise rules cannot influence state behavior—is too strong.⁷² To see this impact, however, one must look beyond the simple path of law --> behavior and examine the expressive function of the law as well as the ways in which norms cast in legal form may influence individuals and social groups in domestic settings.⁷³ Because the status of international law was so frequently challenged during the Cold War, lawyers like Baxter may have felt it necessary to claim that only those rules that could in principle be demonstrated to have influenced states were truly law. Yet this makes law's definitional qualities dependent on the very effect these qualities are typically claimed to have produced. This approach--law comprises those agreements and rules which influence states⁷⁴--becomes circular once any claim about the *relative* influence of international law is made. Conflating legality and substance stymies the study of law's relative influence on state behavior as well as the conditions under which law influences state behavior.

This is particularly damaging because, as institutionalist IR theory suggests, international agreements in practice influence behavior through many causal pathways: lowering transaction costs, creating focal points, shifting bureaucratic politics, enhancing monitoring, and altering the nature of justification, among others.⁷⁵ While legality may render international commitments less 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 the role of law in international behavior, we must carefully distinguish law as an independent variable from behavior as a dependent variable. Consequently, we must

⁷² Baxter himself seemed to recognize this; pg. 565. Oona Hathaway argues that human rights treaties have been only weakly effective, if at all, in some areas. Hathaway, Do Human Rights Treaties Make a Difference? 111 YALE L. J. 1935 (2002). Cf. Ryan Goodman and Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 EUR. J. INT'L L. 171 (2003)

⁷³ See e.g. Thomas, *supra*; Arend, *supra* at Ch 1; THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Risse, Ropp, and Sikkink, eds, 1999); Harold H. Koh, Transnational Legal Process, 75 NEB. L. REV (1996); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEG. STUD. 537 (1998).

⁷⁴ See eg Bruneel and Toope, *supra*.

⁷⁵ Judy Goldstein and Lisa Martin, Legalization, Trade Liberalization, and Domestic Politics, in Legalization volume, 2000 at 620.

employ a framework that allows us to look at law alongside other relevant independent variables.⁷⁶

Reliance on enforceability as a criterion for legality is equally problematic. To be sure, international law is likely to be more effective when enforcement is possible—all else equal.⁷⁷ (Below I discuss why all else is rarely likely to be equal). But legal obligation can exist even if it clearly cannot be enforced. In American constitutional law many rules exist for which there is little prospect of judicial enforcement. Yet we do not consider these rules to be distinctive in their *legal* quality: to be "non-law" or "soft law" only. Courts may decline to pass judgment on the grounds that disputes about them are political questions. But to argue thus is not to claim that these constitutional principles are less-than-law. It is merely to claim from prudence, policy, or constitutional provision that the judicial domain does not encompass such disputes.

In sum, the prevailing concept of soft law is incoherent and hampers understanding. One might object and 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 the distinction is, for several reasons, not merely semantic. First, legality is empirically important to government negotiators, as evidenced by the considerable debate in many cases over whether a proposed accord will be a contract or a pledge. There is little state practice supporting the concept of law that is "soft," but nonetheless law. Nor is there evidence that states view commitments that analysts have labeled soft, such as the Basel Accord, to be legal commitments at all. Second, an agreement's legality often has implications for domestic law, which may explain in some cases why states—and private actors—argue over legality. (I discuss this issue further below). Third, the politics of *legal agreement* as opposed to *political agreement* are distinctive. As Kahler argues, "legalization, in creating new institutional forms, mobilizes different political actors and shapes their behavior in particular ways."⁷⁸

Some accords are contracts because they were intended by the parties to be legally-binding. Some are pledges because they were expressly intended not to be legally-binding.

⁷⁶ The number of such alternative independent variables is numerous, and the many competing schools of thought in IR theory are evidence of the range. Here I merely stress that only by isolating law as a formal attribute can we begin to compare the putative impact of law qua law against other, competing factors.

⁷⁷ This is the usual claim of realists and economists; see e.g. Downs et al, *supra*; Barrett, *supra*. The general issue of enforcement is addressed in Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961).

That in both cases they were also intended to be shallow or to have weak structures for review does not change their legal character, though it does have great import for their effectiveness. As Hillgenberg notes, "treaties remain treaties even if there are only minimal possibilities for responding to infringements or if the justification for non-fulfilment or withdrawal from the treaty is largely left to the discretion of the state under obligation."⁷⁹ Crudely 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. It also blunts progress in our understanding of law's *relative* impact as a regulatory tool.

IV The Choice of Legal Form in International Agreements

In Part III I argued that legality is binary. States choose to use law or to reject it. When they use it they create a contract, and when they reject it they create a pledge. While the pledge-contract distinction is fundamental, we have few convincing theories of why states chose pledges or contracts. Political scientists for decades ignored issues of legal form—and international law itself—entirely.⁸⁰ International lawyers have long been interested in the phenomenon of soft law, but eschewed theories of why and when states choose to create legally-binding commitments. The few efforts that exist have rarely moved beyond more or less ad hoc lists of factors that appear to influence legality.⁸¹ These lists are helpful and sometimes rich, but—much like multi-factor lists in adjudicatory doctrine—they are often unsatisfyingly malleable and indeterminate.

Despite the paucity of scholarship, there is a core set of arguments that appear repeatedly. This set of arguments can be broadly characterized as “rational-functionalist”.⁸² Rational-functionalist explanations assume rational actors; these actors design institutions based on the differing outcomes anticipated. Effects, in short, are causes. As Robert Keohane

⁷⁸ Kahler *supra* at 661.

⁷⁹ Hillgenberg *supra* at 500-1.

⁸⁰ As the late Abe Chayes liked to say, scholars of international relations fear using the “L word.” That fear is fading; see e.g. Goldstein et al, 2000, *supra*; Koremenos, Int’l Org. 2001; Lipson, 1991.

⁸¹ Compare Aust, *supra*; Hillgenberg, *supra*; Boyle, *supra*.

⁸² Indeed, the functional advantages of pledges and contracts identified in the existing literature are remarkably uniform. Compare Hillgenberg; Aust; Boyle; Lipson; Abbott and Snidal; Bilder [book]; and Brown Weiss. See also Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment* 12 Mich. J Int’l L 420 (1991); Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, and Reinecke and Witte, both in Shelton, 2000, *supra*; and Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law* 38 I.C.L. Q. (1989).

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 maintained them. Institutions exist because they could have reasonably been expected to increase the welfare of their creators."⁸³ Below I discuss the prevailing rational-functionalist explanation of legality in international agreements, critique that explanation, and offer some additions to it.

A. Functional Arguments

What desired effects drive states to choose between pledges or contracts when negotiating agreements? Why do states not always negotiate contracts? One recent, and representative, study suggests the following functional reasons why states choose pledges over contracts⁸⁴ :

- Pledges offer greater flexibility
- Pledges are more preliminary and hence less precedential
- No need for ratification and legislative action
- Pledges are more confidential and of a lower profile
- Pledges can be made with parties not diplomatically recognized or legally incapable of signing treaties

The last three reasons share a focus on the domestic politics and constitutional systems of states: variables that are associated with liberal theories of IR. I will return to these factors below. The first two, however, are core elements in what I term the functional approach to the choice of legality.

For example, in an analysis of what he terms "informal agreements,"⁸⁵ Charles Lipson claims that informal agreements (pledges) are sometimes favored because they make fewer informational demands on governments than do formal (contractual) agreements. Because of their greater flexibility, governments need not predict the future and can more easily adjust

⁸³ ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984) at 80.

⁸⁴ Hillgenberg, *supra*.

⁸⁵ Lipson's category of informal agreements includes non-binding agreements, secret accords, and even tacit accords.

the agreement or renege later on.⁸⁶ Flexibility is said to be advantageous when uncertainty is high.⁸⁷ This focus on uncertainty helps explain why agreements on production among OPEC countries are pledges—world 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.⁸⁸ Pledges also avoid a prominent public commitment. As a result, the reputational costs of "non-compliance" are lower. Finally, Lipson claims that pledges are faster to negotiate and come into "force" immediately.

Despite these advantages many if not most important agreements are contracts. Functional arguments generally point to the need for credibility in commitments to explain the predominance of contracts. Credibility is a core concern in international cooperation because in an anarchic system there is no central body able to enforce agreements. Contracts, unlike pledges, "signal...intentions of special intensity and gravity,"⁸⁹ and thus bolster the credibility of commitments. This is true both because they evidence seriousness and because, by explicitly using international law, contracts tie the commitment to the body of international legal rules. A violation becomes not simply a violation of a particular commitment but rather a violation of an entire system of rules. Moreover contracts usually must, as a matter of domestic law, be ratified by legislatures in many states. This process adds to the signaling dynamic noted above.⁹⁰

Credibility and flexibility thus lay at the core of the functionalist approach to form. While contracts increase credibility they are relatively inflexible; pledges exhibit the opposite pattern. The flexibility inherent in pledges is also said to bridge cleavages in preferences among bargaining parties, permitting agreement where a contract is impossible.⁹¹ Nonetheless, flexibility in an international agreement, while useful for dealing with uncertainty, is problematic when the agreement requires states to undertake costly actions

⁸⁶ Id at 500.

⁸⁷ Id. See also Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 *Int'l Org.* 289 (2001); GEORGE DOWNS AND DAVID ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* (1995). The Rational Design special issue distinguishes several types of uncertainty; for my purposes these distinctions are not germane. Rational Design, *supra*.

⁸⁸ Lipson, *supra*. There are in fact many arms control accords that are pledges. See Gualtieri, *supra* for a discussion.

⁸⁹ Lipson, *supra*. See also Guzman, *supra* [credibility draft]

⁹⁰ Lisa L. Martin, *The US and International Commitments: Treaties as Signaling Devices* (draft, 2003)

⁹¹ See e.g. Dupuy, *supra*, at 429-430; Seidl-Hohenveldern, 1979 at 193; Patricia Birnie, *Legal Techniques of Settling Disputes: The Soft Settlement Approach*, in *PERESTROIKA AND INTERNATIONAL LAW* (W.E. BUTLER, ED, 1990);

which depend on other states taking complementary actions. This highlights the problem of opportunism: if a state, acting pursuant to an accord, makes what economists term an asset-specific investment, that investment is only valuable when connected to other complementary investments by other states.⁹² If states believe that contracts raise the likelihood of compliance by others, they will be more likely themselves to invest in costly actions required by the agreement. Flexibility of commitment creates more scope for non-complementary behavior by other states. Thus flexibility *ex post* reduces the incentive to make the asset-specific investment *ex ante*.⁹³ While the negotiation of a contract hardly eliminates this problem, the negotiation of a pledge certainly exacerbates it. A functional approach predicts that states prefer contracts when the scope for such opportunistic behavior is high.

Perhaps the most fully developed version of the functional approach is that of Ken Abbott and Duncan Snidal.⁹⁴ They argue states prefer contracts (which they term “hard law”)⁹⁵ under four conditions: when the potential for costly opportunism is high; when non-compliance is costly to detect; as a sorting device when states seek to form clubs of like-minded parties; and by executive branches as a means of committing other branches of government.⁹⁶ Conversely, the major advantage of soft law (pledges) is greater flexibility in the face of uncertainty. Soft law agreements, they claim, also produce lower negotiating costs⁹⁷ and greater opportunity for compromise when state preferences are deeply diverse.⁹⁸ While Abbott and Snidal briefly consider several alternative hypotheses about the choice of legal form, their argument is overwhelmingly functional.

⁹² Beth Yarbrough and Robert Yarbrough, *International Institutions and the New Economics of Organization*, 44 INT’L ORG. 235 (1990)

⁹³ Similar issues are raised in the literature on hold-up problems in contracts generally; see eg. OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

⁹⁴ Abbott and Snidal, *supra*.

⁹⁵ A category similar to contracts, but with focus on precision and delegation as well.

⁹⁶ Abbott and Snidal at 429.

⁹⁷ Cf Chinkin; *supra* at 860: “despite the potential advantages of treaties the reality is that the process of negotiating a soft law instrument can often be as complex and lengthy as that for the negotiation of a treaty. This is inconsistent with a belief that the end result is in any event of no legal significance.” That soft law instruments often have important behavioral impacts is reflected in the fact that states bargain hard over their terms. States are also often concerned with the precedential value of soft law instruments – part of the ‘stepping stone’ argument noted above.

⁹⁸ See also Szasz, *supra*; Dupuy, *supra*, at 429-430; Seidl-Hohenveldern, 1979 at 193; Patricia Birnie, *Legal Techniques of Settling Disputes: The Soft Settlement Approach*, in *PERESTROIKA AND INTERNATIONAL LAW* (W.E. BUTLER, ED, 1990); Abbott and Snidal also stress the costs associated with delegation to an external actor. This flows from the particular nature of their definition of hard legalization, in which delegation is central.

