UNDERSTANDING DYNAMIC OBLIGATIONS: ARMS CONTROL AGREEMENTS

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INTRODUCTION

In this Article, I consider the obligations that result from international agreements that are structured to create evolving commitments that adapt to uncertain or unpredictable circumstances. I propose that these consensually changing obligations be characterized as “dynamic.”

Contemporary treaties generating dynamic obligations differ significantly from traditional patterns. Consideration of three hypotheses will improve the reader's understanding of these obligations. First, the character of the evolving relationship between the parties, which results from practice and experience under the agreement, influences the viability of these obligations. Second, the evolution of dynamic obligations will be more easily accepted by the parties to international agreements when those parties share expectations and conventions that result from a larger collective regime. Finally, reciprocal behavior among the parties increases the probability of continued compliance with dynamic obligations. Dynamic obligations cannot be fully explained by traditional models of international legal agreements. Instead, an appreciation of international regimes, relational contracts and reciprocity is needed to fully understand agreements that create dynamic obligations.

Recent changes on the international scene enhance the importance of cooperative solutions to complex international questions. President Bush has told a joint session of Congress that the international community is moving toward “a new world order” which is “freer from the

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threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace.”¹ He highlighted the importance of collective security when he declared that “no longer can a dictator count on East-West confrontation to stymie United Nations action against aggression.”² The President stated that “[a] new partnership of nations has begun.”³

Secretary of State James Baker has testified that the United States faces “a critical juncture in history” which is generating “one of the defining moments of ... a new era full of promise but also one that is replete with new challenges.”⁴ Speaking of the recent crisis in Iraq, Baker stated that “the current crisis is the first opportunity ... to reinforce the standards for civilized behavior found in the United Nations Charter, and to help shape a more peaceful international order built on the promise of recent trends in Europe and elsewhere.”⁵ Baker asserted, “[I]t’s our view ... that we must seize this opportunity to solidify the ground rules of the new order.”⁶

Baker’s Soviet counterpart, former Foreign Minister Eduard Shevardnadze, described the Iraq crisis as posing a threat to “the emerging new world order.” Speaking about the role of the United Nations, Shevardnadze reiterated the central importance of U.N. mechanisms:

We are again becoming the United Nations and we’re returning to our own global constitution; the United Nations Charter, and to those of its provisions that were forgotten for a while but have been proven to be indispensable for the most important and vitally necessary of our tasks: the maintenance of international peace and security.⁷

The international arena faces enormous changes. Many of these reflect the decreasing relevance of a conception of a world order as based on the sovereign independence of states.⁸ Trade and environmental issues require collective action on an unprecedented scale; technological advances enhance both the benefits of cooperation and the dangers of conflict. New technologies also move people, capital, and information between countries with a speed that could not have been imagined a few

¹. President’s Address to a Joint Session of Congress, N.Y. Times, Sept. 12, 1990, at A20, col. 1.
². Id.
³. Id.
⁵. Id.
⁶. Id.
decades ago. International boundaries have become surprisingly permeable to many types of traffic.

I focus on arms control in this Article because it provides a surprisingly provocative model for understanding cooperative interactions between states. Each nation possesses strong incentives for successful surprise defection from an arms control agreement. On the other hand, the non-defecting party risks serious damage to fundamental national security interests should defection occur. Arms control has been called a classic example of the "prisoner's dilemma." In spite of the apparent incentive structure, the United States and the Soviet Union have compliance records that, while not perfect, show surprising support for the agreements. Even where one party has complained of non-compliant actions by the other, the complaints have not resulted in the formal termination of the agreements.

Arms control treaties also offer clear examples of several important aspects of international agreements that generate dynamic obligations. First, parties to arms control agreements will not rely upon dispute resolution by neutral tribunals. Even if a neutral tribunal were to adjudicate the breach, the mere imposition of legal responsibility for putative violations cannot suffice to resolve the disputes. Second, a state will seek to maintain the evolving arms control relationship notwithstanding viable legal claims of noncompliance by the other state so long as the compliant state believes its basic substantive interests are being preserved. Third, the parties will encounter fewer difficulties with negotiating and implementing agreements creating dynamic obligations if they begin within a larger framework of shared perceptions and practical expectations as to the subject matter of the agreement. Finally, states which engage in reciprocal compliance behavior pursuant to one set of obligations will develop shared norms that will facilitate entry into other agreements with even more dynamic obligations. While other agreements have these characteristics, agreements in the arms control context expose them particularly well. Examination of the evidence provided by arms control will illuminate many aspects of formalized yet evolving international commitments.

Part I begins with a puzzle related to the implementation of a recently ratified arms control treaty. In early March 1990, press reports

indicated Soviet violations of this treaty. Instead of taking the forceful action that many would have expected, the United States responded with quiet diplomacy. The explanation for this response grows out of a broader consideration of formal agreements and dynamic obligations.

In Part II, I offer a definition of "dynamic international obligations." I describe how the combination of uncertainties and collective action problems can lead to the establishment of dynamic obligation structures. After exploring dynamic obligations, I discuss some of the general political and strategic characteristics of arms control agreements.

In Part III, I review some common ideas about international obligation, criticizing some of the traditional notions. I focus on the familiar writings of H.L.A. Hart and on recent work by Thomas Franck to show that the source of international obligation is not the formalized consent of a sovereign state, but shared expectations of compliance with legitimate norms.

In Part IV, I review some traditional approaches to defining international obligations. Most doctrines rely on the interpretation of formal international agreements as the principal method for defining the scope of international obligations. The traditional doctrine does not completely explain the behavior and expectations of states where dynamic obligations are at issue. Where a treaty generates dynamic obligations, technical examination of the minutia of treaty language and prior negotiating history may not provide useful evidence of contemporary evolving expectations. Even the more flexible doctrines relating to material breach and suspension depend on incomplete and confusing theories of treaty interpretation.

In Part V, I undertake two tasks. First, I examine the theory of relational contracts in order to gain insights into international treaties through an analogy to domestic agreements. The interaction between parties to relational contracts evolves, creating new expectations as to appropriate behavior. Purely legal arguments have diminished force in the face of a valued relational arrangement. The norms that arise between parties to a relational contract are similar to the sorts of norms applicable in the international community.

Second, I explore the theory of regimes. That theory, developed in the literature on international relations, provides hypotheses for examination of the formation and implementation of shared expectations of state behavior that arise through the recognition of mutual interests. By institutionalizing cooperative behavior, states can reduce the costs of collective action that would frustrate the realization of national interests. The presence of a regime-like pattern of behavior between states could ease the problems that would otherwise be involved in determining the scope of a dynamic obligation.

In Part VI, I consider the role of reciprocity as a norm that fundamentally enhances the viability of dynamic obligations. Whether international regimes or relational contracts are considered, some recognition of reciprocal obligation is essential to the viability of dynamic arrangements over time.

In Part VII, I explore United States and Soviet responses to existing arms control agreements, and suggest that a regime based on reciprocity may be forming that would enhance the prospects for future arms control.

Finally, I draw some conclusions about the benefits of using the theory of regimes to explore international legal issues in areas other than arms control.

I. A PUZZLE: INF NONCOMPLIANCE NONDISPUTES

The United States ratified the INF Treaty at the conclusion of a complex and arduous process of nuclear modernization and arms control negotiation that spanned nine years. The Treaty was signed by President Reagan and General Secretary Gorbachev on December 8, 1987. After four months of Senate hearings and debates, a process "perhaps more thorough than the review of any comparable treaty in the Senate's history," the Senate approved the INF Treaty on May 27, 1988.


President Reagan exchanged instruments of ratification with General Secretary Gorbachev in Moscow on June 1, 1988.14

The INF Treaty requires the United States and the Soviet Union to destroy all ground-launched cruise and ballistic missiles with ranges greater than 500 kilometers but less than 5500 kilometers.15 The Treaty is notable in three respects.16 First, no other arms control agreement has required the actual destruction of an entire class of nuclear weapons systems. Second, no other agreement has required asymmetric reductions, obligating the Soviet Union to destroy more nuclear weapons systems than the United States. Finally, no other treaty has incorporated such highly intrusive verification measures. The parties negotiated a complex and highly detailed document to reach these ends.17

At each stage of the treaty process, American negotiators and legislators expressed concern for the risks to United States interests posed by potential Soviet violations. United States government officials and members of Congress repeatedly insisted that Soviet compliance with the agreement was paramount. American negotiators took care to structure the agreement so that any Soviet noncompliance having military significance would be immediately exposed.18 American officials assured the Senate that Soviet violations would not be tolerated.19 Members of the

13. Id. at S6937.
17. The provisions of the treaty are summarized in the State Department's letter of submission to President Reagan of the INF Treaty for his transmittal to the Senate. See Message from the President of the United States, TREATY DOC. No. 11, 100th Cong., 2nd Sess. [hereinafter Executive Branch Summary], reprinted in part in SFRC INF REPORT, supra note 11, at 110-36. The President's transmittal also included a memorandum of understanding and two protocols dealing with locations of missile facilities, elimination procedures, and verification inspection procedures. SFRC INF REPORT, supra note 12, at 7-8. In addition, the transmittal included the multilateral Basing Countries Agreement between the United States and its European allies within whose territories United States intermediate- and shorter-range weapons had been deployed. SFRC INF REPORT, supra note 12, at 8.
18. Secretary of State Shultz testified: "The INF verification regime is the most stringent and intrusive in history. . . . It is our judgment that the treaty, through its successive layers of procedures, contains the measures needed for effective verification of compliance." Secretary Shultz's Statement Before the Senate Foreign Relations Committee (Mar. 14, 1988), reprinted in DEP'T ST. BULL., May, 1988 at 18 [hereinafter Statement of Secretary Shultz]. He later conducted a special negotiating session with the Soviets six months after the signing of the INF Treaty in order to deal with verification questions raised during Senate consideration of ratification. See All INF Treaty Verification Snags Settled, Senate Told, L.A. Times, May 12, 1988, at 1, col. 6.
19. Secretary of State Shultz stated:

We must and will react vigorously to any questionable Soviet activities. If we detect an action that seems to be a violation, we will press the Soviets on it. . . . The Soviets may be able to demonstrate that the action in question was not a violation. If they do not, this
Senate insisted upon adequate verification during ratification proceedings.\(^{20}\)

On March 6, 1990, the Washington Times reported that U.S. military observers had discovered two dozen SS-23 missiles in the German Democratic Republic.\(^{21}\) The SS-23, a Soviet ground-launched ballistic missile having a range of 500 kilometers, can deliver nuclear warheads over a large portion of western Europe including most of the NATO capital cities.\(^{22}\) Because the INF Treaty required that all Soviet SS-23s be destroyed, the discovery was remarkable.\(^{23}\) The Soviet Union denied any obligation in relation to the SS-23s because title to them had passed to East Germany.\(^{24}\) Ironically, when United States INF negotiators had contended that West German–owned missiles should not fall under the agreement, the Soviets responded with a threat to postpone execution.\(^{25}\) On the face of it, the mere existence of the SS-23s appeared to be a violation of the Treaty. At the very least, the presence of the weapons violated the “spirit” of the Treaty.

Compared to the storm of protest that might have been expected given statements by American officials at the time of entry into the agreement, the response by the United States was surprisingly mild. Senator Richard Lugar, a Republican member of the Foreign Relations Committee, suggested that there might have been a “mistake.”\(^{26}\) Defense Department officials indicated that, although the discovery could be “potentially serious” and a “potential violation,” the Department was still considering the matter.\(^{27}\)

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\(^{20}\) "We cannot risk dismantling our European INF deterrent force if it is impossible to verify that the Soviets have destroyed all of their SS-20's and other missiles covered by the treaty." INF Treaty Requires Cautious Examination, 133 Cong. Rec. S17409 (daily ed. Dec. 8, 1987) (statement of Sen. Pressler).