Functionalism's focus on credibility and flexibility is consistent with theories of cooperation generally.⁹⁹ The strength of the credibility signal embodied in the choice of legal form depends on the clarity of commitments, prior reputation, and the observability of performance. Even with a contract, of course, the credibility of international commitments is a problem because states can easily renege on their commitments. Realists frequently note this en route to casting doubt on the capacity of states to cooperate effectively outside of a few circumscribed areas.¹⁰⁰ Nonetheless, it is widely believed that contracts are *more* credible than pledges, even if analysts may differ over *how* credible contracts (or pledges) generally are.

This leads to a prediction about legality, one not explicitly made in the extant literature but which flows from its premises. Pledges ought to be most common in coordination situations. In cooperation characterized by coordination games, incentives to violate commitments—once agreed—are low.¹⁰¹ In other words, the threat of opportunism is low and the credibility of commitments is high. Under these conditions functional premises suggest a preference for pledges rather than contracts, all else equal.

In sum, the existing literature on the choice between contracts and pledges shares a core of functional claims. Together, these claims can be boiled down to a parsimonious theory, in which rational states trade off ex ante credibility for ex post flexibility. The central explanatory variables are

- a] uncertainty in the expected rate and depth of change in the underlying cooperative issue;
- b] the risk of opportunistic behavior by other states; and
- c] diversity in interests and preferences.

International commitments are most credible when embodied in contracts. When the potential for opportunism is high, uncertainty low, or preferences are broadly aligned, contracts are likely to be chosen. But when change is expected to be high, opportunistic

⁹⁹ Judith Goldstein and Lisa Martin, Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note, in Goldstein et al, *supra* at 620-621; Lisa Martin, Credibility, Costs and Institutions: Cooperation on Economic Sanctions," 45 *WORLD POL.* 406 (1993).

¹⁰⁰ Eg. Downs et al, *supra*; Barrett, *supra*; Goldsmith and Posner, *supra*.

¹⁰¹ The incentive to defect is not zero, however. For example, "Battle of the Sexes" games, in which parties want to coordinate but have differing preferences over how, create incentives for one party to publicly defect in order to move the equilibrium to its preferred option. In general in coordination "no incentive exists for surreptitious cheating. Since the point of diverging from an established equilibrium is to force joint

opportunities few (perhaps because the problem is one of coordination), or preferences widely varied, pledges are more likely to be chosen. This functional theory is testable and explains a significant portion of state behavior. Yet it has several limitations.

B. The Limits of Functionalism

One problem is how these different factors interrelate. If uncertainty about the underlying problem is high (predicting a pledge) but the expected costs of opportunism are also high (predicting a contract), what happens? How, in short, are these factors traded-off one another?

Empirically, it is not hard to find cases which seem inconsistent with the functional approach, or at least suggest that one factor (e.g. the costs of opportunism) significantly outweighs the others. For example, functionalism predicts that under high uncertainty states prefer pledges to contracts. Yet many agreements that face significant uncertainty are actually contracts. Global climate change is a paradigmatic example. Both climate change per se, and, perhaps more importantly, expert knowledge about climate change are likely to continue to change markedly.¹⁰² Yet the 1992 UN Framework Convention on Climate Change and the 1997 Kyoto Protocol to the UNFCCC were negotiated as contracts. In the same period as the UNFCCC the same set of states negotiated what was to have been a contract on forest management but instead became a pledge: the "Non-Legally-binding Agreement on Forest Principles." This occurred despite the fact that the cleavages in preferences among the states involved were quite similar in both cases. Moreover, uncertainty about forests is low. Forests, and our knowledge of the underlying causes of deforestation, are likely to change much more slowly and predictably than analogues in the area of climate change. The resulting pattern is the opposite of that predicted by functional accounts.

One possibility is that this pattern is produced by differing risks of opportunism. In climate change the risk of opportunism is high. Emissions reductions are costly and implicate economic competitiveness, yet a stable climate is a public good. In forest preservation opportunism risk is lower: healthy forests have some public goods qualities but much of their

movement to a new one, defection must be public." Lisa L. Martin, *The Rational State Choice of Multilateralism*, in *MULTILATERALISM MATTERS* (JOHN G. RUGGIE, ed, 1993) at 102.

¹⁰² Indeed the importance of this issue is what justified the creation of the Intergovernmental Panel on Climate Change; see Doug Kysar and James Salzman, *Environmental Tribalism*, 87 MINN. L. REV 1099 (2003) at 1119.

benefit accrues to the state that possesses the forest. Moreover, the implications for global economic competitiveness are limited. If the risk of opportunism is a more important explanatory variable than uncertainty, 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 only be observed when the risk of opportunism is low AND uncertainty high. Even this amended theory faces anomalies, however. OPEC commitments are plagued by a high risk of opportunism, and yet are a common example of a pledge.¹⁰³

Functional accounts face another problem, however: they tend to draw the distinctions between contracts and pledges in overly stark terms. For example, they overlook the fact that contracts can be drafted with significant flexibility built-in.¹⁰⁴ Some contracts incorporate provisions for ex post adjustments to commitments. International agreements often create “collective-choice mechanisms intended to last for an indefinite period of time and to deal with issues that cannot be fully anticipated at the outset.”¹⁰⁵ Fisheries regimes are paradigmatic examples, in which quotas are adjusted seasonally. On occasion, such adjustments may be made by majority vote binding on all the parties: under the Montreal Protocol (a contract), parties can revise regulatory provisions by majority vote.¹⁰⁶ Contracts can be drafted to permit maximum flexibility in other ways. The Kyoto Protocol contains innovative provisions for emissions trading, “bubbling” among states, and joint implementation that permit major redistributions in the regulatory burdens of the parties.¹⁰⁷ These redistributions occur *after* the negotiation of the accord. Depending on the ultimate rules for these mechanisms—still to be decided—this flexibility may be quite large. Flexibility can be built into contracts in other ways as well. Binding dispute settlement—in my framework a choice of agreement structure --will inevitably interpret existing rules, sometimes creating what are essentially new rules. In general the structural choice to create a dispute settlement system permits the creation of less precise and hence more flexible rules ex ante. The bottom line is that there are many ways to make an agreement flexible. As a result,

¹⁰³ Lipson, *supra*.

¹⁰⁴ Koremenos, *supra*.

¹⁰⁵ ORAN YOUNG, *GLOBAL GOVERNANCE IN WORLD AFFAIRS* (1999) at 37.

¹⁰⁶ See eg. EDWARD PARSON, *PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY* (2003)

¹⁰⁷ See MICHAEL GRUBB, *THE KYOTO PROTOCOL: A GUIDE AND ASSESSMENT* (1998).

we cannot explain the choice to negotiate a pledge simply as the product of a preference for flexibility.

In a similar fashion, pledges are not the only solution to preference cleavages. Many contracts are in fact the product of deep divisions among the negotiating states. States can use substantive ambiguity to address preference heterogeneity. The recently-negotiated Cartagena Protocol on Biodiversity illustrates graphically the ability of negotiators to draft contracts that paper over differences.¹⁰⁸ 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. To be sure, in many instances pledges have been used to bridge cleavages. Yet contracts can be used as well. Why was contractual form rejected for East-West human rights cooperation during the Cold War, but accepted for global human rights instruments such as the International Covenant on Civil and Political Rights? Why was contractual form rejected for a forests agreement but accepted for a contemporaneous climate change agreement? Without more, the functional approach cannot give a satisfactory account.

In sum, the legality of particular multilateral agreements is difficult to account for with a purely functional approach. While pledges clearly facilitate compromise, many contracts are imprecise and use this to paper over differences. Often state choices do not map onto the uncertainty about the underlying issue, as a functional approach predicts. And since flexibility can be built into a contract directly, governments need not, and empirically often do not, resort to pledges when faced with uncertainty. One way to amend the functional approach is to focus on the scope for opportunistic behavior, which, while difficult to measure *ex ante*, seems critically important to the choice of contract over pledge. However, this revision to the theory also faces some empirical anomalies: pledges have been used in situations where opportunism appeared likely (the 30% Club in the NO_x agreement in Europe; OPEC) or strongly proposed in such situations, even if not ultimately adopted (the Bush-Putin negotiations over arms control). But these problems are fewer, suggesting that the

¹⁰⁸ Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM J. INT'L L. 606 (2002). Whether bridging preferences through substantive generality is a good idea is a distinct question. See e.g. Bilder, *supra* [book] at 38: "some commentators believe that equivocal or ambiguous international agreements are wholly illusory and not useful, giving the appearance of genuine agreement and shared understandings when in fact there is none."

risk of opportunism is probably a key variable determining the choice between legal and non-legal agreement.

The fact that flexibility can be produced even in contracts may explain yet another problem with functional accounts: the lack of pledges in many key areas of international cooperation. While functionalists do not predict a particular quantity, the functional logic suggests that pledges should be common. We live in an uncertain world; international agreements are almost universally believed to be expanding into new areas at a rapid rate; and many cooperative situations are not plagued by opportunism, either because the level of cooperation is so low or, more straightforwardly, because the situation is a coordination game in which the incentives to defect from the agreed solution are low.¹⁰⁹ Yet empirically pledges are not common in major multilateral negotiations. They are not common in areas such as environment and human rights, where uncertainty is arguably highest and, at least for human rights, the risk of opportunism low. They are not particularly common even in areas characterized by coordination games, such as air traffic control. Moreover, pledges appear concentrated in distinct areas, such as international monetary affairs.

The problem with a pure functional account is thus two-fold: the alleged advantages of pledges or contracts are much more contingent in practice than these accounts suggest, and the relative frequencies of the two choices are imbalanced: pledges appear less frequently in practice than a reasonable reading of functional theory suggests. When they do appear, they seem to be clustered in certain areas of cooperation.

C The Domestic Politics of International Cooperation

Despite these critiques, functional accounts of legality are powerful. They explain a significant amount of variance through their focus on the flexibility-credibility tradeoff. However, we lack good understanding of the conditions under which states seek to signal credibility or retain flexibility. Those conditions that have been put forward face some important empirical anomalies.¹¹⁰ Yet the consistency of functional arguments across the

¹⁰⁹ Rasmussen, *supra*.

¹¹⁰ Some functional analyses advance other reasons for the choice of form, some of which—such as the desire to screen out less committed actors or bind governmental successors—are not part of the stylized functional theory I have presented. Abbott and Snidal even suggest a focus on the sort of domestic political factors I emphasize *infra*. That role, however, remains underdeveloped and my goal here is to develop this approach further.

literature--in both law and political science--suggests that functional explanations of form may have reached their limits.

In this section I look to the role of domestic politics and institutions, and of power-based bargaining, to supplement functional accounts.¹¹¹ This approach is "liberal," with liberal understood as a positive theoretical tradition, not a normative belief system.¹¹² Because on its own liberal theory tells us relatively little about whose preferences get realized in world politics, I also look to realist premises about bargaining and power.¹¹³ These premises are particularly important when examining endogenous change in design features.

1. The Liberal Framework

Liberal IR theory has three core assumptions.¹¹⁴ First, individuals and private groups are the fundamental actors. Second, these actors use the state as a means to their pre-existing ends.¹¹⁵ Third, it is the configuration of interdependent state preferences that ultimately determines state behavior. International outcomes are a function of the relationship between potential outcomes and state preferences. Liberal theorists recognize that that realist conceptions of power are important, but stress that liberalism provides an important understanding of power: one rooted in a society's "willingness to pay" for certain ends.¹¹⁶ 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 international obligations—but it is present. This assumption is realistic rather than heroic: there is substantial evidence that many states try seriously to comply with their international

¹¹¹ Hence I am not claiming that functional accounts are fatally flawed. Rather, I am arguing that "domestic politics complements...functional explanations for legalization by supplying an explanation for government preferences." Kahler, *supra* at 667.

¹¹² Andrew Moravcsik, *Taking Preferences Seriously: A Positive Liberal Theory of International Politics*, 51 INT'L ORG. (1997)

¹¹³ Even Moravcsik acknowledges this. "...collective state behavior should be analyzed as a two-stage process of constrained social choice. 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." *Id.* at 544.

¹¹⁴ *Id.*

¹¹⁵ "Societal pressures transmitted by representative institutions and practices alter 'state preferences.'" *Id.* At 519. This claim is not dependent on the government in question being a democracy, though clearly democratic government can bolster responsiveness.

¹¹⁶ Moravcsik at 523-4.

obligations,¹¹⁷ and that they seek to ensure, when negotiating agreements, that they can comply with their obligations.¹¹⁸ Second, I assume that states are moderately risk averse when they cooperate.¹¹⁹ 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 is useful for laying out the basic argument. I later relax this assumption and show how these choices relate. Supplementing functional accounts with liberal insights helps illuminate how and why legality, substance, and structure interact as they do in the design of agreements.