\(^{23}\) INF Treaty, supra note 10, art. I, at 90.\^


On approximately the same date, Soviet compliance with the INF Treaty was questioned in another area. Soviet officials refused to allow U.S. inspectors to use an X-ray device to inspect canisters being removed from the Votkinsk missile production facility. Under the INF Treaty, U.S. inspectors were stationed at Votkinsk to insure that no prohibited SS-20 missiles were produced at that factory. The Votkinsk facility produces the SS-25, a missile similar to the prohibited SS-20 but having a longer range. Soviet escorts contended that the X-ray equipment would allow the United States to collect intelligence regarding the SS-25, a missile permitted by the treaty, under the guise of inspection for the prohibited SS-20. The U.S. response was again rather mild. Spokesperson Margaret Tutweiler stated that U.S. inspectors had declared the matter to be an "ambiguity" under the treaty. Other U.S. officials claimed that the Bush Administration was considering declaring the Soviet Union in violation of the INF Treaty. The Votkinsk incident is the most serious encountered by U.S. inspectors since the ratification of the INF Treaty. Because the verification procedures adopted under the INF Treaty may be adopted in many other agreements currently under negotiation, the implications of the Votkinsk dispute are important.

Considering the previous assertions regarding the importance of compliance, the United States government's responses to revelations of SS-23 missiles in East Germany and to disputes over appropriate inspection technology demand examination. The assertions that Soviet compliance was fundamentally important did not lead to formal protests or claims of violation. The absence of claims of violation is even more remarkable considering the Reagan administration's practice of pointing out the pervasiveness of Soviet violations of arms control treaties.

The consideration of these two events arising under the INF Treaty raises obvious questions: What constitutes a violation of the INF Treaty? What consequences flow from a claim of violation? Do arms control agreements create "legal" obligations? Why has the reaction to

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29. Id.
30. Id.
31. Id.
32. State Department Press Briefing, Federal News Service (Mar. 15, 1990). The declaration of an "ambiguity" pursuant to article VI, paragraph 12 of the Protocol Regarding Inspections obligates the Soviet Union to clarify the matter. Upon failure to clarify the question, the inspecting party can include the ambiguity in the inspection report. Article XIII of the INF Treaty establishes the Standing Verification Commission to clarify questions "relating to compliance." INF Treaty, supra note 10, art. XIII, at 97.
33. See id.
these incidents fallen far short of the consequences promised during the INF Treaty ratification proceedings? What is the impact of the changed context of U.S.-Soviet relations on the American response to the claimed violations?

Considerations beyond traditional legal doctrine suggest why hostile claims have not resulted. Specifically, relational and regime-based considerations could lead to more measured responses. In some circumstances, the parties must reevaluate the perceived risks which led to the formation of an international agreement. In other cases, the parties must reassess the benefits that will result from mutual performance. When parties enter an agreement in contemplation that later adjustments will be required, they must consider more than formal legal analyses. After examining traditional concepts of international obligation in relation to arms control treaties, I explore two other conceptual frameworks to inquire into the nature of the international treaty obligations. I consider whether these alternate approaches might help in the appreciation of the apparently anomalous responses to Soviet practices related to the INF Treaty. I also touch upon the concept of reciprocity underlying the functioning of international agreements.

But first I must clarify one type of agreement that might ease the burden. I next consider international agreements that create dynamic obligations.

II. DYNAMIC OBLIGATIONS AND ARMS CONTROL

A. DEFINING DYNAMIC INTERNATIONAL OBLIGATIONS

To understand the particular characteristics of dynamic obligations, one needs a more precise definition. Dynamic international obligations result from agreements that are structured to allow consensual changes in the obligations imposed in order to fulfill the object of the treaty in uncertain conditions. Dynamic obligations arise under agreements that allow the parties to mutually adjust commitments while maintaining a shared perception of reciprocal responsibility.

At least four sources may cause the uncertainty that leads to the formation of particular dynamic obligations. First, states may recognize that changing economic relations or technological capacities could create future risk. Even though states may anticipate some gains from cooperation, they cannot evaluate the character of those gains because of uncertainty about the course of economics or technology. For example, the growth of the technology for direct broadcasting from satellites has
caused some states to fear the loss of control over the content of mass media broadcasts within their territory.\textsuperscript{34} Arms control agreements create this sort of risk.

Second, states may be uncertain about important facts, knowledge of which could affect realization of gains from cooperation through a formal agreement. Even if formal cooperation is established, implementation of a formal agreement may require continued revision of the terms of its obligations as knowledge is acquired. For example, states involved in the exploitation of marine fisheries recognize the dangers of overexploitation, but they may not know how to coordinate their efforts. The history of whaling provides a good example.\textsuperscript{35} The International Convention for the Regulation of Whaling\textsuperscript{36} established the International Whaling Commission to determine the appropriate catch of whales based on scientific estimates of the sustainable yield of the whale population.\textsuperscript{37} The parties to the agreement recognized that scientific research would be necessary to establish and revise the regulations.\textsuperscript{38} Eventually, the parties to the Convention determined to halt some forms of whaling altogether.\textsuperscript{39}

Third, although states may recognize a shared risk and may expect the shared risk to be somewhat significant, the states may not know the precise level of risks that they may face. Recent efforts to generate international agreements to limit carbon dioxide emissions, motivated by the threat of global warming, reflect that type of uncertainty.\textsuperscript{40} Negotiations began because of international concern that global warming poses significant but unpredictable environmental changes. The difficulty in reaching agreement on regulation of these emissions shows the disagreement about appropriate responses.\textsuperscript{41}

\textsuperscript{34} See, e.g., Comment, \textit{Current and Future Legal Uses of Direct Broadcast Satellites in International Law}, 45 \textit{LA. L. Rev.} 701 (1985) (authored by James E. Bailey, III) (discussing the right of a state to broadcast television signals into another state without consent, and the effects of International Agreements on direct broadcasting satellites).


\textsuperscript{37} International Convention for the Regulation of Whaling, \textit{supra} note 36, art. III, para. 1; American Cetacean Soc'y, 478 U.S. at 224.

\textsuperscript{38} International Convention for the Regulation of Whaling, \textit{supra} note 36, art. V, para. 2.

\textsuperscript{39} American Cetacean Soc'y, 478 U.S. at 227.


Finally, although states may conclude that gains are possible from cooperation, they may be uncertain about the proper strategy of response to an admittedly serious risk. The states which became parties to the Vienna Convention for the Protection of the Ozone Layer expressed concern for the environment and human health and agreed to conduct research. They also agreed to take measures that would be adopted later as protocols to the Vienna Convention, even though those measures would be determined based on subsequent scientific research. The signatory states later adopted a protocol which specified the initial phase of limitation obligations.

In each of these situations, uncertainty complicates the perennial problem of coordinating collective action in response to shared risks. Any state which recognizes risks that require collective international responses to ameliorate the risk-creating circumstance should also recognize that cooperation entails serious collective action problems. Even though each state may observe joint gains from the ideal cooperative pattern of interaction, it cannot be sure that cooperation will result. If the state undertakes unilateral action consistent with an optimal cooperative strategy for mitigating the shared risk, other states may not behave in the same manner. If they do not behave cooperatively, the first state may incur the costs of its actions without any confidence that its proportion of any collective gains will provide adequate compensation for its costs. If the first state acts alone, it will create a "public good," having conferred a costly benefit on a group from which it cannot exclude non-cooperating states. The complexity of this problem only increases when uncertainty raises continuing doubts about appropriate responses to the shared risk.

43. Id. art. 2, para. 2, at 24, reprinted in 26 I.L.M. at 1531.
44. Id. art. 2, para. 1, para. 2(c) at 24, reprinted in 26 I.L.M. at 1531.
46. Collective action problems develop when interacting parties have the opportunity to acquire joint gains through cooperative action if each party incurs individual costs. Any party that can receive benefits from the cooperative action of the other without acting cooperatively stands to gain more by avoiding the costs of cooperation. Consequently, each party acting in its own best interest withholds cooperative action, and prevents the realization of the joint gains. See R. Hardin, Collective Action 25-37 (1982); O. Young, International Cooperation: Building Regimes For Natural Resources and the Environment 1-2 (1989). The classic prisoner's dilemma provides a useful analytic model for such collective action problems. Id. at 25-28. Game theory has been applied to both arms races and arms control agreements. S. Brams, Superpower Games: Applying Game Theory to Superpower Conflict 86-115 (1985); see also S. Brams & D. Kilgour, Game Theory and National Security 16-35, 60-72 (1988).
Formal agreements that create dynamic obligations provide one mechanism for coping with the combination of uncertainty and collective action problems. The formal agreement enhances the probability that signing states will perceive themselves subject to an obligation. The dynamic character of the obligation will encourage the continuation of cooperative action even after the initial formal terms of the agreement prove to be inadequate or obsolete. The continuation beyond the formal terms of the initial agreement provides the greatest benefit, but the largest conceptual problem, of dynamic international obligation.

With this notion of dynamic obligations in mind, one can begin to understand how agreements that create dynamic obligations offer one response to the collective action problem of arms control. Arms control treaties present the difficulties of promoting cooperative collective action in the face of changing technologies and strategic contexts. In the next section, I briefly explore the characteristics of arms control and arms control treaties that give rise to dynamic obligations. After discussing those characteristics, I review traditional approaches to international obligations, criticizing some while expanding upon others. Later, I examine the ideas of relational agreements, international regimes and reciprocity in order to explore more fruitful approaches to understanding the obligations of arms control agreements.

**B. ARMS CONTROL TREATIES AND DYNAMIC OBLIGATIONS**

Arms control agreements involve at least two of the sources of uncertainty that generate dynamic obligations. Changing weapons technologies create uncertainty about the risks of the future strategic situation and the mechanisms to minimize them. Additionally, the parties cannot be certain that the other side will not defect from the cooperative pattern, because the agreement binds parties that necessarily pose some threat to each other. Arms control demands agreements that protect expectations by maintaining a dynamic structure. In spite of uncertainties, the obligations created by these agreements must protect an evolving security relationship.

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48. Part III of this Article, *infra* text accompanying notes 73-121, explores the manner in which perceived obligations might lead states to alter behavior instead of pursuing immediate self-interest.

Nuclear arms control treaties are a recent innovation among international agreements. Prior to 1963, no such agreements had ever been reached. Because of the relationship between arms control and nuclear strategy, theoretical analysis has identified circumstances where agreements to control nuclear weapons may contribute to strategic stability.

International relations scholars characterize the global arena as an "anarchic" system. Interactions between states occur in the absence of any supranational authority that can insure collective security. Each state must insure its own interests through the exercise of its own power. This anarchic arena gives rise to the "security dilemma." Any state, perceiving itself to be threatened by the actions of a second state, will undertake measures to deter and defend against that threat. The second state will also consider itself threatened to the extent that the first state enhances its own security capabilities. If the second state responds in a way that revives the threat originally perceived by the first state, the first state may renew its efforts to enhance its own security. A vicious cycle is likely to result, which will at best cause inordinate and futile expenditures of resources on security. At worst, war could result.

The principal difficulty of arms control lies in its pursuit of "cooperation under anarchy." Arms control "is the process by which nations with adversary interests agree that their individual national security is better served if the arms competition between them is managed under agreed covenants." Arms control agreements "include all the forms of

The parties commit themselves to conduct additional negotiations to establish appropriate limitations if either party develops an anti-ballistic missile systems based on new technologies utilizing physical principles other than those developed at the time of the treaty. Id. at 3456.

50. Unless I specifically indicate otherwise, my analysis will focus on bilateral agreements. Multilateral agreements raise a number of issues that are substantially more difficult. However, the pendency of multilateral agreements on conventional arms control may raise precisely those issues in the near future.

51. Probably the most notable arms control agreement achieved prior to the nuclear age was the Washington Naval Treaty of 1922. For a very recent account of this period of naval arms limitation, see R. Gordon, Arms Control During the Pre-Nuclear Era: The United States and Naval Limitation Between the Two World Wars (1990).


55. Id. The contemporary nuclear arms posture provides only one example. The naval arms race between Great Britain and Germany between 1890 and 1914 provides another vivid example. See J. Keegan, The Price of Admiralty: The Evolution of Naval Warfare 111-20 (1988).

56. See generally Oye, supra note 53 (using game theory to describe the condition necessary for cooperation).

military cooperation between potential enemies in the interest of reducing the likelihood of war, its scope and violence if it occurs, and the political and economic costs of being prepared for it.”58 Because arms control forces states to limit themselves in matters central to national survival, the challenges of establishing cooperative action seem daunting. Substantial theoretical analysis has been devoted to the problems of security cooperation.59

Negotiators of arms control agreements frequently find that the strategic instability they seek to remedy has arisen from “technological creep.”60 The continued interplay of perceived threat and response has historically led to the evolution of weapons systems.61 This demonstrates the dynamic involved in the security dilemma. Each time a military power introduces new weapons or develops improved versions of existing weapons, opposing powers have incentives to master, develop, and improve weapons using the same technology. Anticipation of this response leads the first party continuously to pursue the most advanced weapons technology. Static arms control agreements become obsolete because they fail to provide for changing weapons technologies.62

An important objective of any arms control agreement is to decrease the incentives of each party to undertake actions threatening to the other party. To the extent that the agreement is successful in reducing such

59. See sources cited supra note 46.
62. See G. DUFFY, supra note 57, at 9. Historians have noted that the negotiators of the first strategic arms limitation agreement failed to address an important technology that both the United States and the Soviet Union possessed. Interim Agreement on the Limitation of Strategic Arms, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3462, T.I.A.S. No. 7504 [hereinafter SALT I]. This technology involved multiple independently targetable re-entry vehicles (“MIRVs”), which allow a single missile to deliver up to thirty warheads to different targets. M. BUNDY, DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS 550-52 (1988); J. NEWHOUSE, WAR AND PEACE IN THE NUCLEAR AGE 201-03 (1988). Some have argued that the failure to limit the use of MIRV technology stands as one of the main failings of SALT I. See M. BUNDY, supra, at 555-56; J. NEWHOUSE, supra, at 240-41. But see P. NITZE, FROM HIROSHIMA TO GLASNOST: AT THE CENTER OF DECISION—A MEMOIR 291-92 (1989).

On the other hand, an agreement executed on the same day as SALT I specifically anticipated the impact of technological change on the longevity of the constraints created by that agreement. The ABM Treaty committed the parties to enter new negotiations should new technologies develop that allowed the development of military systems that served the same purposes as those explicitly prohibited under the agreement. See ABM Treaty, supra note 49, Agreed Interpretations, Common Understandings and Unilateral Statements, statement D at 3456.
incentives, the agreement is said to enhance "stability." In particular, if an agreement helps to eliminate the benefit that any party perceives it will receive by being the first to undertake aggressive action, the agreement enhances "crisis stability." An agreement that enhances the ability of each party to comprehend and predict the security-related behavior of the other reduces the risk of conflict through misunderstanding and misperception.

Because of the crucial interests involved, each state believes it needs to respond quickly to the risks caused by noncompliance of other parties. Consequently, arms control treaties contain provisions that allow each party to observe and evaluate the other parties' behavior in relation to treaty obligations. Because material noncompliance creates fundamental national security risks for the conforming party, verification provisions must provide early warning of strategically significant infractions to allow timely response. Parties to arms control agreements will not wait for adjudication by neutral tribunals before responding to material noncompliance.

The importance of the interests involved in arms control has motivated the United States to maintain national control over dispute management mechanisms. As a result, current United States–Soviet arms control agreements set up special tribunals for the resolution of disputes. In addition, United States–Soviet agreements permit each party
to withdraw from the agreement should it determine that its national interest is threatened.\textsuperscript{71}

Agreements do not provide the sole means by which stability is reached in security relationships.\textsuperscript{72} Still, formal agreements can ease the establishment of a continuing relationship by providing a context within which each party becomes progressively more comprehensible to the other. Because of the peculiar nature of agreements that establish cooperation under anarchy and in the face of the security dilemma, knowledge of this relationship and its context will illuminate full understanding of the formal agreement. Full comprehension of arms control treaties cannot be gained through a narrow focus on formal legal agreements or their traditional legal provisions. Those who seek to understand arms control agreements must learn why states would choose to cooperate when the risks posed by defection from cooperation could be so devastatingly high. Full exploration of the motivation to cooperate requires a more sophisticated comprehension of the varied dimensions of international obligation.

\textbf{III. THE FOUNDATIONS OF INTERNATIONAL OBLIGATION}

Traditional doctrines of international law concerning obligations generally and treaties in particular grew out of theories of consent. The doctrines provide blanket rules that offer none of the subtlety and flexibility necessary to cope with the problem of coordinating collective international action in the face of uncertain risks. Partly because of this formalistic inflexibility, skeptics have challenged the existence of any notion of consent that can effectively explain how sovereign states are bound.

On the other hand, skeptics who challenge the efficacy of international obligations cannot explain the empirical fact that states generally comply with commitments. They cannot explain why states sometimes manage to cooperate even in the face of uncertainty. Neither can they explain the fact that state officials often explain or justify state actions with reference to international obligations.\textsuperscript{73} The analysis suggested by

\textsuperscript{71} INF Treaty, \textit{supra} note 10, art. XV(2), at 97; ABM Treaty, \textit{supra} note 39, art. XV(2), at 3446.

\textsuperscript{72} T. Schelling & M. Halperin, \textit{supra} note 58, at 77.

\textsuperscript{73} While such explanations may be strategic, their frequency is substantial. A review of some press reports between October and mid-December of 1990 reveals many statements discussing the
H.L.A. Hart provides a better representation of the function of international obligation. Thomas Franck, in his recent work, argued that legitimacy explains the motivations that might lead each state to compliance with international norms. These analyses expand traditional doctrines and begin to explain the existence of dynamic obligations.

Proponents of the validity of international norms frequently base their arguments on notions of the consent of the sovereign state. International legal scholars traditionally ascribe the binding character of obligations to a fundamental norm, *pacta sunt servanda*. This norm requires that international agreements be performed in good faith.

A broad importance of compliance with international obligations even where countervailing national interests might exist.

In referring to a proposed new immigration law, Gennady Gerasimov, Head of the Information Directorate, Soviet Foreign Ministry, stated, "The Minister of Foreign Affairs is insisting on adopting this law, the sooner the better, because we want to follow our international obligations, and by our international obligations, we must have this law on immigration. Freedom of movement, they call it." Press Conference at the National Press Club, Washington, D.C., December 7, 1990, available in LEXIS, Nexis Library, Federal News Service File.

Explaining the need for budget cuts involving the armed forces, Premier Antall of Hungary stated to the National Assembly, "As regards defence, when an entirely new military-political situation evolved, naturally, cuts have to be made. We undertook international obligations in connection with the withdrawal of the Soviet Army, and the Hungarian Army is outdated." Live Relay of a Speech to the National Assembly, Budapest Home Service 1534 gmt 4 Dec. 1990, British Broadcasting Service, p. E/0940/C1/1, available in LEXIS, Nexis Library.

The official Yugoslav News Agency reported:

The Yugoslav Federal Assembly has ratified the 1987 Montreal protocol on the control of substances harmful to the Earth's ozone layer, the Federal Secretariat for Information announced on 30th November. Yugoslavia also ratified the 1985 Vienna convention on the protection of the ozone layer earlier this year. It has thus accepted all international obligations to control the production of aerosol products, cooling equipment, polyurethane foam, fire equipment and other products containing freon and halon.


Japan's government was described as pressing the parliament to "agree to draft an alternative law that will show it is not trying to shirk its international obligations" related to the Persian Gulf crisis. Joseph, _Japan Tries to Save Face on Gulf Force_, The Times, Nov. 8, 1990, Overseas News.

Nigerian President Ibrahim Babangida, addressing the South Commission of the Non-Aligned Conference, discussed the problems of African debtor nations. President Babangida "stressed Africa's resolve and commitment to meet legitimate international obligations, but argued that repaying debt should not make the African people sacrifice their welfare." _Nigerian President Calls For Urgent Solution to Africa's Debt Crisis_, Xinhua General Overseas News Service, November 8, 1990, Item No. 1108020, available in LEXIS, Nexis Library.

range of justifications has been offered for the binding character of the principle. The norm is most often cited as the basis for the binding character of formal agreements, respected scholars have argued that this norm is the foundation of all international legal obligation.

Many critics, however, argue that these claims fail because they present consent as the fundamental basis of obligation. Those who have argued that states must comply with obligations because they have

78. See L. Oppenheim, International Law: A Treatise § 493 (H. Lauterpacht 7th ed. 1952) (citing a range of justifications). Some commentators contend that the obligation to comply with agreements is integral to all major legal systems. See, e.g., Lachs, supra note 76, at 364-65. Scholars often draw analogies to the obligational norms underlying domestic agreements, implying that the same obligational principle applies to both international agreements and domestic contracts. Id. One scholar has noted the serious challenges that can be raised to the use of the "domestic analogy." H. Suganami, The Domestic Analogy and World Order Proposals 1 (1988).


With respect to treaties, pacta sunt servanda is obviously not self-defining. A range of formal agreements now fall within the notion of "treaty" covered by the obligatory norm. The Vienna Convention on Treaties defines "treaties" in very informal terms. Although neither the form nor the characterization of the agreement is dispositive, the agreement must be in writing and it must be executed by representatives having power to bind the state. See Vienna Convention on the Law of Treaties, supra note 77, art. 2, para. I(a), at 681. Controversy remains as to unilateral undertakings, resolutions of international organizations, and agreements specifically designated to be nonbinding. Lachs, supra note 76, at 370.

More importantly, the content of the international treaty obligation may only be determined through interpretation. "Good faith calls for the performance of treaties that would correspond to their object and purpose. Thus the conclusion is not whether formal or less formal communications create obligations between the parties. The real issue is what exactly those rights and obligations comprise." Id. at 368. Consequently, the rules of interpretation form an integral element to any understanding of the meaning of pacta sunt servanda.

Other sources of tension have developed in the application of pacta sunt servanda to international agreements. Developing states have contended that their consent to treaties forced upon them through unequal bargaining power cannot be fully binding. Id. at 367-68. The doctrine of changed circumstances provides relief for parties confronted with situations fundamentally differing from those existing at the time the manifested consent to the agreement. Vienna Convention on the Law of Treaties, supra note 77, art. 62, at 702. Each of these challenges to the doctrine reflects problems involved in the balancing of the importance of treaties as an instrument of international relations and the need to accommodate peaceful change in relationships between states. R. Bledsoe & B. Boczek, The International Law Dictionary 260-61 (1987).

Ultimately formal agreements provide only one source of international obligation. Almost every treatise or text contains a traditional list of sources of international law. Article 38 of the Statute of the International Court of Justice provides the standard list: international conventions, international customary practices generally accepted as law, and general principles of law recognized by major legal systems. Judicial decisions and scholarly writings provide evidence of the legal rules. Statute of The International Court of Justice, June 26, 1945, 59 Stat. 1031, 1055, T.S. No. 993 (entered into force, Oct. 24, 1945).


consented cannot overcome the double-edged character of that argument. If states bind themselves only by their consent, how can those obligations survive the withdrawal of that consent? Why should a state fail to pursue its own immediate self-interest when the only applicable norm flows from a prior commitment that is now rejected?