I consider three explanatory factors: domestic preferences, domestic institutions, and relative power. Domestic preferences refer to the perceptions and preferences of domestic constituencies interested in international cooperation. Traditionally popular interest in international agreements was limited. Until recently most agreements addressed commerce, navigation, military alliances, and diplomatic issues such as immunity. But as the substantive focus of agreements has expanded to include individual rights, environment, food safety, and other areas of policy commonly addressed domestically, a large number of varied actors have organized around international cooperation.¹²⁰ These groups are constituencies for cooperation. My first hypothesis is that governments in large part negotiate agreements—and negotiate agreements in a particular form—because these constituencies demand them. Failure to satisfy the preferences of these groups gives rise to domestic costs (sometimes termed “audience costs”) for governments.

What are the preferences of these constituencies for cooperation? While preferences obviously vary among different groups, they are not in general evenly distributed. Preferences are asymmetric because, as an empirical matter, domestic groups that demand international cooperation on a particular issue rarely demand pledges. Rather, as many

¹¹⁷ Raustiala and Slaughter, *supra*; Chayes and Chayes [book] ch. 1; Bilder, [book] at 7-10 Compliance is plagued by measurement problems. But even in some hard cases the majority of commitments are complied with. See eg Brett Ashley Leeds, *Alliance Reliability in Times of War: Explaining State Decisions to Violate Treaties*, 57 INT'L ORG 801 (2003)

¹¹⁸ Often by recasting the commitments in terms that match existing domestic statutory regimes. See e.g. Simmons, 2000, *supra*; Kal Raustiala, *Domestic Politics and International Regulatory Cooperation*, 49 WORLD POLITICS (1997)

¹¹⁹ Downs and Rocke, *supra*, at 16.

¹²⁰ The most striking manifestation of this phenomenon is the enormous number of organizations involved in “NGO Forums” now regularly held in conjunction with major United Nations

commentators have noted, they almost always demand contracts.¹²¹ For example, the recent Land Mines Convention was spearheaded by an alliance of nongovernmental organizations (NGOs). These NGOs did not seek a pledge: they demanded a contract. This preference for contracts accords with the prevailing view that pledges are weak and ineffective, and that contracts more likely to lead to real changes in behavior. (A similar belief underlies the claim that contracts are more credible than pledges, though this claim can have a self-fulfilling quality.)¹²² In many areas of cooperation—such as the environment, certain types of arms control, trade, and human rights—the preference for contracts is pervasive. Indeed, in these areas negotiations that end in a pledge—a rare event—are commonly dubbed failures, while those that produce contracts are, subject to criticisms about substance or structure, largely considered successes.¹²³ For example, as Dinah Shelton states regarding international labor law, "it is notable here, as in other contexts, that non-state actors favor binding instruments..."¹²⁴ Similarly, Douglass Cassell argues that

The long term question may not be 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.¹²⁵

conferences. PJ Simmons, *Learning to Live with NGOs*, FOR POL'CY 1998; Jessica T Mathews, *Power Shift*, FOR. AFF. (1997)

¹²¹ See e.g. Shelton, in Shelton, *supra* at 9-10; O'Connell, in Shelton, *supra*; Cassell, *supra*. There are unusual exceptions to this tendency. For example, in the 1970s steel producers preferred to have the executive branch negotiate VERs (voluntary export restraints) with foreign producers because of GATT concerns. See *Consumer's Union of US, Inc. v. Kissinger*, 506 F. 2d 136 (DC Circuit 1974).

¹²² By this I mean a pooling equilibrium occurs. If all relevant actors believe that contracts are more credible then to choose to cast commitments in non-binding form is to signal low credibility; hence in equilibrium no actors choose to do so.

¹²³ See eg William K. Stevens, *Lessons of Rio: A New Prominence and an Effective Blandness*, "New York Times, June 13, 1992 ("Environmentalists attacked the [non-binding forest principles] as hopelessly weak, even a step backward."). This view has not changed much over the intervening decade. See e.g. Maria Adebawale, et al, *Environment and Human Rights*, IIED working paper at www.iied.org/docs/wssd: "Non-mandatory ('soft law') treaties such as the Rio agreements are an inadequate basis for effective control of [globalization]."

¹²⁴ Shelton, *conclusions*, at 458. That said, pledges are common in the International Labor Organization system.

¹²⁵ Cassell at 401

Correctly or incorrectly, many interest groups demand bindingness--contractual form--in international cooperation. Liberal theory suggests that this bias helps explain why contracts are so common. My claim is not that domestic actors always favor contracts, because they do not. My claim is only that domestic actors exhibit a decided *tendency* toward contracts.

Domestic preferences are somewhat asymmetric in another dimension. There are always domestic actors that oppose international cooperation as well as those who prefer it. Domestic actors 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 to a new agreement therefore demand pledges. Rather, there are three relevant choices: pledges, contracts, and no agreement. While difficult to measure, domestic actors opposed to new cooperation generally appear to oppose any new agreement at all, contract or pledge, though they may ultimately prefer a pledge to a contract. Empirically, it appears rare for domestic actors to demand pledges as a first-best choice.

2. Domestic Institutions and the Approval of Agreements

Like interest groups, domestic institutions play a prominent role in liberal theory. Governments negotiate an international agreement, but typically the agreement must be approved subject to some domestic process. How a state does this is a constitutional matter not subject to international law, and hence there are many approaches. But frequently approval involves legislative action.

The typical process in democracies is that the executive branch negotiates agreements and presents them to the legislature—or part of the legislature—for formalized consent prior to ratifying the accord. In parliamentary democracies such as the United Kingdom the executive controls the legislature and thus the process of legislative approval is largely pro forma. In the US and other presidential systems, by contrast, the legislative role is more profound. In the US the Senate must approve many international agreements, which can be a difficult task, especially under divided government.¹²⁶ Not all agreements are subject to Senate approval; trade accords, for example, are traditionally placed before both houses of Congress for a straight majority vote, though this process is not without its critics.¹²⁷ Many US

¹²⁶ Some 25% of global 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. (2003).

¹²⁷ See the debate between Bruce Ackerman and David Golove (in favor) and Laurence Tribe (against). ACKERMAN AND GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995); Tribe, *Taking Text*

accords are sole executive agreements, subject to no direct approval role by Congress. This tripartite framework—treaties, congressional-executive agreements, and sole executive agreements-- is purely one of American constitutional law. As a matter of international law, an agreement (say a contract) remains a contract regardless of how it is approved internally.

The choice between pledge and contract is not unrelated to these domestic distinctions, however. Unlike a contract, a pledge is never subject to congressional action, whether through the Senate or both houses of Congress. The Case Act, which regulates the making of international agreements by the US government, mandates that "international agreements other than treaties...be transmitted to Congress within sixty days after the execution thereof."¹²⁸ The implementing regulations of the Case Act, however, do not require the transmittal to Congress of non-binding agreements. For the Case Act to apply, "the parties must indeed their undertaking to be legally-binding, and not merely of political or personal effect. 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]."¹²⁹

This fact may help explain both why the US government (and other governments) sometimes prefer pledges and why domestic actors rarely do.¹³⁰ A pledge provides a more confidential, or at least less highly scrutinized, means of cooperation. Pledges do not fall within the terms of the Case Act. Members of Congress are less likely to hold hearings on pledges and the agreement will rarely be debated on the Senate floor. This claim should not be overstated—hearings were held in Congress on the Helsinki Final Act, and it received extensive media attention, much of it negative—but it is nonetheless unusual for a pledge to result in high levels of political attention.¹³¹ Even for sole executive agreements, where Congress does not play a direct approval role, the lack of applicability of the Case Act when the sole executive agreement is in the form of a pledge means Congress—and domestic interest groups—are less likely to be aware of the agreement and less likely to be able to

and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation 108 HARV. L. REV. 1221 (1995)

¹²⁸US Congressional Research Service, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (November 1993) at 350. The UK has a similar rule: pledges do not have to be published whereas contracts do. See Aust 1986 at 789.

¹²⁹ Regulations of the Secretary of State, 22 CFR part 181, reprinted in TREATIES AND OTHER INTERNATIONAL AGREEMENTS at 352. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW S. 301, Rep. note 4.

¹³⁰ I thank Eric Posner for discussions on this point.

¹³¹ Thomas, chapter 3 and 4.

politically capitalize on criticism of it.¹³² The Case Act and the dynamics it spawns do not apply to other governments, of course. But the preceding illustrates how domestic institutions can influence the choice of legal form.

Governments may also prefer a pledge because they fear that the political prominence of a contract will increase domestic scrutiny. For example, Richard Cooper has argued that one reason international exchange rate regimes are commonly pledges is that,

[T]he 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 to accept, in day-to-day operations--a discrepancy between their stated preferences and revealed preferences....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.¹³³

In other words, pledges provide governments with some useful insulation against domestic political pressures. The central premise of my analysis--that domestic politics, rather than purely functional concerns, explain much of the variation observed in the choice of legal form--is consistent with Cooper's claims.

The degree to which domestic factors actually explain the choice of between pledge and contract by the executive is not clear. Some pledges do become politically prominent, and unless an agreement is classified it is not difficult for interest groups or legislators to become knowledgeable about it. Pledges do, however, lower the political salience of an agreement, making it harder for opponents to successfully highlight its failings or existence. The lack of

¹³² This 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 when that is likely to prove troublesome. Martin finds that there is little empirical support for that claim. LISA MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* (2000). My claim is that pledges--which are distinct from sole executive agreements, which can be legally binding--provide a way to lower the political salience of agreements.

¹³³ Richard Cooper, *Prolegomena to the choice of an international monetary system*, 29 *INTL ORG* (1975) at 95-96. See also Gold, *supra*.

legislative attention to pledges is nonetheless a double-edged sword. When states need to signal that they are serious about an international commitment, a contract is useful. But a contract has another advantage irrespective of its legal quality on the international plane: it typically requires domestic action before ratification. By involving legislatures in approval, a contract signals widespread domestic support.¹³⁴ By the same logic pledges are easier to reverse by future governments.¹³⁵ In the US, for example, the President can, as a constitutional matter, terminate a contract as easily as he can terminate a pledge.¹³⁶ But politically it is harder to terminate or reverse a contract, because of the stronger signal of intention contractual form carries. Moreover, under the "Charming Betsy" canon of statutory construction courts in the US construe statutes that facially contradict treaty commitments as consistent with the treaty obligation if at all possible.¹³⁷ Pledges, which do not create the legal obligations the canon aims to protect, are thus more likely to be held to be reversed by legislative action and may therefore be less valuable to the executive *ex ante*.

Domestic institutional differences are more persuasive at accounting for the bias in favor of contracts on the part of domestic interest groups. Domestic actors will not always prefer contracts. But contracts create many more avenues of access to the cooperative process. Congress is more likely to play an active role in approving a contract, and knowledge and access to the cooperative process is greater. Hence it is unsurprising that the domestic actors that compose constituencies for cooperation prefer contracts to pledges. Not only are contracts conventionally believed to more effective at shaping state behavior, they provide better political access for domestic actors.

The particularities of the US constitutional system do not apply to all states. But it is fair to say that in general, where constitutions provide for a consent process at the domestic level, that process more frequently applies to contracts than to pledges. Pledges are not legal agreements and thus formal legislative approval is often considered unnecessary. Pledges thus provide states with greater political insulation, and conversely inhibit the influence of

¹³⁴ Martin, 2003, *supra*.

¹³⁵ I thank Oona Hathaway for discussions on this point.

¹³⁶ While the issue is not uncontroversial, the dominant view is that the President may terminate treaties without the Senate's consent. See eg Louis Henkin, *Foreign Affairs and the Constitution* (2nd ed, 1996) at 211-212. Cf. Bruce Ackerman, *Treaties Do Not Belong to the President Alone*, NEW YORK TIMES, pg A 23, Aug 29, 2001

¹³⁷ See eg, *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001)(recognizing that the "Charming Betsy canon . . . has traditionally justified a narrow interpretation of ambiguous

private actors. In short, there are at least two reasons why domestic groups may prefer contracts. One is perceptual: the belief that contracts are more effective at shaping state behavior than are pledges. The second is tactical: because of the nature of domestic institutions in many states, especially in democracies, contracts require more legislative process at the domestic level and therefore greater opportunity for influence. Both these factors create incentives for domestic groups to prefer contracts to pledges.