A. THE PROBLEM OF INTERNATIONAL OBLIGATION

The problem of obligation poses a tremendous dilemma for all scholars of jurisprudence and philosophy. Even a cursory glance at definitions and characterizations that have been offered illustrates the difficulties involved. Anthony Flew describes "obligation" generally as "[a] duty that a person is under a moral compulsion to perform if [the person] has a role in society and there are moral rules in that society dictating that anyone playing this role must thereby perform that act."\(^2\)

More specifically, the concept of "legal obligation" is overwhelmingly complicated. *Black's Law Dictionary* demonstrates the difficulty in its introduction to a very extensive group of definitions of the term "obligation": "[a] generic word... having many, wide, and varied meanings, according to the context in which it is used."\(^3\) These attempts at definition raise many more questions than they answer. Renowned legal scholars have wrestled with the concept of obligation as it relates to law.\(^4\)

In the face of these quandaries, the fact that the notion of international obligation is problematic should come as no surprise.\(^5\) Important thinkers have historically questioned the existence of any supervening principle of international obligation that might constrain the action of the sovereign. Among the most famous of those critics were Machiavelli and Hobbes. Machiavelli stated that

> a prudent ruler ought not to keep faith when by so doing it would be against his interest, and when the reasons which made him bind himself no longer exist. If men were all good, this precept would not be a


\(^3\) *Black's Law Dictionary* 1223 (4th ed. 1968). The dictionary confirms the difficulty of the term with its first attempt at a definition: "That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc." *Id.*


\(^5\) With respect to ideas of international obligation, Oscar Schachter observed that "[n]o single theory has received general agreement and sometimes it seems as though there are as many theories or at least formulations as there are scholars." Schachter, Towards a Theory of International Obligation, 8 Va. J. Int'l L. 300, 300 (1968).
good one, but as they are bad, and would not observe their faith with
to you, so you are not bound to keep faith with them.\textsuperscript{86}

Hobbes, in developing his theory of the domestic sovereign as essen-
tial to avoiding the war of all against all, notes that international sover-
eigns constantly engage in that war among themselves:

[I]n all times, kings, and persons of sovereign authority, because of
their independency, are in continual jealousies, and in the state and
posture of gladiators; having their weapons pointing, and their eyes
fixed on one another; that is, their forts, garrisons, and guns upon the
frontiers of other kingdoms; and continual spies upon their neighbors,
which is the posture of war. . . .

In such a war, nothing is unjust. . . . The notions of right and
wrong, justice and injustice have there no place.\textsuperscript{87}

Hobbes argues that justice, the most important law of nature, essentially
involves the performance of covenants.\textsuperscript{88} However, Hobbes sees justice
as pertinent only where there existed security:

The laws of nature oblige in conscience always, but in effect then
only when there is security. . . . For he that should be modest, and
tractable, and perform all he promises, in such time, and place, where
no man else should do so, should but make himself a prey to others,
and procure his own certain ruin, contrary to the ground of all laws of
nature, which tend to nature's preservation.\textsuperscript{89}

B. PRACTICAL OBLIGATIONS AND H.L.A. HART

The work of H.L.A. Hart suggests responses to these arguments.
Hart initially calls into question the justifications for fundamental inter-
national norms like \textit{pacta sunt servanda}. He then criticizes those who
conclude that there is no possible basis for affirming the existence of
international obligation. Finally, he analogizes international obligation
to more traditional notions of obligation.

First, Hart questions whether natural law principles can be applied
to the international arena. In addressing theories of natural law, Hart
identifies several characteristics of all human societies that might support

\begin{footnotes}
\footnotetext[87]{T. Hobbes, Leviathan 101 (M. Oakeshott ed. 1962) (1651).}
\footnotetext[88]{Id. at 113.}
\footnotetext[89]{Id. at 122-23.}
\end{footnotes}
such notions. He carefully distinguishes the international arena, however, because the attributes supporting rules of fundamental order in a society of natural persons do not necessarily obtain between states.

Second, Hart responds to commentators who rely on sovereign consent to explain the binding character of international norms. Most theorists who take this position do little more than assert that states can only bind themselves by means of their own consent. The contention that because of sovereignty, states may only bind themselves with their consent is incoherent, because states having such sovereignty could free themselves of international obligations by merely withdrawing their consent. Finally, Hart notes that while states rely principally upon formal international agreements to establish binding obligations, empirical evidence cannot prove that only consensual agreements can bind states.

Hart makes a strong argument in response to claims that sovereign states cannot bind themselves beyond their immediate will to be bound. He asserts that "sovereignty" is not an inherent concept. The notion of sovereignty discussed in political theory generally characterizes the relationship as one between a government and a person under that government's jurisdiction. When attention turns to international entities, the degree of autonomy of states depends not on relative power but on generally accepted notions of the appropriate scope of independence for those international entities. To say that a state inherently possesses unlimited sovereignty "prejudges a question which we can only answer when we examine the actual rules. The question for municipal law is: what is the

90. Hart points out some inherent characteristics of human beings that support natural law notions. First, human beings are vulnerable to bodily harm from the violence of others. Second, the differences between the intellectual and physical capabilities of individuals are generally not overwhelming. Third, although human beings sometimes act altruistically, they also frequently act selfishly. Fourth, human needs must be fulfilled from locally limited resources. Finally, human will and comprehension are sufficiently limited so that behavior is not predictable and commitments will not necessarily be fulfilled. These characteristics support the general existence in human societies of rules prohibiting violence, protecting property, and requiring compliance with promises. H.L.A. Hart, supra note 74, at 189-94.

91. The inherent characteristics of persons do not apply equally to states. A state may be far better able to use force and violence. It may also prove to be relatively invulnerable to the retributive responses of other states. The differences between persons and states, particularly in the first two categories, raise doubts that the characteristics of states can easily support natural law notions of the obligations of states. Id. at 213-15.

92. Hart responds more fully to contentions that the nature of sovereignty limits the degree to which states can submit themselves to binding constraints.

93. Id. at 219.
94. Id. at 220.
supreme legislative authority recognized in the system? For international law it is: what is the maximum area of autonomy which the rules allow to states?"95

Hart's work suggests that international legal obligations should be understood in practical terms. Binding international obligations exist if "they are thought of, spoken of, and function as such."96 Reflecting generally upon rule-imposed obligations, Hart wrote, "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought upon those who deviate or threaten to deviate is great."97 Hart continued by pointing out two additional characteristics of rules that generate obligations:

The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. . . . Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes a duty may wish to do.98

Responding to arguments that obligations can only exist when a system of sanctions creates the rule-directed response, Hart points out the "internal perspective." Those who have rule-based obligations generally justify and explain their behavior and criticize the behavior of others in terms of the rule.99 This rule-guided self-criticicism and self-limitation stands as the hallmark of obligation. The presence of some who lack internalized constraints does not diminish the importance of the rule-based obligation.100

Hart's work makes at least three significant contributions to international obligation theory. First, he shows the error of the Austinian criticisms based on the absence of effective centralized enforcement. After showing that even mature domestic systems require an internal perspective in addition to enforcement threats, Hart argues that the internal perspective is of central importance in the international area as well. Where relations between states are involved, Hart argues that the internal perspective is sufficient to support the presence of international obligations based on legal rules. Second, Hart argues that traditional natural law notions cannot be applied to international obligations. Rules drawn from

95. Id. at 218.
96. Id. at 226.
97. Id. at 84.
98. Id. at 85.
99. Id. at 87-88.
100. Id. at 88.
natural law analysis of human societies cannot be transposed uncritically to establish principles of obligation in the international setting.

Finally, Hart builds the foundation for a practical conception of international legal obligation. Instead of analyzing of the scope of obligation abstractly, Hart recognizes that the scope of an international obligation is defined by the perceptions of states purportedly bound by obligation. Obligations exist to the extent that states judge themselves by those obligations: to the extent that states justify and criticize their actions in terms of international legal rules.

Hart's analysis provides a provocative starting point, but it leaves certain important questions unanswered. His practical approach to the meaning of international obligations must be expanded. Hart did not explain why a state would perceive that a rule created an obligation. He did not describe how rules that function to create obligations might be identified adequately to allow consensual agreement of generally applicable commitments. Fortunately, another scholar offers insight into the answers to those questions.

C. LEGITIMACY AND OBLIGATION: THE PULL TO COMPLIANCE

A recent book by Thomas Franck supplements Hart's functional analysis by exploring the sources of incentives that lead states to comply with international norms.\(^1\) For the sake of his argument, Franck rejects the standard jurisprudential efforts to categorize international norms as "legal" or "not legal," finding such efforts only marginally relevant to the evaluation of international norms.\(^2\) Franck finds that the concept of legitimacy provides a central explanation for compliance behavior of states.\(^3\) To the degree that states perceive an international norm as legitimate, the norm exerts a "compliance pull" which provides the incentive for state decision makers to observe the norm.\(^4\)

Franck defines legitimacy as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."\(^5\) He contends that four factors

\(^{101}\). T. FRANCK, supra note 75; see also Franck, Legitimacy in the International System, 82 AM. J. INT'L L. 705 (1988) (developing an earlier version of his legitimacy theory).
\(^{102}\). T. FRANCK, supra note 75, at 33-34.
\(^{103}\). Id. at 38-39.
\(^{104}\). Id. at 49.
\(^{105}\). Id. at 24.
indicate the degree of a norm's legitimacy: determinacy, symbolic validation, coherence and adherence.\(^\text{106}\) "Determinacy" refers to the degree to which states can agree about the content of a norm.\(^\text{107}\) "Symbolic validation" refers to the degree to which states perceive the norm to be authentic.\(^\text{108}\) "Coherence" refers to the degree to which the norm is both internally consistent and consistent with the entire body of norms that regulate international behavior.\(^\text{109}\) "Adherence" refers to the hierarchic fit between the norm in question and other norms accepted as legitimate.\(^\text{110}\) When these four indicators provide sufficient foundation, Franck concludes that states will perceive an international norm as legitimate.\(^\text{111}\) When these four indicators provide sufficient foundation, Franck concludes that states will perceive an international norm as legitimate. That norm will then exert upon each individual state a pull toward compliance capable of counter-balancing the short-term interests which could support action inconsistent with the norm.

For Franck, the principal indicator of the presence of an international community is an international consensus on the legitimacy of a system of primary and secondary norms.\(^\text{112}\) Under his analysis, \textit{pacta sunt servanda} simply reflects a shared perception that formally adopted international commitments should be respected and implemented by states because the states are members of a rule-community in which compliance with agreements is a norm.\(^\text{113}\) In this way, Franck reaches conclusions similar to those of Hart: it is membership in the rule-community of states that provides the foundation of international obligation.\(^\text{114}\) By complying with legitimate international norms, a state garners the benefits of status as a member of the international community. Those benefits flow from the fulfillment of its reasonable expectations of reciprocal compliance with the obligations shared by state participants in the international system.\(^\text{115}\)

Franck's work inspires a number of observations. First, Franck recognizes that his concept of international legitimacy is of limited value for

\(^{106}\) Id. at 49.  
\(^{107}\) Id. at 66.  
\(^{108}\) Id. at 91.  
\(^{109}\) Id. at 147.  
\(^{110}\) Id. at 184.  
\(^{111}\) Id. at 192-94.  
\(^{112}\) Id. at 186.  
\(^{113}\) Id. at 196; cf. H.L.A. Hart, \textit{supra} note 74, at 84 (discussing community-based obligations).  
\(^{114}\) T. Franck, \textit{supra} note 75, at 198-200.
those concerned with substantive norms. Franck notes both operational and theoretical reasons for doubting that normative notions of justice based upon the interaction of natural persons can be applied to states in the international arena. Those seeking a conception of legitimacy that includes evaluation of the morality of international norms must look elsewhere.

Franck’s reference to a “fundamental teleological question” regarding international norms raises more questions than it answers. Analysts may evaluate legitimacy without ever inquiring into the ultimate goals or purposes of international norms. Questions about the “purpose” of the international system may lead to serious skepticism as to the intentions of the interrogators.

More specifically, the elements of Franck’s theory of legitimacy present theoretical problems. Because Franck’s definition of legitimacy gives procedure priority over justice, Franck takes a relatively formalistic approach to international norms. According to Franck, agreement on principles of behavior among highly differentiated states mandates a focus on formal rather than substantive standards of legitimacy. As between order and justice, order may be the best that we can do.

In his discussion of determinacy, Franck argues that some norms have clear meaning because no one could seriously identify another meaning. However, he concludes too quickly that the scorn and approbation of those responding to frivolous contentions would prevent reliance on those contentions. Franck’s discussion of validation is also

115. See id. at 208-46.
116. His operational reason is based in the metaphorical character of references to justice where the subjects of reference are collectivities. His theoretical reasons flow from a recognition that interstate norms can be legitimate without reference to justice. Id. at 208-10.
117. Franck defines “teleology” as “the study of ends or ultimate causes.” In his mind, this teleological question relates to the “reasons why rules do, or do not, obligate.” Id. at 5.
118. See id. at 233-35 (discussing the relative importance of order and justice in understanding the function of rules requiring compliance with the obligations of international agreements).
119. Id. at 53-56.
incomplete.\footnote{121} His explanation of symbolic validity, ritual, and pedigree leaves confusion about the relationship between the terms.

Finally, Franck does not acknowledge the degree to which Hart's treatment of international obligations supports Franck's contentions. Many authors have assumed that Hart disparages international law. If Hart is approached without assumptions that "nature" legal systems are superior in all contexts, Hart's appreciation of the import of international obligation becomes evident. Few legal scholars have fully considered the value of Hart's work in providing a jurisprudential foundation for a theory of international obligation.\footnote{122} Franck begins to appreciate Hart's position, but there is more to mine in the rich vein of Hart's writing on international obligations.

Despite these criticisms, Franck makes an important contribution to the analysis of international obligation. Franck provides a credible link between the collective conclusion by states that an international norm exists and the motivation of an individual state to comply with the norm. Franck's discussions of legitimacy and community contribute stimulating new ideas to an arena seriously in need of them. Franck's ideas bear strong similarities to aspects of the theories of relational contracts and international regimes that will be developed later in this Article. Franck shows that reciprocity plays a critical role in motivating states to comply with perceived international obligations. Later I consider whether these theories illuminate the analysis of dynamic international obligations.

Both Franck and Hart provide accounts of international obligation that give greater credence to the notion that international cooperation can overcome collective action problems involving uncertain or changing risks. Doctrines based solely on consent cannot explain why states might wish to overcome collective action problems in order to cooperate in the first place or why they may continue that cooperation even after the formal terms of that consent prove inapposite. Explanations based on the value of membership in the international community provide a richer concept of obligation that may in turn explain why states are constrained beyond the explicit terms of a formal agreement.

\footnote{121} T. Franck, \textit{supra} note 75, at 91-97.
A closer examination of traditional doctrines will reveal their limitations, giving support for an expanded scope of inquiry into the nature of the international agreements that create dynamic obligations.

IV. INTERNATIONAL AGREEMENTS: DYNAMIC OBLIGATIONS AND TRADITIONAL DOCTRINES

Traditional doctrinal approaches to the analysis of international obligations depend upon narrow consent-based theories. Those approaches rely principally upon bare assertions that international norms are legally binding. Traditional doctrines only provide tools to evaluate legality. They do little to resolve collective action problems involving uncertainty. Traditional doctrines do not explain why states might choose to enter into agreements, why they would comply with those agreements, or why they might seek to facilitate the evolution of cooperation beyond the viability of the formal agreement. For many reasons, consent-based theories have limited relevance for the analysis of dynamic obligations. Both Hart and Franck show that alternatives to consent-based theories provide more useful means of understanding the force of international obligations. To demonstrate the comparative limitations of the traditional doctrinal approaches, I briefly review the traditional methods for determining the content of international obligations created by treaties.

A. THE EVOLUTION OF INTERNATIONAL AGREEMENTS

The changing nature of international agreements limits the utility of traditional treaty doctrines. Formal international agreements have served various functions over time. Before this century, very few international agreements established continuing, dynamic relationships between states. Most were political agreements defining control of peoples or territories. Many marked the termination of military conflict

123. The discussion of formal international agreements covers arrangements that would be called both “treaties” and “international agreements” under United States domestic law. Although certain differences exist between the terms in United States constitutional law, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1986), those distinctions are not important here. Most international doctrine places little importance upon the specific terms of characterization used within documents; the terms “treaty,” “convention,” and “covenant” have the same legal meaning. M. SHAW, INTERNATIONAL LAW 77-78 (2d ed. 1986). However, I do mean to include agreements that are formally legally binding as well as those that are not. Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301(1) (1986) (stating the scope of presidential authority to enter into treaties and other international agreements).

or territorial dispute. Treaties established relations between states permitting the operation of traditional diplomacy. Most of these agreements served principally as static frameworks resulting from efforts to avoid intolerable international conflicts. In recent times, however, the role of international agreements has changed. Within the last half century, formal agreements have become the main source of international legal obligation, and the United States has entered new and different types of agreements.

126. See infra note 128.
128. A comparison of the treaties entered into by the United States between 1885 and 1935 shows the changes in the number and character of American international treaty commitments. TREATIES, CONVENTIONS AND INTERNATIONAL ACTS, PROTOCOLS & AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1927-1937 Vol. IV, SEN. DOC. NO. 134, 75th Cong. 3d Sess. A-11 to A-31. (1938). In 1885, the United States entered into six new international agreements, all of which were bilateral. They concerned trade, fishing, boundaries and claims of nationals. Id. In 1910, the United States entered into thirteen new international agreements. Five of these were multilateral, concerned with trademark, patent, copyright, claims arbitration and assistance and salvage at sea. The remaining bilateral agreements concerned claims of nationals, customs, consular relations and most favored nations trade status. Id. The United States entered into eleven new international agreements in 1935, two of which were multilateral. The multilateral agreements concerned the Permanent Court of International Justice and protection of landmarks. The eight agreements concerned diplomatic relations and commerce, extradition, and vessel salvage. Id. One agreement involved the operation of the Trail Smelter, the subject of a famous arbitration. See Trail Smelter Case (U.S. v. Can.), [1941] R. Int. Arb. Awards 1905 (1949).

The period following World War II shows a stunning increase in the number and type of international commitments entered into by the United States. See L. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 8-12 (1984). In 1960, the United States entered into 232 new international agreements. 11 U.S.T. pt. 1 at V-XIII, pt. 2 at V-XIII. This total excludes dozens of modifications to already existing agreements as well as dozens of treaties entered into in earlier years that came into force in 1960. While only one appears to be multilateral, that one involves the founding of the International Development Association, an important arm of the World Bank. Other bilateral agreements cover an enormous variety of subjects including agricultural assistance, military cooperation and assistance, nuclear research and training, telecommunications cooperation, weather reporting, technology transfer, scientific research, technical assistance and economic development, patents and international investments in addition to many other topics.

An additional 205 new treaties were entered into during 1985. I. KAVASS & A. SPRUDZ, A GUIDE TO THE UNITED STATES TREATIES IN FORCE 437-54 (1986 ed.) One was multilateral, relating to air safety in the North Pacific region. The remaining bilateral agreements concerned a range of topics similar to those of 1960, with a slightly greater proportion of technical assistance, aviation, and atomic energy agreements. Several agreements related to pollution, environmental cooperation and fisheries.

In particular, the recent growth in the numbers and types of multilateral treaties is of special interest:

The subject matter of multilateral treaties has an immensely wide range, including, inter alia, rights respecting international waterways, trade and finance, alliances and military
The broader scope of modern international agreements raises doubts about traditional methods for determining the extent of the obligations imposed by those agreements. Traditional doctrines protected the fixed expectations of the parties to an agreement relating to, for example, an international boundary. However, the traditional principles do not respond to the needs of parties for new types of agreements that evolve with changes in technology and knowledge. Although treaties are useful, other approaches can preserve flexibility in international cooperative arrangements. Formal binding agreements can be most helpful if they contain provisions that allow the evolution of obligations and give greater assurances to the parties of the continued viability of the relationship. With sufficient flexibility, formal agreements assist in the establishment of evolving relationships between states, which can facilitate a variety of mutually beneficial adaptive responses to technological, political and economic changes.

While valuable, dynamic international commitments raise conceptual puzzles when traditional doctrines of international obligation are applied to them. Under the conventional doctrine, the extent of a state's obligations under an international agreement should be based upon either an interpretation of the agreement's text or an analysis of the intent of the parties at the time of execution. The subsequent practice of the parties is of lesser relevance. These interpretive doctrines do not illuminate the scope of obligations arising under agreements intended to allow the relationship of the parties to change with new circumstances. Dynamic obligations arising out of formal agreements provide challenges that can improve the understanding of international obligation. Scholars may find substantial rewards as they seek to understand international efforts to balance concerns for predictable international obligations with attempts to adopt cooperative responses to a rapidly evolving international order.
B. THE VIENNA CONVENTION: TRADITIONAL PRINCIPLES OF AGREEMENTS

Because treaties provide such a widely accepted source of obligation, diplomats and legal scholars have focused on the formal codification and revision of international norms relating to treaties. Unfortunately, parties to treaties creating dynamic obligations can expect only limited help from either the traditional rules or revised versions of those rules. Examination of the Vienna Convention on Treaties shows some of the problems involved with applying rules developed for static agreements to modern dynamic obligations.

The Vienna Convention on Treaties received acclaim as the first successful codification of the customary law of treaties. The Convention's negotiators agreed to several provisions on treaty interpretation that are of interest for us. These provisions help the parties to an international agreement determine the scope of their obligations. Since the adoption of the Convention, the provisions have become the primary norms on interpretation, adopted as customary law even by non-signatory states.

The interpretation provisions, while including some progressive principles, retain a very traditional cast. The provisions focus on the text and contemporaneous documents of the treaty as primary indicators of the intent of the parties to the agreement; other extrinsic evidence of the intent of the parties plays a less important role in the interpretation process. In this respect, the Vienna Convention adopts an objective principle of interpretation, limiting interpretation of the subjective intent of the parties.

assumptions of absolute sovereignty, power, and coercion, and the new international law reflecting the new international realities of coordination and cooperation based on the reciprocal consensual relationships.


133. The United States has not ratified the convention, although the Department of State has characterized the treaty as a codification of customary law that is binding on the United States. See Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 VA. J. INT'L L. 281, 298 (1988).

134. Id. at 283-84.

135. I. SINCLAIR, supra note 132, at 115-16.

136. According to two American commentators, the interpretation provisions reflect "a quite conservative (even old-fashioned) series of rules." These rules were adopted after the rejection of a United States amendment which would have given weight equal to the text of the preparatory works of the treaty negotiators. Kearny & Dalton, supra note 132, at 518-19 (1970). But see Bernhardt,
Under the Convention's provisions, a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The "context" includes any contemporaneous agreement between all parties relating to the treaty and any other instruments executed by any of the parties in connection with the conclusion of the treaty accepted by all of the parties. Among the additional factors to be taken into account in interpreting the treaty is "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Should these factors fail to clarify the obligation, "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may conditionally be considered.

These provisions are not helpful. By focusing on the text, they provide a technique that is "archaic and unduly rigid." They send mixed

Interpretation in International Law in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 318, 321 (Max Planck Institute 1984) (arguing that a focus on subjective intent gives presumptive preference to state sovereignty over obligations imposed by international agreements).

The United States Supreme Court has issued many opinions involving the interpretation of international agreements. The Court has long ruled that the purpose of treaty interpretation is to find the intent of the parties to the agreement. See, e.g., United States v. Stuart, 489 U.S. 353, 365-66 (1989).

137. Vienna Convention on the Law of Treaties, supra note 77, art. 31, para. 1, at 691-92. One of the foremost commentators has noted that the inclusion of the object and purpose among the elements informing the interpretation should not be understood as reflecting the adoption of a "teleological" interpretive approach preferred by some commentators. I. SINCLAIR, supra note 132, at 131. On the other hand, he notes that the search for the object and purpose might be construed as a search for the common intentions of the parties, an "approach which has certain dangers." Id. at 130. The preamble to the treaty should provide the best evidence of that object and purpose. Id.


139. Id. art. 31, para. 3(b), at 692. Other factors include subsequent agreements regarding interpretation of the original treaty and relevant rules of international law applicable between the parties. Id. art. 31, para. 3(a), (c), at 692.