3. *Power, Public Goods, and Club Goods.*

Individual states cannot unilaterally choose between pledge or contract. Legality is collectively negotiated. Realist theory suggests that the preferences of powerful states should dominate—and often they do. As I show below, however, sometimes otherwise-weak states have significant contextual power that can influence the legality of an agreement. This is sometimes termed veto or "negative" power, referring to the power to withhold agreement.¹³⁸

The strength of veto power depends critically on the nature of the good produced through cooperation. In issue-areas such as trade that produce *club goods*, veto power is non-existent or trivially-weak. With club goods the benefits of cooperation are by definition excludable.¹³⁹ Hence a threat to remain *outside* the club is rarely credible unless the state in question has preponderant power.¹⁴⁰ Indeed, the opposite is the case: most states outside the EU or the WTO are eager to get in, not to get out. (In trade cooperation, the incentives to join the club tend to rise over time as a larger portion of trade is diverted from non-cooperators to cooperators).¹⁴¹ In club goods situations powerful states set the rules and others tend to follow.

legislation to avoid violations of international law"); Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 GEO. L. REV. (1998)

¹³⁸ The ability to credibly threaten to remain outside a regime is itself contingent on domestic factors, as liberals point out. In negotiation theory, basic concepts like "best alternative to negotiated agreement" are fundamentally about the relationship between the choices on the table and internal preference functions.

¹³⁹ See generally RICHARD CORNES AND TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* (2D ED 1996)

¹⁴⁰ The US and the EU, for instance, closed the Uruguay Round by essentially leaving the GATT in favor of the new WTO. Others had no choice but to follow. Richard H. Steinberg, *Bargaining in the Shadow of Law or Power?*, 53 INT'L ORG (2002).

¹⁴¹ In other words, trade cooperation is inherently expansionary. See George Downs et al, *Managing the Evolution of Multilateralism*, INT'L ORG (1998).

Conversely, veto power is particularly strong in issue-areas where pure or impure *public goods* predominate.¹⁴² In these situations, states that disinterested in cooperation on a given issue still often matter for its resolution.¹⁴³ Yet public goods create incentives to free-ride. States that desire an agreement--perhaps due to domestic pressures--are consequently vulnerable to the exercise of veto power. For example, in the stratospheric ozone negotiations, this dynamic was observed with India.¹⁴⁴ Though India is not a great power, it had a large, growing market and a dark-skinned, poor population for which skin cancer was a distant concern. India had significant veto power in this case because it could credibly refuse to join the ozone regime, and its non-participation would severely undermine the regime's efficacy. As a result India demanded significant side payments as the price of adherence.¹⁴⁵ The provision of sidepayments are one result of the exercise of veto power; change in the legality, substance, and structure of agreements is another. For example, in the global forests negotiations that accompanied the 1992 Rio Conference, the exercise of veto power by states opposed to a forests accord resulted in the negotiation of a pledge instead of the contract desired by many (conventionally much more powerful) Western states.

Consequently, while it is true that pledges 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,"¹⁴⁶ this claim rests critically on the type of problem under consideration. For club goods, recalcitrant governments lack the power to block negotiations or dictate the form of agreement. States eager to join the EU, for example, must meet whatever terms present members demand. Conversely, when governments desire wide participation in a regime--because of fears of leakage, relative gains, or free riding on the provision of a public good--the threat to remain outside the regime is credible, and hence recalcitrant states can force the negotiation of a pledge rather than a contract.¹⁴⁷ The distinction between club and public goods, and the concept of veto power, also have repercussions for the substance of agreements. Pledges are one result of the exercise of veto power; substantive change to the

¹⁴² GLOBAL PUBLIC GOODS (INGE KAUL, ET AL, EDS, 1999).

¹⁴³ In part this depends on whether the issue is supplying a good through action or inaction: inaction, as in the refraining from harming the ozone layer, is more likely to result in veto power than action. If the issue is a public good of the sort represented by the proverbial lighthouse, a large actor may find it cost-effective to supply it even if others benefit while free-riding.

¹⁴⁴ See generally RICHARD BENEDICK, OZONE DIPLOMACY (2ND ED., 1998).

¹⁴⁵ Id.

¹⁴⁶ Chinkin, *supra* at 861.

¹⁴⁷ Participation is extensively discussed in Barrett, *supra*.

agreement terms is another. Both are explored further below. A third potential result of the exercise of veto power--no agreement at all--is an important outcome, but one whose measurement faces severe methodological obstacles.

D. A Liberal Analysis of Legality

Liberal theory posits that states are responsive to the demands of domestic actors. Many of these groups, I have argued, favor contracts over pledges. This preference provides one potential explanation of the empirical bias toward contracts. Yet plainly states also care about other functional concerns, such as flexibility in the face of uncertainty, and these push states toward pledges. How do states respond to these varied pressures?

We lack good answers, but one hypothesis is that domestic demands over legality outweigh concerns over uncertainty. There are two reasons why this is likely to be true. First, state officials tend to have short time horizons and hence discount future events.¹⁴⁸ While they may care about future flexibility in the face of uncertainty, the need for flexibility arises *ex post*. Domestic pressures frequently exist *ex ante*. Second, the tendency to discount future flexibility is accentuated because implementation is often 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 substantial evidence that they do,¹⁴⁹ it is reasonable to believe that domestic pressures operate prior to functional variables such as flexibility or uncertainty.¹⁵⁰

Contracts are likely to correlate with strong and vocal domestic constituencies for another 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.¹⁵¹

One observable implication of these arguments is that the mix of pledges and contracts should vary based on functional considerations, but also based on the level of domestic demand for cooperation. All else equal, we should observe a higher percentage of contracts in issue-areas in which domestic constituencies for cooperation are active and

¹⁴⁸ Paul Pierson, *The Path to European Integration* 29 *Comp. Pol. Stud.* 127 (1996); 135-136; KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001)

¹⁴⁹ *Id.*

¹⁵⁰ The concern with credibility, however, is a functional variable that operates *ex ante*, but also tends to push governments toward the negotiation of contracts rather than pledges.

¹⁵¹ Martin, 2003, *supra*.

politically powerful, and a lower percentage where domestic constituencies are less active and powerful. If uncertainty tends to be higher in some broad classes of agreements, then the percentage of pledges ought to be higher as well, unless domestic constituencies for cooperation are also overrepresented in these same areas. If they are, time preference suggests that the ex ante domestic demand for contracts will outweigh the desire for ex post flexibility.

The empirical evidence is generally, though not entirely, consistent with these broad claims.¹⁵² Lacking good data on agreements, much of this evidence is necessarily impressionistic.¹⁵³ Pledges seem comparatively uncommon in environment, human rights, and trade cooperation--areas which exhibit active domestic constituencies for cooperation and in which those constituencies empirically favor contracts. Exceptions exist, notably the Helsinki Final Act and the Non-Legally Binding Forest Principles but also the many International Labor Organization non-binding agreements.¹⁵⁴ But these pledges are the exception rather than rule. Indeed, Helsinki and the Forest Principles both illustrate the veto power of recalcitrant states. In each, the demands and power of certain states--states which were considered essential for the viability of the agreement-- led to the negotiation of pledges rather than contracts.

By contrast, pledges appear most common in areas of technocratic regulatory cooperation in which domestic interest groups are relatively inactive.¹⁵⁵ In other words, where domestic pressures are weak states appear to have greater latitude in the choice of legality and, as a result, more frequently choose to negotiate a pledge--where for functional reasons, such as a desire for a low political profile, speedy negotiation, flexibility, or because the need for costly signals of intent is lower. Situations where pledges are relatively *common*

¹⁵² Ultimately, convincing empirical evidence is very difficult to array because unlike contracts, which are registered and can readily be documented, many if not most pledges are unregistered. See Aust (book). Only the most prominent are publicized. Yet because these are precisely the accords of greatest interest it is possible to make general, if tentative, claims about the forms of cooperation in important areas of policy.

¹⁵³ Where efforts are underway to create datasets of international agreements, these sets are nearly always focused on contracts. Pledges, since they are not registered with the UN or another central organization, are difficult to collate.

¹⁵⁴ According to the ILO it has sponsored nearly 200 pledges and approximately the same number of contracts. www.ilo.org. I thank Larry Helfer for this fact.

¹⁵⁵ Kal Raustiala, *The Architecture of International Cooperation*, VA. J. INT'L L. (2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). These pledges are also often negotiated directly between sub-state agencies, such as the Securities and Exchange Commission and its counterparts abroad.

include securities regulation, antitrust, postal cooperation, and especially monetary cooperation. These are also areas in which transgovernmental networks of government officials are particularly active, and in which they often employ “memoranda of understanding” and other non-binding accords on an agency-to-agency basis.¹⁵⁶ Often these areas are characterized by coordination problems, in which standards need to be agreed but once agreed are self-enforcing. Because these agreements engender so little political attention they are rarely documented. One consequence is that pledges may be widespread in such issue-areas but difficult to measure empirically. Indeed, Anthony Aust, a former legal advisor in the UK Foreign Office who participated in the negotiation of many such accords, argues that pledges are most likely in such technocratic areas of cooperation.¹⁵⁷

In these more technocratic areas, what empirical evidence is available suggests that the prevalence of pledges roughly, if inconsistently, rises as uncertainty rises—as functional theory predicts it should. For example, as international capital and foreign exchange markets have grown and intensified, international monetary agreements have exhibited a decline in legalization.¹⁵⁸ Exchange rate agreements such as the Plaza and Louvre accords, which addressed issues of high uncertainty—governments have only limited control over the fundamental economic factors that determine exchange rates—were pledges. Similarly, the OECD’s Financial Action Task Force *40 Recommendations* (on money laundering) is a pledge, as is the Basel Accord on Capital Adequacy.¹⁵⁹ These examples, though not systematic evidence, are consistent with the functional expectation that uncertainty will influence the form of commitments. They are also consistent with the claim that pledges are most common in areas of low domestic salience.

The analysis I have advanced 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, such as the ICCPR, the Helsinki accords were fundamentally about East-West cooperation and detente. The Soviets and the Americans thus each had enormous veto power—the implied threat to stay out of any legally-binding accord

¹⁵⁶ Id

¹⁵⁷ Aust refers primarily to bilateral pledges, but the logic does not suggest that the same would not be true for multilateral pledges. Aust book

¹⁵⁸ Simmons, *supra*.

¹⁵⁹ See www.OECD.org/fatf.

was highly credible because the exercise was pointless without them. For universal human rights accords such as the ICCPR no one state possessed sufficient veto power to successfully demand a pledge, and it was thus negotiated as a contract.¹⁶⁰

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

V. Pledges, Contracts, and the Substance of Agreements

Governments are the architects of agreements; they set the substantive terms of their commitments. Following Downs, I define the *substance* of an agreement simply as the depth or shallowness of the commitments.¹⁶¹ Deep agreements require significant changes from the *status quo ante*; shallow agreements require little or no change. In this Part I consider more closely the issue of agreement depth. Examining variation in depth can shed light on when and why states choose pledges or contracts and can also show how legality influences substance. Legality and substance are interactive, not independent, variables.

A. Deep & Shallow Multilateralism

Many scholars have noted the variety in the depth of international agreements. Multilateral environmental accords, for example, are often shallow. Many human rights agreements are similar. Scholars of environmental cooperation note the shallow nature of many international commitments and bemoan the endurance of the "law of the least ambitious program."¹⁶² Trade agreements generally are thought to be deeper, as are many arms control accords.¹⁶³ From the perspective of functional theory two contrasting arguments about the connection between legality and depth are plausible. The first suggests that contracts are likely to be associated with *shallow* commitments, the second that contracts are likely to be associated with *deep* commitments. Both claims are consistent with functional

¹⁶⁰ Though in the US the ICCPR had a limited impact on domestic law, since reservations were made to any provisions that contradicted or extended aspects of the Bill of Rights. See Jack Goldsmith, Should International Human Rights Law Trump US Domestic Law? 1 Chi J Int'l L 327 (2000)

¹⁶¹ Downs, Rocke, and Barsoom, *supra*.

¹⁶² Arild Underdal, One Question, Two Answers, in ENVIRONMENTAL REGIME EFFECTIVENESS (EDWARD MILES ET AL, 2002) at 25

¹⁶³ Downs, Rocke and Barsoom, *supra*.

premises about credibility. Yet because functional arguments cannot distinguish when one or the other should occur, they pose a puzzle for functional accounts.

The logic of the *first* argument about depth and legality is as follows. Credibility is based on expectations about performance. The shallower a commitment, the more likely its performance. The more likely the performance, the more credible the commitment *ex ante*. Put differently, commitments that are shallow are more credible, and commitments that are deep are less so. This suggests that rational states will be wary of negotiating deep contractual agreements, because these commitments are more difficult to comply with and hence are less credible. In short, there is a negative relationship between legal form and depth. Negotiating commitments as contracts should lead to a reduction in the depth of those commitments, *ceteris paribus*, because states seek a “compliance cushion” or large margin of error.¹⁶⁴ To do otherwise renders commitments less credible *ex ante*. Likewise, pledges are preferred if commitments must be deep because they do not raise 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.”¹⁶⁵

One implication of this dynamic is that we should observe high levels of compliance with contracts. This follows from the initial premises: if contracts are deliberately rendered shallow, then they are by definition easy to comply with. While measurement of compliance is methodologically challenging, most international lawyers believe that contracts do exhibit high compliance. As Louis Henkin stated in his famous aphorism: “almost all nations observe almost all of their commitments almost all of the time.”¹⁶⁶ Substantial numbers of scholars have seconded Henkin's claim. Whatever the merits of this claim, it is consistent with the argument I have described. This argument is also consistent with the oft-noted phenomenon of shallow, lowest-common denominator treaties.¹⁶⁷ Indeed, the major reason Henkin was right was not that international law is powerful and influential but that international agreements are often shallow and codify what states would do anyway. States build

¹⁶⁴ As Simmons argues, “governments 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...[in international monetary cooperation] commitment is associated with conditions that one can reasonably anticipate will make compliance possible.” Simmons, *The Legalization of Monetary Affairs*, at 599.