140. "Preparatory works" include generally adopted documents, publicly available to all of the parties, which were created during the negotiation of the agreement. Agreed minutes or negotiating texts provide examples of such documents. See I. SINCLAIR, supra note 132, at 144-47. In general, these supplementary sources may be used to confirm the meaning resulting from analysis of the text, context and other factors included in Article 31, or to provide the interpretation should Article 31 lead to a result that is "ambiguous or unclear" or "manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties, supra note 77, at 32, at 692.

signals regarding reliance on evidence of subjective intent by granting priority to subsequent practice over the joint negotiating record. They fail to distinguish types of treaties that serve different functions.\textsuperscript{142} It is unlikely these provisions reflect the actual practice of international tribunals.\textsuperscript{143}

Most important, these traditional rules provide little guidance for parties seeking to comply with agreements that create dynamic obligations. The drafters of the Vienna Convention contemplated dispute resolution through neutral tribunals.\textsuperscript{144} As I will argue, most disagreements over the meaning of dynamic obligations will not be brought before neutral tribunals. The traditional rules reflected in the Vienna Convention have little to offer parties dealing with ongoing disputes over the present character of evolving obligations. While the parties involved may take dynamic obligations seriously, the traditional rules of treaty interpretation offer little help in clarifying the scope of those obligations.

C. THE VIENNA CONVENTION: MATERIAL BREACH

The provisions of the Vienna Convention concerned with treaty breach, while still traditional, provide more practical procedures for coping with purported violations of international treaty obligations. The Convention’s provisions “serve the cause of the stability of treaty relations”\textsuperscript{145} by ensuring that the compliant party may maintain the treaty relationship by suspending its performance rather than completely terminating the agreement in the event of material breach by the other party.\textsuperscript{146} The Vienna Convention thus encourages parties to maintain

\textsuperscript{142} The rules applicable to “constitutive” treaties or law-making agreements remain controversial. Bernhardt, supra note 136, at 323-24. Cf. I. Sinclair, supra note 132, at 131-35 (criticizing the broad adoption of evolving principles by the European Court of Human Rights).

\textsuperscript{143} See I. Sinclair, supra note 132, at 116; Kearny & Dalton, supra note 132, at 520. There may be little systematic legal rationale for the use of practice under the traditional rules. McGinley, Practice as a Guide to Treaty Interpretation, Fletcher F., Winter 1985, at 211, 226.

\textsuperscript{144} See Vienna Convention on the Law of Treaties, supra note 77, arts. 65 & 66, at 703-04.

\textsuperscript{145} Kearny & Dalton, supra note 132, at 540 (citing the comments of the United States representative to the negotiating conference on the Vienna Convention).

\textsuperscript{146} Vienna Convention on the Law of Treaties, supra note 77, art. 60, para. 1, at 701. The more complex provisions relating to multilateral agreements tend to balance the rights of parties specially affected by the breach against those of other parties seeking to preserve the multilateral relationship. Id. art. 60, para. 2, at 701. The special prejudice posed by the breach of a multilateral arms control agreement is also captured by the Convention, id. art. 60, para. 2(c), at 701, in effect allowing the broader suspension and termination rights designated for parties to bilateral agreements to apply in such cases. See I. Sinclair, supra note 132, at 189.
the treaty relationships in the face of substantial disputes that have not been submitted to neutral tribunals.\textsuperscript{147}

Unfortunately, article 60 of the Vienna Convention, which concerns suspension, termination and material breach, sends confusing signals to states seeking to develop measured reciprocal responses to perceived noncompliant behavior of other states.\textsuperscript{148} In order to allow suspension of performance by the non-breaching party, the party concerned about non-compliant behavior must determine whether a material breach has occurred.\textsuperscript{149} The Convention defines a material breach as "the violation of a provision essential to the object and purpose of the treaty."\textsuperscript{150} To determine whether a material breach has occurred, an exercise in treaty interpretation must be undertaken.\textsuperscript{151} The previous discussion has demonstrated how little guidance the Convention provides for treaty interpretation. Ultimately, the Vienna Convention allows parties to act so as to preserve the treaty relationship while seeking to resolve the dispute; however, the Convention offers little in the way of guidance or support for those efforts.

D. TRADITIONAL TREATY RULES AND DYNAMIC OBLIGATIONS

A review of the traditional rules applicable to international agreements shows the limitations of those rules as applied to dynamic obligations. The Vienna Convention provides some assistance. The parties to a treaty dispute can structure their arguments roughly around the interpretation process suggested by the Convention, regardless of their criticisms of the character of that process. The parties can recognize that a suspension of performance under the agreement is consistent with the approved responses of a non-breaching party to a material breach.

\textsuperscript{147} A "material breach" involves "the violation of a provision essential to the accomplishment of the object and purpose of the treaty." Vienna Convention on the Law of Treaties, supra note 77, art. 60, para. 3, at 701.

\textsuperscript{148} The United States proposed a standard requiring that the complying state respond proportionally to actions of the non-complying state. The amendment received insufficient support to be adopted. Kearny & Dalton, supra note 132, at 540. Later efforts to establish dispute resolution through conciliation followed by arbitration also failed. Id. at 547-51. On the problems of article 60 generally, see Kirgis, Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties, 22 CORNFELL INT'L L.J. 549 (1989). "Article 60 of the Vienna Convention on the Law of Treaties raises—or at least leaves unresolved—troublesome questions with respect to breaches." Id. at 549.

\textsuperscript{149} Vienna Convention on the Law of Treaties, supra note 77, at art. 60(2)(b), at 701.

\textsuperscript{150} Id. art. 60(3)(b), at 701.

\textsuperscript{151} Kirgis, supra note 148, at 552.
The failure of the Convention to help in the interpretation of treaties that generate dynamic obligations should not come as a surprise. The Convention addressed procedural rules governing international treaties; its drafters did not speak to the changing character of substantive international obligations. In essence, the Vienna Convention provides traffic-control rules for formal treaty relationships, allowing parties to determine their own goals while setting parameters for the manner in which each party uses the treaty relationships to achieve those goals. However, traditional procedural rules applicable to the obligations of formal international agreements cannot address the substantive problems involved in preserving agreements that generate dynamic obligations. To implement agreements intended to overcome uncertain collective action problems, a practical notion of obligation that allows for adaptation is required. The Convention's rules do not incorporate these practical notions of obligation, because the Convention's traditional doctrines grew out of the formalistic consent-based notions of static obligations that arose from conventional international agreements.

If important interests require a state to respond quickly and flexibly to the defections of other states from a cooperative arrangement, the Convention's rules will not suffice. Actions that may comply with the letter of traditional rules may seriously jeopardize the realization of gains from cooperation. The Convention's drafters assumed that the adjustment of interests reached by the parties upon execution of the agreement would endure for the term of the agreement. In a disputed arms control agreement, however, that assumption is almost always false. Changing technology can easily alter the interests and the perceived threats facing the parties in ways that can only rarely be foreseen at the execution of the agreement. States seeking to continue cooperative rather than competitive interaction must monitor the tenor of their relationship with tools more sophisticated than purely legal analyses of rights and duties.

Arms control agreements provide instruction in another respect. The parties to arms control treaties structure their agreements to minimize the threats posed by a potentially changing strategic context. As a result, the parties to an arms control agreement order their relationship in ways not contemplated by those who codified the traditional doctrines. States involved in arms control try to develop treaty relationships designed to minimize risks of defection by the non-complying party.

152. See infra Part VIII.
They try to establish mechanisms to allow resolution of a dispute while minimizing the disruption of the ongoing treaty relationship.

A practical analysis of obligation takes into account the concerns of parties to dynamic obligations. The analyses offered by Hart and Franck lead to the inference that, if dynamic interaction generates rules that function as obligations, those rules should be recognized as creating obligations even if they do not fit a traditional pattern based in formally negotiated texts. The content of dynamic obligations depends on the perceptions of those affected by them; that content will evolve with the changing perceptions of the parties.

In the next section, I explore the differing conceptual structures that result from conceiving of agreements in relational terms. I then use the theory of international regimes to gain insight into the background obligations operative in certain agreements that create dynamic obligations. Finally, I examine the potential for reciprocity to serve as the fundamental norm of dynamic agreements.

V. RELATIONAL AGREEMENTS AND INTERNATIONAL REGIMES

Because successful implementation of dynamic obligations depends on the relationship between the parties, whatever solidifies that relationship will enhance the viability of the underlying agreement. Scholars in two distinct fields have developed analogous concepts, both of which explore the characteristics of arrangements that make cooperation possible between parties facing collective action problems. Domestic legal scholars have explored elements of long-term contracts to clarify the role of formal legal mechanisms in ordering the relationship between the parties. These scholars have developed the concept of relational contracts.154 Expanding on these ideas, other commentators have noted the

international implications of relational approaches.\textsuperscript{155} International relations scholars have explored aspects of cooperative behavior through the theory of international regimes,\textsuperscript{156} which provides insight into the broader context within which an agreement having relational aspects can function successfully. In this section, I argue that the theory of regimes helps to explain the context where agreements between states creating dynamic obligations can have the greatest probability of success. It also provides conceptual tools for analyzing the function of particular international transactions in the broader setting of systematic interactions between states. The concept of relational contracts provides a useful analogy in determining regime theory has value. By comparing relational agreement theory and regime theory, the compatibilities between the two approaches can be discovered. These two theories contain elements that might account for the functioning of dynamic obligations.


\textsuperscript{156} The most widely cited articles on the topic are found in International Regimes (S. Krasner ed. 1983). See also R. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984); S. Krasner, Structural Conflict: The Third World Against Global Liberalism (1985); O. Young, International Cooperation: Building Regimes for Natural Resources and the Environment (1989). A recent survey of the theoretical work is Haggard & Simmons, Theories of International Regimes, 41 Int’l Organization 491 (1987). See also J. Dougherty & R. Pfaltzgraff, Contending Theories of International Relations: A Comprehensive Survey 172-76 (3d ed. 1990); Young, International Regimes: Toward a New Theory of Institutions, 39 World Pol. 104 (1986). Robert Keohane and Joseph Nye point out that the regime concept has an extensive history in the literature of international law, although it has not been given consistent theoretical content. See sources cited in Keohane & Nye, Power and Independence Revisited, 41 Int’l Organization 725, 732 n.16 (1987); see also sources cited in O. Young, supra, at 12 n.1. For a critique of regime theory, see J. Dougherty & R. Pfaltzgraff, supra, at 172.

A. RELATIONAL CONTRACTS

Several scholars have noted two different types of private domestic contracts. Some contracts involve discrete transactions between parties who are otherwise strangers. Under these circumstances, no relationship exists between the parties either before or after the transaction. However, in many other contracts, a pre-existing relationship between the parties will continue after specific exchanges of goods and money. In still other agreements, the parties contemplate a continuing series of transactions covered by a single agreement. The continuation of the relationship between the parties to an agreement will often be more important than the precise resolution of specific disputes that arise from particular exchanges. These agreements are characterized as relational contracts.

Relational contracts generally entail long-term agreements involving initial uncertainties or risks that the parties commit themselves to work out during the pendency of the relationship. They are distinct from discrete contracts, which tend to involve sales transactions executed by parties who may have no interest in any future mutual transactions.

Scholars of relational contracts argue that the underlying incentives to continue the relationship will also determine the strategies for dispute resolution, with the importance of the underlying relationship often


158. One writer provided the following description:

The fundamental insight of relational contract theory is that most private exchange occurs within ongoing relationships between parties, rather than the discrete transactional environment assumed in classical and neoclassical contractual theory. In relational contracts, discrete practices, like breach and litigation, have been replaced by adjustment within social and political processes largely separate from the positive legal institutions of the state.

While the foundations of this 'internal law' in long-term relations are the contracts drafted between the parties, the internal rules of relational contracts often ignore or modify the technical terms of the formal contract.

Comment, supra note 155, at 728-30 (footnotes omitted).

159. Two authors define relational contracts:

A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance.


severely constraining resort to formal legal procedures. Only the prospect of financial demise will cause a party to resort to formal legal remedies that are likely to disrupt the contractual relationship. The compliance strategies of contractual parties can only be understood if both legal rules and underlying relational dimensions of the agreement are appreciated.

These observations have generated some controversy among scholars of domestic contract law. The critics note that the existence of relational or other elements mediating the adoption of legal remedies does not vitiate the force of available formal judicial remedies. In spite of these criticisms, consideration of relational contracts provides valuable insight into dynamic international obligations.

Parties entering domestic relational contracts must attend to the existing bonds between them, to the formal terms of the agreement, and to the domestic legal system. In comparison, the relative weakness of the international legal order makes relational considerations much more important in international relations. Continuing treaty relationships must adapt to both the context and the content of the affiliation between the parties. In particular, those structuring treaties that create dynamic obligations must generate incentives to comply with the obligations that are reinforced by the larger relational context of that treaty.

By examining theories of relational contracts, which are necessarily dynamic and evolving, one can identify principles that will be useful in the analysis of dynamic treaty-generated obligations. Relational contracts have factors that are similar to aspects of dynamic obligations. Later, I show how an institutional structure like international regimes might provide a congenial context for the full implementation of dynamic obligations.

B. RELATIONAL ASPECTS OF TREATIES

Dynamic treaties provide a response to shared uncertainty. For example, arms control agreements offer an opportunity to ameliorate the

161. Gottlieb, supra note 155, at 568. In fact, the formal rules of traditional contract law as identified by courts and legal scholars have marginal significance. Gordon, supra note 157, at 571. But see Yngvesson, Re-examining Continuing Relations and the Law, 1985 Wis. L. Rev 623 (comparing the impact of multiplex relations and single-stranded relations on the probability of resort to formal mechanisms for dispute resolution).
162. See Macaulay, supra note 154, at 471-77.
163. Comment, supra note 155, at 730.
165. Id.; Yngvesson, supra note 161, at 625-27.
security dilemma. The practicability of implementing an arms control agreement is dependent upon the relationship between the parties. Arms control treaties can thus be characterized as international agreements that involve relational elements in the dynamic obligations that they create.

Several elements of relational domestic contracts have counterparts in international agreements that create dynamic obligations. First, the specific situation in which a dynamic relational agreement operates has fundamental importance. That context independently constrains the relationship between the parties of the formal agreement. The strategic, political, and economic environments within which two states function will limit their interaction within any formal treaty arrangement. These elements may explain far more than do the legal rules alone. On the other hand, the presence of formal treaty-based obligations may by definition restrict choices that would otherwise be compatible with preexisting extrinsic international legal rules.

Second, traditional legal rules will not define all the commitments that flow from formal agreements that create dynamic obligations. Special norms arise from “agreements, arrangements and other patterns of interaction between the parties” applicable in the relational context. These norms may cause parties to comply with treaties that otherwise would have no binding legal force. For example, a state’s nonlegal international agreements or unilateral representations can create commitments based on obligations of good faith. Similarly, the expectations of other states generate obligations even though a formal agreement is expressly nonbinding. In either case, reliance on traditional legal rules would cause the parties to an international agreement to underestimate the practical obligations imposed by relational forces.

Third, where relational considerations have an impact on the performance of an international agreement, the dispute resolution also transpires in a relational context. As Professor Gideon Gottlieb noted:

The dominant aspect of juridical activities in relational societies is not of a litigious character. It centers instead on the practices of actors.

166. See Gottlieb, supra note 155, at 568; Yngvesson, supra note 161.
167. See G. Duffy, supra note 57, at 8-9.
170. See R. Bilder, supra note 129, at 32-34.
171. Gottlieb, supra note 155, at 584.
and on their usages, customs and interpretations that mediate between actors' actual patterns of conduct and the formal juridical instruments that are deemed to govern them.\textsuperscript{172}

International agreements and legal treatises commonly note that negotiation, mediation and conciliation are the primary means for dispute resolution.\textsuperscript{173} Because few judicial fora exist to resolve disputes over treaties\textsuperscript{174} and because formal distinctions between compliance and violation of relational agreements have limited utility,\textsuperscript{175} nonjudicial procedures that incorporate relational considerations play an essential role in resolving disputes. For similar reasons, resort to formal adjudication may be constrained by relational considerations,\textsuperscript{176} with nonlegal sanctions playing a critically important role for states seeking to redress violations.\textsuperscript{177}

Finally, "[a] relational approach focuses . . . on the temporal dimension of the relationship."\textsuperscript{178} Because each party's understanding of the other's practices, usages, customs and interpretations must necessarily evolve as the relationship endures, the content of the obligations between the parties will also evolve. The obligations result from the accumulated practice under the relational agreement. Considering that evolution, reliance upon traditional evidence of the intent of the parties at the time of ratification provides much less guidance about the rights and duties imposed by a dynamic obligation. Under the relational

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{172} Id. at 568.
\item \textsuperscript{173} See, e.g., U.N. Charter art. 33, para. 1; Charter of the Organization of American States art. 21. For general discussions of non-judicial dispute resolution, see I. Brownlie, Principles of Public International Law 705-06 (3d ed. 1979); L. Henkin, R. Pugh, O. Schachter & H. Smir, International Law: Cases and Materials 570-72 (2d ed. 1987) (citing materials on non-judicial dispute resolution).
\item \textsuperscript{174} The Vienna Convention on Treaties specifically adverts only to the International Court of Justice. Vienna Convention on the Law of Treaties, supra note 77, art. 66(a), at 704.
\item \textsuperscript{175} Gottlieb, supra note 155, at 597.
\item \textsuperscript{176} Id. at 577.
\item \textsuperscript{177} Id. at 577. The distinctions between three categories of countermeasures, or self-help unilateral responses, in international disputes offer useful insight. "Retortsions" are lawful but unfriendly acts perpetrated by a state against a target state that has previously violated the rights of the acting state. "Reciprocal measures" involve the nonperformance of obligations that are directly related to those owed the offending state. "Reprisals" are otherwise unlawful coercive acts that are excused from illegality because they respond to prior unlawful acts by the target state. L. Henkin, R. Pugh, O. Schachter & H. Smir, supra note 173, at 541-42.

These traditional categories of response demonstrate the degree to which international law has adapted to reliance upon non-judicial dispute resolution procedures. Obviously, relational considerations would provide important guides and constraints on the response adopted, if any, when actual disputes occur between parties to an agreement.
\item \textsuperscript{178} Gottlieb, supra note 155, at 569.
\end{enumerate}
\end{footnotesize}
approach, the contemporary practice of the parties assumes heightened importance.\textsuperscript{179}

Because arms control agreements contain relational elements, their inconsistency with traditional notions of contractual arrangements need not impede their effectiveness. Since parties to arms control agreements pursue nonjudicial dispute resolution, the absence of a neutral tribunal has little significance. Reliance on alternative methods of dispute resolution diminishes the significance of formal determinations of putative violations even though the interests at stake are enormous. In fact, each party to an arms control agreement may make special efforts to preserve the treaty relationship despite claims of violation so long as that party's substantial interests are protected. The relationship between the parties provides the functional core of the complex of obligations formally recorded in an arms control treaty.

But parallels between theories of relational contracts and international agreements must be cautiously drawn. At least two important differences are present. First, the number of state players in the game of international relations is small.\textsuperscript{180} The small number of states enhances the importance of reputation as a limiting factor upon state actions.\textsuperscript{181} States are less likely to behave in a manner radically different from the expectations of other states. States that thwart general expectations of compliance with international obligations may rapidly find themselves losing the benefits of international cooperation. In contrast, the large number of individual economic actors and business opportunities increases the risk of noncompliance with domestic contracts. Formalized agreements may be particularly important in the private domestic sphere, because it is impossible to know the reputation of every potential contracting partner in the domestic sphere. Where anonymity is the presumption, formalized obligations and sanctions may provide a critical adhesive. The domestic system relies upon formalized agreements and rules of enforcement to provide a framework for transactions involving total strangers within a diverse national economy.

\textsuperscript{179} This notion is not problematic in the international context, where it has long been accepted that the continued practice of the parties can generate important legal obligations. See Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125. The subsequent practice of the parties has been consistently relied upon by international tribunals to give current meaning to ancient agreements. See McGinley, supra note 143, at 212.

\textsuperscript{180} Liechtenstein recently became the 160th member of the United Nations, an organization including all but a very few of the states in the world. Principality of Liechtenstein Becomes 160th, and Smallest, Member of U.N., L.A. Times, Sept. 20, 1990, at A4, col. 3.

Second, norms play different roles in the international and domestic arenas. In developed domestic legal systems, well-codified norms apply to individual actors. The basic notion that those who make promises should keep them is common to many cultures. With mass democracies, it is the domestic legal system that instills confidence in the citizenry that the breach of a binding promise will be redressed. However, identifying a set of norms applicable between states poses serious problems. Simply identifying a source of norms analogous to the moral strictures imposed upon individuals within a state is difficult. Determining the specific target of moral injunctions to states is even more problematic. On the other hand, the importance of reputation among states may substitute for the generalized moral obligations of domestic legal systems. So, while there are differences between the international context of treaties and the domestic context of relational contracts, comparison remains useful.

Finally, many would argue that concerns related to national interest in the international context will dominate any tendency to comply with international obligations. International relations scholars who subscribe to the realist theory would argue that considerations of national interest and power will direct a state's response to purported obligations. According to that theory, compliance with international obligations depends upon the coincidence of compatibility between those obligations and the national interest of the state. While some realists may underestimate the degree to which orderly compliance with expectations of other states can serve national interest, the relative importance of relational considerations in state decisions remains unclear. In spite of those questions, relational analysis shows that compliance with international obligations can be consistent with state interest. Advocates of international obligation need not rely only upon natural law or consent-based theories.

In summary, theories of domestic law developed to distinguish long-term, interactive relational contracts from contracts that involve a discrete transaction contribute to the analysis of treaties that create dynamic obligations. These treaties differ from traditional static treaties in many of the same ways that relational contracts differ from discrete contracts. In particular, context provides important foundational information for treaty arrangements. Custom, practice and usage will mediate the impact of formal legal rules, while traditional judicial mechanisms will play only a small part in resolving the disputes that eventually arise. Finally, because the relationship between the parties evolves, contemporary practices, usages and norms are more relevant in

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182. See J. Dougherty & R. Pfaltzgraf, supra note 156, at 81.
interpreting international treaties than is the intent of the parties at treaty execution. While inferences must be drawn cautiously, the relational contract analogy suggests important avenues for exploration.

The study of domestic relational contracts suggests that several aspects of agreement-based obligations cannot be captured by traditional legal theories of agreements. Where agreements arise against the background of a long-term, evolving pattern of interaction, an examination of the entire relationship can clarify important aspects of the specific agreement. I have suggested that similar perspectives on international agreements, particularly those that provide a framework for obligations likely to evolve over time, can offer rewards.

The analysis of relational contracts is a starting point for critical evaluation of the interaction between the parties to international agreements that create dynamic obligations. From that analysis, it may be possible to facilitate the evolution and preservation of agreements creating dynamic obligations. International jurists have traditionally seen domestic legal systems as providing rules for resolving international disputes. Analysis of domestic contract patterns can provide one model for formalized treaty relationships that are structured to implement dynamic obligations. The theory of international regimes may suggest others.

C. THE THEORY OF INTERNATIONAL REGIMES

In generalizing about relational contracts one commentator asserted that relational agreements establish unique "regimes." That use of the term "regime" closely tracks a traditional legal definition. However, relational contracts involve more than rules or regulations. Scholars discussing relational contracts also speak of relational norms. One

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183. The Statute of the International Court of Justice lists general principles of law found in major domestic legal systems as one source of international legal rules. Statute of the International Court of Justice, supra note 79, art. 38.

184. Every relationship in a relational order is characterized by its own rules, procedures, precedents, and practices that constitute the 'regime' of the relationship. The regime of every relationship tends to be unique. It is a combination of the formal, informal, and mediating systems—that is, of the agreements, course of practice, interpretations, course of performance, usages and customs. Gottlieb, supra note 155, at 599.