¹⁶⁵ Steven R. Ratner, *International Law: The Trials of Global Norms* 110 For Pol’y 65, 68 (1998)

¹⁶⁶ Louis Henkin,

¹⁶⁷ Eg. Underdal, *supra*.

compliance cushions into contracts, making the commitments credible yet shallow. Empirically, the history of international law contains many exemplars of this pattern.

The logic of the second argument reverses the correlation, and asserts that legality and depth are *positively* correlated. Functionalism asserts that states fear the prospect of cheating by other parties, especially when they negotiate deep commitments.¹⁶⁸ Deep commitments are costly to implement, and hence incentives to defect are high. Casting such commitments in legally-binding form raises the costs of non-fulfillment. The deepest, most costly commitments therefore should be contracts to help maximize the probability of compliance and minimize the prospects for opportunism. This is the opposite prediction of that made above, but there is empirical support for this claim as well. This prediction is consistent with the experience of the WTO, NAFTA, and many arms control agreements, which are often deep *and* legally-binding.

Both the argument that depth and form of commitment are negatively correlated and the argument that are positively correlated are logically plausible. Both have some empirical support.¹⁶⁹ And both are consistent with functionalist theories of form. Liberal theory, however, suggests that differing domestic political dynamics explains the empirical pattern.

B. Deep & Shallow Multilateralism II

In proffering an explanation for this apparent puzzle I highlight two factors, both of which focus on domestic actors—the constituencies for cooperation. The first is the degree to which domestic actors are *directly impacted* by the consequences of non-compliance by governments, and hence have continuing incentives to monitor the implementation of international agreements. The second is the *organizational structure* of the relevant domestic constituencies, understood in Olsonian or collective action terms.¹⁷⁰ Both of these factors in turn influence the credibility of political threats or pressure by domestic actors, and hence, in the liberal paradigm, the choices of governments. Differences in these factors help explain when depth and legality are positively correlated and when they are negatively correlated.

¹⁶⁸ E.g. Abbott and Snidal, *supra*.

¹⁶⁹ This pattern is similar in the area of agreement structure. Some analysts have argued that an inverse relationship exists between the stringency of review mechanisms and the stringency of substantive commitments. See e.g. Patrick Szell, *The Development of Multilateral Mechanisms for Monitoring Compliance*, in WINFRIED LANG, ED, *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* (1995) at 107. This is discussed in depth below.

¹⁷⁰ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION*

Organizational structure refers to the distribution of gains and losses associated with international cooperation. As Mancur Olson noted decades ago, some interests are concentrated while others are diffuse.¹⁷¹ These patterns strongly shape the possibilities of collective action. Concentrated benefits and diffuse harms produces 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 demand (can credibly threaten) that their governments negotiate the international accords they desire--in most cases, deep contracts--or they will withhold key political support.¹⁷² Domestic actors which lack these attributes or exhibit them weakly will in turn be less credible in their political demands. If domestic preferences matter, these patterns will influence the choices states make in crafting agreements.

Direct impacts refers to the degree to which domestic actors will be directly harmed by violations in other parties. Direct harm creates incentives for extensive and persistent monitoring by domestic actors. To continue with economic accords, exporting or investing firms directly benefit from compliance by other states with international economic commitments and are directly harmed by violations. Information about market access is an inherent by-product of the normal business of exporting firms. When violations occur, these groups can and do pressure their respective governments to take action; indeed, they often fashion the political and legal claims that states bring against other states.¹⁷³ 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 interests in trade with human rights or environmental NGOs. The latter may also desire deep contracts. But because these groups will not be directly impacted by failures by other states to implement or comply with their obligations, it is less credible that they will closely monitor implementation of the agreement over the long

¹⁷¹ Olson, *supra*.

¹⁷² See also Gilligan 1997, cited in Goldstein and Martin 2000.

¹⁷³ GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003)

term.¹⁷⁴ And, at least in the environmental arena, there is only modest evidence that they do so in practice.¹⁷⁵ Human rights NGOs do place a high premium on monitoring implementation, but in practice can only address a small range of potential violations.¹⁷⁶ These groups clearly pressure states to produce the agreements they desire. But because pressure may be generated in the short run, but is likely to wane in the long run, the political leverage environmental and human rights NGOs possess is comparatively weak. Most importantly, these actors lack the organizational advantages that firms possess in the trade or investment arena. The benefits from an environmental accord are typically diffuse, not concentrated. NGOs are relatively unprivileged organizationally. Due to their organizational disadvantages and their lack of continuing incentives to monitor performance, their political power is only moderate or weak. Consequently, states can more readily negotiate shallow contracts here than they can in areas like trade.

In sum, the pattern of agreement design--the varied balances struck between form and substance--is more explicable once we look beyond functional considerations and examine the domestic political underpinnings of international agreements. Let me summarize the argument so far. Environment and human rights accords are shallower, in general, 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. Though by no means unknown, pledges are comparatively rare in all these areas because of a bias toward contracts in the preferences of domestic interest groups. States, faced with uncertainty, nonetheless frequently embrace contracts because of this bias. In so doing, however, they sometimes adjust the substance of commitments, rendering commitments more shallow than they would be otherwise. In other cases, however, contractual commitments remain deep. This variation in depth is largely, though not solely, a product of differing political power on the part of domestic interest groups.¹⁷⁷

¹⁷⁴ "Many international NGOs 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, at 120.

¹⁷⁵ Raustiala and Victor 1998. .

¹⁷⁶ ALSTON AND JAMES CRAWFORD, EDS., *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* (2000). Hathaway's argument about human rights treaties rests in part upon non-state actors easing off states which sign and ratify agreements, leading to, in some cases, back-sliding in actual behavior. Hathaway, *supra*.

¹⁷⁷ That said, one problem with this account is that deep contracts do exist in areas such as the environment. The Montreal Protocol on Ozone Depletion is a good example. But Montreal had some special qualities. For one, the cost-benefit ratio of eliminating most ozone-depleting substances was

This argument raises the question of why governments supply shallow contracts rather than deep pledges when they face relatively weak political pressures from domestic constituencies for cooperation. As an empirical matter, deep pledges are relatively uncommon.¹⁷⁸ Another way of posing the question is to ask why many domestic actors put such a high premium on contracts.

I have already offered some tentative answers to this question. Domestic actors may prefer contracts because the domestic process advantages they offer: greater opportunities for notice and comment, and greater likelihood of influence. Domestic actors may also believe, as conventional wisdom suggests, that contracts are simply more effective than pledges. And it may be that form is more readily grasped politically than is substance. A contract, however shallow it may be, perhaps better insulates states from the charge that they ignored a pressing problem. That an accord is legally-binding is a single, salient point of information readily understood at the conclusion of negotiations and easily propelled into the news cycle. That an accord is deep and demanding is often a much more complicated assessment, one that may only be known over time. (And negotiators may, either by deferring important decisions or creating flexibility, mask the actual degree of depth). In other words, form is more readily grasped than is substance.

These conjectures suggest the value of looking beyond functional accounts of international agreements. A focus on domestic factors provides added explanatory leverage and clarifies aspects of the relationship between different features.¹⁷⁹ Most importantly, these arguments demonstrate the importance of analyzing form and substance concurrently, rather than in isolation.

C. The role of power

overwhelmingly favorable. For another, stringent international regulations were attractive to manufacturers because of the high likelihood of domestic curbs and, perhaps, because of the oligopoly profits the treaty created for firms able to produce legal substitutes. Montreal is more the exception than the rule. In general, shallow contracts appear more prevalent in areas like environment and less prevalent in areas like trade. See eg ELIZABETH DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY (2000), CHAPTER 4; James Maxwell and Sanford Weiner, Green Consciousness or Dollar Diplomacy? 5 INT'L ENV. AFFAIRS 19 (1993)

¹⁷⁸ One possible exception in the environmental arena is the Toronto Declaration on Climate Change, negotiated in 1988. See generally IAN ROWLANDS, THE POLITICS OF GLOBAL ATMOSPHERIC CHANGE (1995) at 190-192. The declaration was, by most accounts, not very effective.

¹⁷⁹ This focus also reflects the reality of contemporary cooperation, in which marked rise in the influence of non-state actors has been widely noted. Peter Spiro, New Global Potentates, CARDOZO L. REV (1996); PJ Simmons, Learning to Live with NGOs, FOR POL'CY 1998

The preceding arguments can be extended by considering the role of power. The first pattern presented above—that legality and depth are negatively correlated—can be exacerbated where state preferences over legality diverge. In these cases states that desire a contract may have to coerce or compel other states to agree to a contract rather than a pledge. The degree to which this is possible depends in part on the nature of the good secured by cooperation. Public goods problems can create significant veto power. States with veto power may demand a shallow agreement or they may demand side-payments to cooperate (or both). At the limit, they may exit negotiations altogether.¹⁸⁰ These demands can decrease the depth of the accord (and, as I discuss below, may also weaken the review structure of the accord). The Landmines Convention, for example, originally foundered over precisely this problem. One result was the weakening of the substantive provisions of the regime.¹⁸¹

Where the problem addressed through cooperation is a club good, or has significant reciprocal elements, as in the WTO or other trade agreements, veto power is rare. Parties which desire a deep contract can develop one and then expand membership as they choose.¹⁸² This is the basic logic of free trade agreements, which tend to expand—as in the EU, WTO, and NAFTA—over time as new members accept the conditions presented by existing members in order to secure the goods the regime produces.¹⁸³

Some areas of cooperation are characterized by neither public or club goods. The area of human rights in particular presents some unique qualities. Why exactly states create human rights treaties is unclear. Some scholars argue that states negotiate human rights agreements to lock in protection of norms domestically; others claim that these agreements operate primarily as normative registers of internal behavior.¹⁸⁴ Either way, in human rights veto power is weaker than it is in public goods setting, but not as weak as in a club good setting where affirmative advantages flow only to those states that participate. The commitments in

¹⁸⁰ This issue is comprehensively addressed by Barrett, *supra*.

¹⁸¹ Proponents eventually broke with the goal of wide participation and successfully created a deeper contract. But in doing so they sacrificed the participatory scope of the agreement.

¹⁸² The 'deep then broad' vs. 'broad then deep' debate in treaty design reflects this question. George Downs, et al, *The Transformational Model of International Regime Design*, COLUM. J. TRANS. L. (2000); Daniel Bodansky, *Bonn Voyage*, THE NAT. INTEREST (Fall 2001).

¹⁸³ A dramatic example is the creation of the WTO, in which the EU and US exited the original GATT. Other states had to follow and join the new organization, taking on a plethora of new obligations—such as intellectual property protection—in the process. Steinberg, *supra*.

¹⁸⁴ Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, *Eur J Intl Relations*, 1:2 (1995), pp. 157-189; Thomas Risse, Stephen Ropp, Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

human rights accords do not depend on universal adherence to be effective in any state—indeed, they could be implemented unilaterally. The degree of veto power that states wield in human rights cooperation instead seems to flow largely from the desire on the part of many states and advocates to have near-universal participation. Universal participation is important because human rights are seen as inherently transcendent: they are shared by all persons, and agreements detailing them ought to be subscribed to by all states. In general, human rights agreements exhibit a special pattern: they are riddled with reservations at a comparatively 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 agreement depth, and occasionally as a constraint on agreement legality.

V The Structure of Agreements

I use the term *structure* to refer to rules, procedures, and institutional bodies created by an international agreement for the collective monitoring and enforcement of party performance. Like legality and substance, structure is a distinct dimension of an agreement's architecture and exhibits significant variation. Some accords create courts or tribunals—the paradigmatic review structure for many lawyers, because it relies on authoritative third parties to adjudicate disputes.¹⁸⁵ Sometimes these courts are tied to sanctions for non-compliance. In other agreements there are no sanctions, and often no structure of review at all. In between these extremes are many alternatives. As described above, scholars have often folded the structure of review into a hard law-soft law spectrum, treating it as one more factor that determines whether an agreement is hard or soft.¹⁸⁶ This article instead treats structure as a distinct design feature, one that may influence the effectiveness of agreements whether they are contracts *or* pledges.

A. Types of Structures

The most familiar type of review structure is a court. Courts and other third-party adjudicatory bodies strike many lawyers as necessary, components of a legal system. Yet the general absence of courts, and the relatively weak influence of those courts that do exist, is a

¹⁸⁵ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

¹⁸⁶ E.g. Baxter, *supra*.

distinguishing characteristic of the international legal system.¹⁸⁷ The ICJ for example, decides relatively few disputes. Many of the disputes it does decide are only of moderate importance. The ICJ only has compulsory jurisdiction where states have agreed to it; this can be rescinded, and thus its compulsory nature is more fictional than real. Most significantly, the ICJ lacks any sanctioning power. Other international courts are more powerful and effective. The WTO Dispute Settlement Body is probably the best known. It decides cases between member states, employing both *ad hoc* dispute panels and a standing Appellate Body.¹⁸⁸ The WTO can authorize trade sanctions--more precisely, the suspension of benefits that otherwise would be necessary under the agreement. The European Court of Justice (ECJ) is another powerful court, one that has become so central to the European system that it may longer actually be an *international* court: its ruling have both direct effect and supremacy over conflicting national legislation.¹⁸⁹ At a minimum, like some human rights tribunals the ECJ is a supranational rather than purely international court.¹⁹⁰ That is, it permits individuals to bring claims against states, rather than limiting standing to states.

The ECJ and the WTO are exceptional. In practice, the vast majority of international agreements neither create courts to adjudicate disputes nor employ trade or other sanctions as enforcement tools.¹⁹¹ Many of the agreements that do contain dispute clauses have never had those clauses invoked. Collectively, the limited role of international courts comprises a central part of the prevailing critique that international law is not real law. In this view, the weak role of international courts renders enforcement unlikely and eviscerates the core attributes of law.¹⁹² International courts clearly lack the authority and coercive bite that most domestic courts possess. Yet the number of international courts and tribunals is rising rapidly. The 1990s witnessed the revival of specialized war crimes tribunals, the International Criminal

¹⁸⁷ International courts are proliferating, however; see generally *Symposium: The Proliferation of International Tribunals: Piecing Together the Puzzle* 31 NYU J Int'l L & Polcy (1999); Thomas Burgenthal, *Proliferation of International Courts and Tribunals: Is it Good or Bad?* 14 LEIDEN J. INT'L L. (2001)

¹⁸⁸ See generally JOHN JACKSON, WILLIAM DAVEY, AND ALAN SYKES, *INTERNATIONAL ECONOMIC RELATIONS* (4TH ED)

¹⁸⁹ Joseph Weiler, *The Transformation of Europe*, 100 YALE L J (1990); Alter, 2001.

¹⁹⁰ Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter, 2001.

¹⁹¹ Guzman argues that sanctions are rarely included in international agreements in part because they represent "a net loss to the parties -- one party faces a cost that is not recovered by the other." Guzman, *Design*, at 4. This is true only because states rarely create damage awards in international agreements, which would permit the loss borne by the violating state to be partially transferred to other states.

¹⁹² "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 19 (1997).

Court, and the creation of the WTO Appellate Body. Regional human rights tribunals also became more active. This expansion of judicial activity is marked and unprecedented.¹⁹³ Nonetheless, in most cases it is not accompanied by meaningful enforcement tools. In part the very success of the WTO is the reason. Trade restrictions are the most preferred enforcement measure, but WTO rules severely constrict the use of trade measures outside the WTO context. Indeed, a major issue in many environmental agreements is the degree to which they can employ trade measures without running afoul of the WTO.¹⁹⁴

Although the proliferation of courts is an important trend, even a cursory look at international agreements reveals a very wide array of non-court structures.¹⁹⁵ In the interests of analytic clarity I dichotomize the category of review structure into strong and weak. *Strong* review structures render individualized decisions about state performance. These decisions may, but need not, be accompanied by sanctions. These also need not be judgments about particular disputes; they may be statements about individual actors and their compliance with, or implementation of, international commitments. *Weak* review structures either make no such evaluations or only make evaluations about the collective, rather than individual, performance of the parties. In either case, the evaluation does not contain any tangible sanction. Structure as I define it should not be conflated with whether an agreement is effectively enforced in practice, in the sense of deterring or punishing violations. These are outcomes. Structure refers only to the specific *mechanisms or procedures* for monitoring and sanctioning party performance. The choice of structure is endogenous, and is traded off against legality and substance by states.

B. The Consequences of Different Structures

Different structures create different incentives. Functional theories of international institutions suggest that these incentives explain the choice of structure in particular cases; liberal theory suggests that domestic political institutions and preferences (related, in many cases, to perceived consequences) explain the choice of structure; and realist theory suggests that relative power translates whatever preferences states have into outcomes. For example,

¹⁹³ NYU Special issue, *supra*; Burgenthal, *supra*.

¹⁹⁴ Michael Weinstein and Steve Charnovitz, *The Greening of the WTO*, FOR. AFF. (Nov-Dec. 2001); Duncan Brack, *Environmental Treaties and Trade*, in *TRADE, ENVIRONMENT, AND THE MILLENNIUM* (Gary Sampson and Bradnee Chambers, eds, 1999)

¹⁹⁵ See in particular the chart of institutions at www.pict.org

functional accounts of the structure of review in the WTO's precursor system, the General Agreement on Tariffs and Trade (GATT), argue that the relatively weak sanctions the GATT contained were intended to ensure that states could violate rules when domestic political pressures to violate were high enough.¹⁹⁶ Realist accounts claim that the WTO dispute resolution system was designed by the powerful states to maximize their interests.¹⁹⁷ I sketch out a liberal account below. But whatever theoretical approach is favored--and these approaches are not mutually-exclusive-- it is critical to understand the actual impact of different review structures. The dearth of research on this topic, however, makes any such claims tentative.

Strong structures are, unsurprisingly, believed to be more constraining on state behavior—to be more likely to promote compliance. This is particularly true for structures that rely upon courts. However, it is important to separate out the likely impact of courts qua courts—as seats of legal discourse—from the enforcement powers that courts may be presumed to have in the domestic context but rarely possess internationally. Even in the case of the WTO, where the Appellate Body can determine non-compliance and authorize withdrawal of trade concessions by a "wronged" states against the non-compliant state, the court itself does not wield direct powers of enforcement or even the power to authorize other, centralized enforcers; it merely plays a gatekeeping role with regard to a fundamentally self-help process. Thus even the strongest international court does not actually have the power to enforce its decisions in anything like the manner a domestic court does.

This does not render international courts useless, however.¹⁹⁸ 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."¹⁹⁹ 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 do so in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle, and where states

¹⁹⁶ Downs and Rocke, *supra*. This argument focuses on domestic politics, but it is functional in that it argues that expected effects are the causes of the design features the agreement contains.

¹⁹⁷ Richard Steinberg, *Judicial Lawmaking in the WTO: Discursive, Constitutional, and Political Constraints* [draft 2004]

¹⁹⁸ See also Damrosch, *supra*.

¹⁹⁹ Alter, *supra*

are meant to live by their statements."²⁰⁰ This claim reflects the view that the particular nature of legal discourse is, 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 a legal decision or dispute process.²⁰¹ Simply by channeling the claims of states—in Weiler's argument, by requiring justification—courts may induce more compliant behavior. The implicit assumption 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, promoting further cooperation.²⁰²

Courts may also enhance reputational concerns, which can be a critical factor in ensuring compliance with commitments. Economists have long noted the importance of reputation in sustaining cooperation. This is particularly so in situations characterized by sub-optimal equilibria (such as the prisoners' dilemma) where the parties cannot enter into enforceable contracts.²⁰³ Dispute settlement bodies foster cooperation by enhancing the flow of information about party behavior. In the process they deter non-compliant actions, whether or not they can enforce their decisions coercively.²⁰⁴

Paul Milgrom, Douglass North, and Barry Weingast's model of the medieval Law Merchant is a famous example.²⁰⁵ The Law Merchant system involved a neutral third party who adjudicated disputes and retained information about prior behavior on the part of 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."²⁰⁶ Similarly, by highlighting

²⁰⁰ Joseph Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP POL. STUD 4 (1994) at 519, cited in Alter, *id.* Weiler presents a more elaborated argument about the role of the ECJ in his landmark *The Transformation of Europe*, *supra*.

²⁰¹ "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* at 212.

²⁰² See Arend, *supra* 129-133; Jutta Brunnee, 63 HEIDELBERG J. INT'L L (2003) at 261 "international law...is generated and molded through interaction and, in turn, affects behavior by influencing actor identity, thereby reconstructing interests."

²⁰³ See also Guzman, *supra* [theory of compliance]

²⁰⁴ Milgrom, North, and Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON & POL. (1990).

²⁰⁵ *Id.*

²⁰⁶ Milgrom, et al, at 19

violations of commitments, and thereby deterring them, dispute settlement bodies in international agreements may promote compliance with obligations even if they lack—as indeed they typically *do* lack—coercive powers of enforcement. For this process to work, however, states must want to participate in the accord. They must fear being excluded from the benefits of the agreement in question. For agreements involving club goods, such as NAFTA, this is a highly plausible predicate. For agreements that address public goods it is much less plausible. By definition, parties cannot be fully excluded from the benefits of the regime and the incentives to free ride are strong. If reputational costs rise, states may simply exit the agreement.

Third-party dispute settlement also can create greater clarity about legal rules, which may in turn promote greater compliance with those rules. Managerial compliance theory, for example, argues non-compliance occurs in part due to ambiguity.²⁰⁷ If managerialists are correct, the greater the clarity of rules the greater should be compliance, *ceteris paribus*. Courts, by adjudicating disputes, signal and refine ambiguous rules and hence “make it easier for a government to calculate what may happen” should a case go to court.²⁰⁸ Where noncompliance gives rise to bilateral disputes this process should also influence settlements.²⁰⁹

The important point is this: all these arguments suggest that strong review structures, *even if they lack enforcement powers of the sort domestic courts possess*, can promote compliance with international agreements. To the degree 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. This is true for three reasons. Because determinations of performance are collective (or non-existent), reputational signals of the sort stressed by Milgrom et al are highly attenuated. Second and relatedly, the normative pressure to engage in justificatory discourse, emphasized by so many theorists of courts, is non-existent or highly diluted because states

²⁰⁷ Chayes and Chayes, *supra*.

²⁰⁸ Alter, 2001 at 10.

²⁰⁹ For example, Mnookin and Kornhauser’s study of bargaining “in the shadow of the law” found that lower levels of uncertainty about likely judicial decisions drove settlement bargaining, both encouraging settlement and shaping the nature of those settlements. See Robert Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. (1979). For related studies in the WTO context see Marc Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in WTO Cases*, 24 Fordham Int’ L. Rev. (2001); Andrew Guzman and Beth Simmons, *To Settle Or Empanel?* J. LEGAL STUD (2002).

need not defend their own policies or actions. Third, by definition weak review structures cannot authoritatively sanction even self-help enforcement measures by other states.

Despite these relative deficiencies, weak review structures are not wholly without impact. By prodding governments to generate reports on implementation, they may stimulate more attention to international commitments. They may disseminate information to other states and increase transparency.²¹⁰ Some studies of weak review structures suggest that they can help states to "learn," collectively, about how to implement complex commitments, thereby promoting higher levels of compliance.²¹¹ They may also empower domestic actors interested in the accord. These effects may, over time, promote better compliance and a more effective agreement.²¹² These causal chains are long, however, and contingent. In general, weak structures provide only limited influence over state behavior vis-à-vis their international obligations.

C. Structure and Legality

Empirically, contracts are negotiated with a wide array of review structures. Many are weak, but some, like the WTO, are strong. Some agreements also have separate, optional agreements for their review structure. Optional protocols in human rights accords typically provide individuals access to an judicial body. The optional protocols are strong forms of review; they shift the larger agreement—for those states who accept the protocol—from a contract with a weak review structure to a contract with a strong review structure.²¹³ More study is needed, but pledges, unlike contracts, very rarely include strong review, optional or otherwise.²¹⁴ The paradigmatic strong structure—the court—does not appear to be part of any existing pledge. One notable exception to this general pattern is the OECD Financial Action Task Force (FATF) *40 Recommendations*, aimed at money laundering. The FATF uses a system

²¹⁰ Ron Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 Int'l Stud Q (1998)

²¹¹ Chayes and Chayes, [book]; Victor, Raustiala, and Skolnikoff, 1998.

²¹² Id.

²¹³ The fact that several human rights agreements use this distinctive optional approach highlights the unusual nature of human rights cooperation: both the touchiness of many states over perceived incursions into their sovereignty and the lack of reciprocity undergirding human rights agreements.

²¹⁴ Shelton suggests that there may be empirical examples of strong review in pledges—and argues that this strong review results from the form of the agreement—but doesn't provide examples or evidence. Shelton, in Shelton, *supra* at 15. Simmons (same volume) provides one, albeit unusual, example. Pledges can be incorporated by reference into a legally-binding agreement; for example, the FAO's Codex Alimentarius is non-binding but is incorporated into the WTO Sanitary and Phytosanitary Agreement as a regulatory safe harbor and is thereby subject to adjudication by the WTO dispute settlement system.

of review in which each member's legislation and activities are monitored and evaluated by the others, with 'compliance' enforced by reputational concerns and the threat (not yet used) of expulsion from the FATF.²¹⁵ This form of peer review is similar to that employed by the WTO in the Trade Policy Review Mechanism, and seems to be effective.²¹⁶ A related example is the oft-discussed Helsinki Final Act. The Helsinki process involved follow-up meetings every few years, aimed at a "thorough exchange of the views...on the implementation of the provisions of the Final Act."²¹⁷ These meetings are often said to have played an important role in the effectiveness of the Act.²¹⁸

States choose what kind of review structure to include in an agreement. Not surprisingly we observe a wide range of choices among contracts. The fact that pledges rarely contain strong review structures is surprising, however. There are good reasons to expect the opposite: if strong monitoring and enforcement procedures in fact raise the costs of non-compliance, then states ought to be more willing to embrace them when the standard is not legally-binding. (Put differently, when rules are legally-binding, states may seek weak review as a way of ensuring that non-compliance is not discovered or not addressed). Indeed, as one analysis of the FATF system puts it, "it is less likely that mechanisms for mutual monitoring and surveillance would have been agreed to in a binding legal context."²¹⁹

Nonetheless, the FATF is aberrational in this respect. While contracts exhibit a myriad of structures both weak and strong, pledges nearly always have weak structures. One possibility is that pledges are symbolic, or cheap talk: since states do not intend to follow through on pledges, they do not include institutions for monitoring or enforcement. There are several problems with this argument, however. If pledges are merely cheap talk, what is gained by them? Both states and domestic audiences have plenty of experience with pledges. If pledges were meaningless we would not observe them in equilibrium.²²⁰ Moreover, if pledges are just cheap talk why do states expend so much effort in bargaining over the precise

²¹⁵ Simmons, in Shelton at 257-8.

²¹⁶ DOUGLAS KEESING, IMPROVING TRADE POLICY REVIEWS IN THE WTO (1998). As Simmons notes, "The key to the FATF's success seems to flow from the serious and sustained attention the organization gives to monitoring and assessment." Id at 261.

²¹⁷ Helsinki Final Act, supra [under heading of 'Follow Up']

²¹⁸ Schlager at 355. This process, she argues, has diminished in importance in the post-cold war world. Id at 362.

²¹⁹ Simmons, supra 262.

²²⁰ In some situations cheap talk is common because of pooling equilibria, but this is not the situation here. Pledges are too costly, both in transaction costs and in risk of sparking political action, to be negotiated simply to avoid NOT negotiating them.

substantive terms of pledges? Symbolism alone cannot explain the prevalence of pledges with weak review structures. Yet it is plain that some pledges *do* contain a significant symbolic element. It may be that pledges are crafted with weak structures because they are seen as stepping stones to “real” treaties. Many pledges, however, remain pledges forever. While the causal story remains a topic for future research, the empirical pattern is clear: pledges almost never have strong review structures, whereas contracts exhibit a myriad of review structures. As I argue in Part VI below, pairing pledges with strong review structures may be an optimal cooperative approach under certain settings.

D. *Structure and Substance*

What is the connection between an agreement’s review structure and the substantive obligations it contains? Like the discussion of legality and substance above, two contradictory accounts are plausible. The first suggests that strong review structures correlate with deep agreements; the second that strong review correlates with shallow agreements.

The first account follows a similar logic to that laid out in Part V. Strong review structures disperse information, enhance the power of reputation, clarify rules, force states to justify their actions on principled bases, and possibly employ coercive enforcement measures. All these features improve incentives for compliance. Consequently, strong review structures increase the credibility of commitments *ex ante*, making deeper bargains possible. In other words, states who prefer a deep agreement will construct strong review structures to ensure that violations are deterred. Risks of opportunism generally rise the deeper the agreement.²²¹ Strong review serves to dampen the likelihood of opportunism, rendering cooperation more robust.

The second account reverses the logic of the first. The deeper the agreement is substantively, the *less* likely is a strong review structure. Faced with a deep set of commitments, states fear the ramifications of non-compliance but recognize that non-compliance is possible, even likely. Hence it is precisely the effects of strong review that lead states to eschew them in order to maintain their reputation as credible cooperative partners. As Patrick Szell puts it, “There is an inevitable correlation between the strictness of a treaty’s compliance and enforcement regimes and the stringency of its substantive obligations. One

²²¹ Coordination games are an exception: the risk of opportunism is generally low once a standard is set.

should expect countries to be ready to undertake tougher commitments if they see that supervision will be light, and vice versa."²²²

Which view is correct? Empirically, both have support. Szell provides several examples of the latter dynamic from environmental agreements, whereas trade agreements tend to exemplify the first dynamic. Rational-functionalism is consistent with both accounts. As in the discussion of substance and legality liberal theory sheds some light on this pattern. As argued above, domestic constituencies for cooperation differ across different issue-areas. Those in trade are both organizationally-privileged and likely to experience direct impacts from non-compliance with international commitments. Private actors in other areas, such as environmental protection, are weaker on both counts and hence less able to credibly threaten state officials with adverse political consequences if they fail to negotiate effective accords. As with the legality-substance relationship, the substance-structure connection divides along substantive lines, which are in turn the product of differing domestic politics. Trade accords such as NAFTA feature deep structure and strong review because domestic actors that favor these accords are politically-privileged.²²³

By contrast, environmental agreements, as Szell rightly notes, feature weak review structures, *especially* the deeper they are substantively. Human rights accords are similar, though they feature a twist: while most feature weak review, the optional protocol system permits those states--and only those states--who desire strong review to opt for it. The peculiar nature of human rights commitments--that they are commitments by governments to protect individuals within their jurisdictions--arguably necessitates such a system as other states face few incentives to pursue action against a breaching party. Arms control accords present yet another pattern: extensive monitoring but rarely formal dispute settlement. Most significant arms control accords have strong review structures under my criteria. But they rarely contain dispute settlement of the type commonly seen in economic agreements. As Guzman argues, this may be because the stakes of arms control are so high.²²⁴ States clearly

²²² Szell, The Development of Multilateral Mechanisms for Monitoring Compliance, in WINFRIED LANG, ED, SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW (1995) at 107

²²³ Guzman makes the interesting point that in cases where "political leaders enjoy benefits from when they impose a sanction (trade agreements, perhaps) are more likely feature" enforcement measures and dispute settlement provisions. Guzman, Design *supra* at 39. Of course, the benefits of suspending trade concessions are somewhat imaginary in economic terms, because free trade is generally a first best unilateral choice. Politically, of course, benefits exist, but so do political benefits in many other areas, such as when a state sanctions other states for human rights abuses.

²²⁴ Guzman, Design, *supra* at 46.

want to know whether other parties are complying. Settling disputes about compliance through tribunals offers little to states, however: they are likely to prefer breaching in response to a violation than a judgment about that violation.

To be sure, decisions about the design of a review structure often stem from many factors. In the WTO, for example, the move to strengthen review was driven by both the interest of the US in disciplining protectionism but also the interest of weaker countries in constraining US trade remedy laws. And it is also true that even in the WTO the review structure--in particular, the penalties for noncompliance--are clearly not set at the optimal level to reduce noncompliance.²²⁵ Instead, they permit a moderate level of noncompliance, in part because parties can anticipate that they will face some, uncertain, pressures for noncompliance from their own domestic firms.²²⁶ Nonetheless, the overarching message of the story is that significant constituencies existed at the domestic level in powerful states that sought to strengthen compliance with increasingly deep trade commitments. These actors saw the creation of a powerful, judicialized review structure as an attractive means to this end.

As noted, arms control agreements tend to create the strongest review structures, particularly in terms of monitoring provisions.²²⁷ Agreements like the Chemical Weapons Convention focus heavily on creating institutions to uncover and deter violations.²²⁸ Here too it may be that states anticipate some future, but uncertain, need to defect themselves and craft these monitoring and enforcement provisions more weakly than might otherwise be expected. But given the nature of arms control--something controlled directly by governments--when compared to trade, an issue in which private actors have strong preferences, it seems less plausible that states seek "optimal imperfection" in arms control.²²⁹ In other areas of international cooperation, such as environmental protection or human rights, domestic actors may prefer a strong review structure in agreements of interest, but, lacking the organizational advantages of firms in the trade context, fail to get those preferences implemented. Rather than supplying strong review structures--what we would expect if states really wanted to

²²⁵ Downs and Rocke, *supra*.

²²⁶ *Id.*

²²⁷ Kenneth Abbott, "Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements, 26 CORNELL INT'L L. J. (1993); Abram Chayes and Antonia Handler Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, INT'L SECURITY (1990).

²²⁸ See generally www.opcw.org; Robert F. Greenlee, The Fourth Amendment and Facilities Inspections Under the Chemical Weapons Convention, 65 U. CHI. L. REV. 943 (1998).

²²⁹ Downs and Rocke, *supra*.

ensure compliance--states negotiate agreements with weak review in order to manage the uncertainty of complying with those commitments. The general empirical patterns, in short, are driven by the structure of domestic interests and functional concerns with credibility and flexibility.

VI. The Undersupply of Pledges

This article has presented a positive analysis of the design of international agreements. This analysis enriches our understanding of the design of agreements, but it also leads to some normative prescriptions. An important feature of contemporary cooperation is that concerns with reputation, credibility, and other factors often lead states to construct commitments that may be legally-binding but are relatively shallow and have weak review structures. As a result compliance with obligations may be high, but the impact on behavior is low.²³⁰ 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 contract. By minimizing concerns with legal compliance,²³¹ pledges may permit states to negotiate more ambitious and deeper agreements. This is particularly important under conditions of uncertainty, where rational, credibility-seeking governments may ensure that accords reliably produce compliance by decreasing their depth.²³² Pledges by no means eliminate this problem, but they may limit it enough in particular circumstances to justify a greater reliance upon them.

While the advantages of pledges are deductively plausible, as I will describe there is some empirical evidence that pledges can promote deeper commitments than can comparable contracts, and are equally if not more effective at changing state behavior.²³³ I make this claim not to suggest that pledges are more effective tools for cooperation than are contracts, all else equal. Rather, the central point of my analysis is that in treaty design all else is rarely equal.

²³⁰ Raustiala and Victor, *supra*; Raustiala, Compliance and Effectiveness in International Regulatory Cooperation, 32 CASE W. RES. J INT'L L. 387 (2000)

²³¹ Steven R. Ratner, International Law: The Trials of Global Norms 110 FOR POL'Y 65, 68 (1998): "Soft law 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."

²³² Raustiala and Victor, *supra*; David G. Victor, The Use and Effectiveness of Nonbinding Instruments in the Management of Complex International Environmental Problems, 91 AM SOC'Y INT'L L. PROC. 234 (1997).

²³³ Raustiala and Victor, *supra*;

Consequently, pledges, which may more effectively influence behavior in situations of uncertainty, deserve more serious attention as a cooperative tool.

A. Compliance vs. Effectiveness

Compliance and effectiveness are related but distinct concepts.²³⁴ Compliance refers to a state of conformity between an actor's behavior and a specified rule. Compliance has many causes, and can be inadvertent, coincidental, or an artifact of the legal standard chosen. Consequently, the sheer fact of compliance with a given commitment tells us little about the impact of that commitment in causal terms. For example, compliance can occur without any action by a government or regulated entity. The Non-Proliferation Treaty obliges many states to not use or develop nuclear weapons, yet many are incapable of developing nuclear weapons. Compliance exists, but there is no causal link between it and the legal rule of interest. Compliance can also occur for reasons entirely exogenous to the legal process, such as technological change. Effectiveness is typically defined as observable, desired changes in behavior.²³⁵ 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 baseline—whether intentionally or coincidentally—compliance is high but effectiveness low. Yet the converse is also possible: rules can be effective even if compliance is low. Speed limits on freeways are an example. Speed limits are rarely complied with in a strict sense, but they appear to dampen speeding nonetheless.²³⁶ They are effective, even if compliance with the legal standard is very low. All else equal, more compliance with a well-crafted standard is better. Yet rules with significant non-compliance still can be effective if they induce desired changes in behavior that otherwise would not have occurred.

This statement is particularly important given the distinct nature of international law. Domestic law is created and enforced in a special context: a legal system in which the majority can effectively and legitimately impose rules upon the minority. International rules, by contrast, are the product of explicit bargains among sovereign equals. Because treaties are an endogenous strategy for states, rather than an externally-imposed set of rules, the parties

²³⁴ Raustiala, 2000, *supra*.

²³⁵ E.g. Young, 1999, *supra*; Victor, Raustiala and Skolnikoff, *supra*; Haas, Keohane, and Levy, *supra*.

²³⁶ See the discussion of Montana's experiment in Robert King and Cass Sunstein, *Doing Without Speed Limits*, 55 B U L. Rev. 155 (1999)

themselves largely determine compliance levels. 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 does not ensure that these agreements are effective. Instead, it often ensures that they are ineffective.

B. Pledges, Contracts, and Effective Agreements

Shallow contracts are frequently examples of high compliance, low effectiveness agreements. States will "under-deepen" many agreements by building in compliance cushions. In other words, the concern with credibility and reputation produces agreements that may be more shallow than domestic actors desire or external observers deem optimal. The exercise of power operates can augment or mitigate this tendency. When public goods are at issue, veto power is at its height and shallow agreements should be even more common. (When club goods are at stake shallow agreements should to be less common). If effective agreements are desired, shallow contracts are rarely useful because they rarely shift behavior. A converse set of normative concerns may also exist: that some deep contracts may be *too* effective at changing behavior. The power of domestic actors in the trade context, for example, may lead to contracts that go beyond an optimal depth (which is, of course, in the eye of the beholder). In doing so, deep contracts create risks for state credibility and for compliance. Some analysts have suggested just such a problem for the WTO.²³⁷ I call these twin problems, respectively, the overly-shallow and overly-deep problems.

Pledges provide one solution to the overly-shallow problem.²³⁸ By sidestepping concerns with *legal* compliance, pledges reduce the disincentives for governments to pursue ambitious or experimental approaches when faced with uncertainty. Yet pledges do not eviscerate all incentives toward implementing shared commitments. As discussed throughout this article there are several reasons—reputation among states, linkage to other issues, domestic political costs, reciprocity, signals to external investors, bureaucratic inertia—that drive state behavior vis-à-vis international commitments yet are not dependent on the legality

²³⁷ Goldstein and Martin, 2000.

²³⁸ I owe much to the perceptive thinking of David Victor on this issue. See eg Victor, 1997, *supra*; DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001)

of commitments.²³⁹ Pledges can trigger these processes in much the same way—though perhaps more weakly—than can contracts. As leading IR theorists have argued, "mechanisms that deter [non-compliance] include domestic costs of violation, 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 require legalization."²⁴⁰ In short, pledges provide a partial solution to the overly-shallow agreement problem by weakening the connection between form and substance in international agreements. Pledges break the *ex ante* concern with legal compliance, thereby reducing the incentive for states to weaken the substance of their commitments in order to ensure compliance. Pledges also permit more ambitious rules and standards.²⁴¹ More ambitious goals may lead to greater behavioral change. Striving but failing to reach a standard can produce more change than meeting a weak standard.

Given the high costs associated with negotiating contracts,²⁴² even a finding that pledges are, under certain conditions, nearly as effective as contracts 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 nothing to meet their commitments. This is the chief reason pledges are avoided in international cooperation. But the critical issue from an effectiveness perspective is whether the losses associated with the increased propensity to violate commitments in pledge form are outweighed by the gains produced by deeper, more ambitious, or more clear commitments. While one needs to read the evidence carefully--and much more research is needed--there are good reasons to believe that such losses will not necessarily dominate gains.

A few studies suggest that the gains from pledges can be marked. Helsinki is the most widely noted example.²⁴³ Schlager, for instance, argues that "the fact that the Helsinki agreements were not cast in the form of legally binding treaties ultimately permitted more ambitious norms to be adopted, best illustrated by the 1990 Copenhagen document...many of

²³⁹ Raustiala and Slaughter, *supra*; Goldstein and Martin, *supra*.

²⁴⁰ Goldstein and Martin at 622

²⁴¹ As Shelton puts, "soft law may be the homage states pay to hard law": rules that would not be acceptable in a contract may well be so in a pledge. Shelton, in Shelton, *supra*, at 12.

²⁴² The negotiation of the Uruguay Round of the GATT took 8 years, for example. The Law of the Sea treaty took even longer. In many cases a tremendous amount of time is consumed in fine-grained debates over "bracketed text" that is driven in part by the legal status of the commitments under consideration.

²⁴³ Victor, 1991 summarizes a number of studies.

the significant provisions of the Copenhagen document would have been unacceptable to legal advisors as *treaty obligations* without clearer definitions."²⁴⁴ Likewise, Shine suggests that pledges can be more specific, ambitious, and innovative and thereby ultimately more useful.²⁴⁵ There is also evidence of the utility of pledges in environmental protection. In several cases states have been more willing to adopt international commitments that are clear and ambitious when those commitments are pledges rather than contracts.²⁴⁶ These pledges have led to observable change in behavior which appears greater than the likely change under a contract.

For example, agreements to address marine pollution in the North Sea and in the Baltic Sea have been made in both contract and pledge form.²⁴⁷ The pledges emerged out of a high-level political process, aided by scientific assessment and collective reviews of implementation.²⁴⁸ The pledges were more ambitious than the contracts, and because commitments were drafted in more clearly—specified percentage cuts of major pollutants—they were more easily assessed through the review process and proved fairly effective in changing behavior.²⁴⁹ Similarly, the Nitrogen Oxides Protocol to the Long-Range Transboundary Air Pollution agreement (a contract) called for a freeze on emissions by a set date. A group of states went further and agreed to cut emissions by 30%, but made that commitment as a pledge.²⁵⁰ The evidence suggests that for participating states emissions were cut more than they likely would have without the pledge, and detailed case studies suggest that the substantively-stricter target induced meaningful regulatory efforts that probably would not have occurred in the absence of the pledge.²⁵¹

Pledges may be most effective when states are cooperating in a new area, in which uncertainty is very high and hence governments are especially prone to be cautious. In addition, existing studies suggest that pledges work better when they are tied to strong structures of review.²⁵² Earlier I noted that strong review in a pledge is empirically rare,

²⁴⁴ Schlager in Shelton 2000 at 353. [emphasis in original]

²⁴⁵ Shine in idem at 222.

²⁴⁶ Raustiala and Victor, 1998, *supra*.

²⁴⁷ See Jon Birger Skaereth, The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation, in Victor, Raustiala, and Skolnikoff, *supra*; Victor, 1991, *supra*.

²⁴⁸ Raustiala and Victor, 1998, *supra*, at 685.

²⁴⁹ Id.

²⁵⁰ See the history in Marc Levy, European Acid Rain: The Power of Toteboard Diplomacy, in INSTITUTIONS FOR THE EARTH (Peter Haas, Robert Keohane, and Marc Levy, eds, 1993)

²⁵¹ Wettstedt, 1998, *supra*.

²⁵² Victor 1991 at 246-7

though not non-existent. The FATF system is perhaps the best example of such an agreement,²⁵³ but others exist: the Helsinki review process, and, as described by Tom Schelling, the Marshall Plan system for allocating aid in the wake of World War II.²⁵⁴ As Schelling notes, the Marshall Plan system suggests that a regularized review process can be quite effective even in the absence of binding rules. Indeed, he argues that the "multilateral reciprocal scrutiny" that system used was probably more effective than a more regularized, rule bound system.²⁵⁵

Pledges are by no means a panacea. But the conventional wisdom—that contracts are always superior to pledges, and that pledges are second-best options—is not backed by conclusive empirical evidence or theoretical conjecture. Empirical examples, while limited, support the idea that pledges *can* be effective. It is clear that the political incentives states face often render contracts weaker (more shallow) than they ought to be by any reasonable normative standard. Particularly when states face high levels of uncertainty about the costs of commitments, or about the best way of organizing cooperation, pledges may have special utility. Under these conditions, pledges may be first-, rather than second-, best options.

C. 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 too deep, the danger is not that effectiveness is sacrificed for legal compliance. Rather, it is that the difficulty of complying with overly deep commitments will lead to numerous violations, and repeat violations may undermine a state's credibility or create political backlash toward the agreement.²⁵⁶ This is the "overly-deep" problem. When deep contracts are tied to a strong system of review, such as third-party dispute resolution, these dangers are magnified. Political support for cooperation may be undermined by efforts to force compliance, or by retaliation undertaken in response to non-compliance.

The current WTO system provides the leading empirical example of an overly-deep contract. The WTO embodies depth of substance, contractual form, and strong review. As

²⁵³ Simmons, *supra*.

²⁵⁴ Thomas C. Schelling, *The Cost of Combatting Global Warming: Facing the Tradeoffs*, FOR. AFF. (Nov./Dec. 1997)

²⁵⁵ *Id.*

²⁵⁶ See e.g. Laurence Helfer, *Overlegalizing Human Rights*

Judith Goldstein and Lisa Martin have argued, the unintended effects of this combination on the activities of domestic economic actors

could interfere with the pursuit of progressive liberalization of international trade...[r]educing the ability of governments to opt out of commitments has the positive effects 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.²⁵⁷

While Goldstein and Martin use a particular definition of legalization, their general point is consistent with my argument. Domestic political pressures, or pressures from powerful states, may lead to the negotiation of overly deep contracts. The dangers of over-depth are magnified by strong review structures. From a normative perspective, these contracts create risks of either non-compliance, which may erode the rule of law internationally, or risks of political backlash, which may erode support for future liberalization initiatives, or an unraveling of the treaty, as parties withdraw their participation.

One solution to the problem of overly-deep contracts is to increase the flexibility of commitments through more opt-out or safeguard provisions.²⁵⁸ Alternatively, treaty architects could weaken the consequences for violation, thereby encouraging more violations at the margin. Yet another, politically unlikely option would be to renegotiate the accord as a pledge. The first option has the advantage of sustaining the commitment to compliance that broadly characterizes international cooperation, but in each of these approaches the effect ought to be to decrease the dangers of backlash which concern observers like Goldstein and Martin. At the same time, a careful reading of the WTO accords shows that there is significant flexibility built in. States, concerned about the possibility of the regime breaking, have sought to alter the substance of the agreements in order to promote bending rather than breaking.²⁵⁹

²⁵⁷ Goldstein and Martin at 603-4.

²⁵⁸ On exit and escape see Larry Helfer, (draft, 2004); Koremenos, *supra*; Downs and Rocke, *supra*; Alan O. Sykes, Protectionism as a "Safeguard": A Positive Analysis of the GATT Escape Clause with Normative Speculations, 58 U. CHI. L. REV. 255 (1991).

²⁵⁹ As Downs and Rocke predict. Downs and Rocke, *supra*.

It is perhaps a telling statement about the weakness of international law that it is hard to generate many other examples of overly-deep contracts, though the International Monetary Fund's structural adjustment accords have sometimes been characterized that way.²⁶⁰ Outside of the WTO the overly-deep problem may be more theoretical than actual. Even within the WTO some observers are skeptical of the claim that the WTO is a deep agreement.²⁶¹

VII Conclusion

International agreements are the core of contemporary cooperation. While the 19th century was the heyday of customary international law, the 20th century witnessed a dramatic increase in the use of agreements--both contracts and pledges. The 21st century may usher in a new cooperative system based on transgovernmental networks and increasingly reliant on pledges and unwritten understandings.²⁶² But even a networked world will require and continue to employ explicit international agreements. Hence understanding the design and operation of international agreements is critical. The recent flourishing of interdisciplinary work by IR scholars and international lawyers provides an increasingly powerful base from which to tackle these questions.²⁶³

My central claim in this article is that the tripartite framework of legality, structure, and substance clarifies the role of agreements in international cooperation. Most importantly, it illuminates the tradeoffs states face as they craft international bargains in an anarchic world. A key facet of the international order is that these institutional dimensions are endogenously-determined by states. To understand the choices states make, these dimensions cannot be understood in isolation. I have devoted significant attention in this article to the question of so-called "soft law" and the choice between structuring international cooperation through law and avoiding legal entanglement. But as I have shown, the choice of legal form interacts critically with both the substance of agreements and the structure of review states create.

This article is primarily positive and conceptual. Yet it suggests some prescriptions as well. Scholars, statesmen, and activists alike have too readily assumed that legally-binding

²⁶⁰ Adam Prezorski and James Vreeland, *The Effect of IMF Programs on Economic Growth*, 62 J DEV. ECON. 385 (2000) for a survey of the literature on these agreements. See also Helfer, *Overlegalizing, on human rights regimes and the death penalty*.

²⁶¹ Goldsmith and Posner, *supra*.

²⁶² Raustiala 2002, *supra*; ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, forthcoming

²⁶³ Anne-Marie Slaughter, Andrew Tulumello, and Stepan Wood, *International Law and International Relations Theory*, 92 AM J INT'L L. 367 (1998)

accords are the best choice for international cooperation, and non-binding pledges merely a feeble substitute. Though are not a panacea, pledges can have surprising power. While contracts can be effective under many circumstances--and pledges often a failure--greater attention to pledges is worthy of future research.