185. Black's Law Dictionary 1153 (5th ed. 1979) defines regimes: "In French law, a system of rules or regulations."

186. See Buckley, Paradox Lost, 72 MINN. L. REV. 775 (1988); Joerges, Relational Contract Theory in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles in the Assessment of Contract Relations Between Automobile Manufacturers and their Dealers in Germany, 1985 WIS. L. REV. 581, 608; MacNeil, Contract in China: Law, Practice, and Dispute Resolution, 38
scholar, for example, has examined the complex relationship between relational mediating processes and formal dispute resolution institutions.\textsuperscript{187} International relations theorists have addressed surprisingly similar concepts in analyzing patterns of interaction, which they call international regimes. According to one scholar, international regimes arise when states develop shared expectations of behavior, and those expectation lead to consistent practices converging around specific principles, norms, rules, and decisionmaking procedures.\textsuperscript{188} Another scholar asserts that regimes are best understood as international institutions made up of "behaviorally recognizable practices consisting of roles linked together by clusters of rules or conventions governing relations among occupants of these roles."\textsuperscript{189}

As conceptualized by these scholars, regimes differ from specific agreements in that agreements will be limited to a single transaction or conflict area, while regimes address a range of related issues.\textsuperscript{190} Robert Keohane argues that regimes form when the benefits of collective action will outweigh the costs of pursuing coordinated state behavior.\textsuperscript{191} Keohane posits that states will construct regimes when coordinated action across a range of collective interests will allow otherwise impossible specific agreements on particular important issues.\textsuperscript{192} Regimes will be formed to establish a framework for evaluating compliance with specific agreements, to improve sharing of imperfectly-distributed information, and to reduce the transaction costs of reaching specific agreements on specific issues.\textsuperscript{193}

Theorists of international regimes have expanded the elements of principles, norms, rules and procedures. They describe a regime as a set of theoretical axioms and ethical "beliefs of fact, causation and rectitude" about the manner in which the world functions.\textsuperscript{194} They characterize regime norms as specifications of general "standards of behavior

\begin{itemize}
\item \textsuperscript{187} See Yngvesson, supra note 161.
\item \textsuperscript{188} Krasner, \textit{Structural Causes and Regime Consequences: Regimes as Intervening Variables}, in \textit{INTERNATIONAL REGIMES}, supra note 156, at 2; see also S. Krasner, \textit{supra} note 156, at 4.
\item \textsuperscript{189} O. Young, \textit{supra} note 156, at 196.
\item \textsuperscript{190} R. Keohane, \textit{The Demand for International Regimes}, in \textit{INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY} 101, 107-08 (1989).
\item \textsuperscript{191} \textit{Id.} at 110-11.
\item \textsuperscript{192} \textit{Id.} at 110.
\item \textsuperscript{193} \textit{See id.} at 111.
\item \textsuperscript{194} Krasner, \textit{Structural Causes and Regime Consequences: Regimes as Intervening Variables}, in \textit{INTERNATIONAL REGIMES}, \textit{supra} note 156, at 2. For an important discussion of norms with implications for regime theory, see R. Axelrod, \textit{The Evolution of Cooperation} (1982).\
\end{itemize}
defined in terms of rights and obligations” for state actors.\textsuperscript{195} Under this theory, regime rules refer to specific behavioral prescriptions within a particular framework, while regime decisionmaking procedures are mechanisms for identifying the applicable rule based on an evaluation of the specific conditions of the dispute.

A regime may have a formalized treaty-based legal structure partially reflecting its norms, rules or decision procedures.\textsuperscript{196} Variations in rules and decision making procedures show changes within the continuing regime. However, substantial modification of the principles and norms of a regime reveals fundamental variations posing risks to the continuation of the regime.\textsuperscript{197}

In both international regimes and relational agreements, context plays an important role. Most importantly, regimes will define a salutary environment for the formation of relational agreements. Shared perceptions of the international context will allow formation of the principles necessary for the development of a regime. Expected regime norms of state behavior generate common customs, practices, standards and usages. Regime norms may generate more explicit rules, but those rules may or may not be formalized in a treaty. When codified, the rule’s application will be mediated by the customs, practices, standards and usages shared by the parties. Usually, disputes regarding regime function will be resolved without resort to formalized dispute resolution procedures. If formal decisionmaking procedures are adopted, only examination of the contemporary status of the standards, customs, usages, practices and any formalized rules can lead to appropriate conclusions about the case-specific obligations imposed by the regime.

\textbf{D. REGIMES, TREATIES, AND DYNAMIC OBLIGATIONS}

When regimes evolve, treaties generating dynamic obligations may provide the most appropriate formalized statements that can be constructed, because they allow the development of custom, usage and practice. They permit adjustment to shifts in rules and decision procedures without requiring formal judicial dispute resolution mechanisms or amendments. They serve as a framework capable of adapting to developments within the regime.

\begin{itemize}
\item \textsuperscript{195} See, e.g., Krasner, \textit{supra} note 194.
\item \textsuperscript{196} J. DOUGHERTY & R. PFALTZGRAF, \textit{supra} note 156, at 168.
\item \textsuperscript{197} Krasner, \textit{supra} note 194, at 3.
\end{itemize}
By examining the factors suggested in an analysis of relational agreements, the impact of regime rules and norms upon an agreement that creates dynamic international obligations can be explored. As with a relational agreement, the context surrounding the regime will determine the manner in which the respective states use the treaty’s codification of the regime’s rules and decision procedures. Where a state holds predominant economic or strategic power, it can demand a more strict adherence to the regime rules from a less powerful state; a weaker state, on the other hand, may be more constrained in commanding precise compliance with formalized rules.198 Where prior interactions between states lead to concerns about the reliability of one party, other parties may demand clear and specific compliance with formalized rules.199

Practices, customs, usages and norms will dictate how states approach demands for compliance with the treaty’s provisions. Adjudication and arbitration will not be the principle means for resolution of disputes related to a viable regime. When the parties to the dynamic agreement seek to define the obligations involved, the entire complex of practices under the regime will constitute that definition. In contrast with a traditional state treaty, understandings of these obligations that are based on the negotiating record or the text and context of the treaty will be fundamentally incomplete.

Finally, a successful regime will provide norms, principles, rules and decision processes that will support the relational elements of relational agreements developed within the regime. Under these circumstances, the parties will be most likely to seek to preserve their treaty relationship despite particularized claims of violation. They will do so because the regime supplements the treaty relationship, buttressing the underlying interests of the parties.

E. RELATIONSHIPS AND REGIMES: SOME CONCLUSIONS

By examining the ideas of relational contracts and international regimes, an understanding can be gained of the elements necessary to the success of dynamic obligations in general and arms control agreements in particular. Parties subject to mutual dynamic obligations need more than legal rules to measure compliance. As one scholar noted, formalized rules best serve as a means for preventing “rare but large defections” from agreed obligations, but norms that have not been formalized thwart

198. R. AXELROD, supra note 194, at 1103-04.
199. See id. at 1107-08.
"numerous small defections." Parties to relational agreements establish norms to guide the relationship that supplement or even replace the formalized agreement. States involved in international regimes develop norms that encompass and guide their interaction under specific treaty terms.

One of the most important norms supporting dynamic obligations and arms control agreements is the norm of reciprocity.

VI. THE IMPORTANCE OF RECIPROCITY

If a unifying principle can be drawn from the application of relational contract theory and regime theory to dynamic treaties, that principle is reciprocity. The following hypothetical shows the importance of reciprocity.

Imagine that a state decided to apply relational contract theory to its specific agreements. Imagine further that the state employed regime theory to the broader patterns of its relationships. The benefits of both approaches could be captured by reliance on reciprocity in both general patterns of interaction and in specific agreements. The state would respond in kind to actions of other states: Cooperative actions would be met with cooperative actions while noncooperation would be met with noncooperation. In this way the state could provide appropriate rewards and benefits to its partners as well as punishments for its opponents.

What is not resolved by this hypothetical is the degree to which a precise balance must be struck between the actions of other states and the responses to those actions. Must each noncooperative act be met immediately, or may some noncooperation be accepted in the interest of the continuing relationship? In order to answer that question, more sophisticated notions of reciprocity must be examined.

The idea of reciprocity undergirds both relational agreements and international regimes. In a relational agreement, where customs, practices and usages provide dispute resolution standards, only mutual compliance can support the continued viability of the arrangement. Where common expectations support the norms, rules and decision procedures of a regime, a state failing to comply jeopardizes its opportunity to receive the cooperative benefits available through the regime.

In turn, regimes reinforce patterns of reciprocal interaction between states. The norms of a regime may provide the source of obligations that

200. *Id.* at 1107.
enable states to move from a rigid practice of reciprocal exchange to one that allows more trust and flexibility between parties to an agreement. Such interaction serves as the hallmark for dynamic obligations in international agreements.

Two authors have explored differing perspectives on reciprocity in the international context. Anthony D'Amato argues that international law relies principally on reciprocal entitlements. States are legally defined by the bundle of entitlements characteristic of sovereignty. D'Amato notes that the primary penalty exacted against a state for violation of the rules of international law involves selective relaxation of prohibitions against the violation of the entitlements of the infringing state. The primary incentive for state behavior consistent with international legal rules is the mutual vulnerability of those entitlements. Although weak enforcement mechanisms characterize international law, D'Amato contends that enforcement through reciprocal vulnerability of entitlements is the basis of compliance with international legal rules.

Robert Keohane has developed a sophisticated analysis of the role of reciprocity in international relations. He posits that reciprocity involves two basic elements: contingency and equivalence. For an interaction to be reciprocal, the response of each actor must be conditioned on earlier actions of another actor, and that response must be roughly equivalent to the actions of the other actor. Within the general rubric of reciprocity, Keohane distinguishes between specific and diffuse reciprocity. Specific reciprocity involves "situations in which specified partners exchanging items of equivalent value in a strictly delimited sequence" act pursuant to obligations that, if they exist, are clearly delineated. Diffuse reciprocity involves exchanges where the requirement of equivalence is relaxed, the sequence is less precisely specified, and the underlying obligations are both more important and more

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202. Compare id. with D'Amato, supra note 122.

203. D'Amato, supra note 122, at 13-25.

204. In arguing that states only consist of only an aggregation of legal rights, D'Amato's ideas are similar to Hart's. See H.L.A. HART, supra note 74, at 216-21.

205. R. KEOHANE, Reciprocity in International Relations, in INTERNATIONAL INSTITUTIONS, supra note 201, at 132-57.

206. Id. at 135.

207. Id. at 136.

208. Id. at 134.

209. Id.
If partners successfully participate in a series of confidence-building specific reciprocal exchanges, diffuse reciprocity can develop, allowing less rigorous attention to specific transactions because of the greater role of obligatory norms. Ultimately, "a pattern of diffuse reciprocity can be maintained only by a widespread sense of obligation." D'Amato and Keohane offer perspectives on reciprocity that are important to notions of dynamic obligations. I have already shown that the legitimacy of international norms depends on reciprocal compliance by states with expectations of norm-observant behavior. Reciprocity plays a critical role in the evolution of international norms. Where formal agreements can be implemented only through dynamic obligations, a normative foundation of reciprocity may be essential because mutual satisfaction of evolving expectations will be essential to the development of confidence between the parties.

The enforcement of any obligations created by arms control agreements will be particularly dependent on the reciprocal vulnerability of compliance expectations. Because only the other party to the arms control agreement can impose a sufficiently serious cost upon the noncompliant state, all other enforcement mechanisms pale in significance. However, strict specific reciprocity will not always provide incentives to continue the treaty relationship. Something slightly less than a strict "tit-for-tat" response may provide a more productive enforcement strategy. Such a concession, granted in the knowledge that it represents less than full equivalence, could encourage moves toward diffuse reciprocity, establishing norms of obligation and compliance that support the future of the relationship. Attention to the larger context of the relationship becomes necessary, because the creation of confidence requires more than bean-counting equivalence.

If the parties establish diffuse reciprocity, the chances of developing a stronger regime structure will increase. That regime structure will assist the development of additional specific relational agreements.

210. Id.
211. Id. at 147.
212. Id. at 146.
213. T. FRANCK, supra note 75, at 198-200.
214. A well-known discussion of reciprocity as a method of developing cooperation under anarchy can be found in R. AXELROD, supra note 194, at 169-71.
215. Id. at 138.
216. Id. at 139.
217. See S. BRAMS, supra note 46, at 152 (arguing that even an evaluation of arms control problems based on formal game theory suggests that a form of diffuse cooperation may be beneficial).
218. Id. at 148.
While the strongest regimes depend on a preexisting and substantial complex of common principles and norms, developing patterns of diffuse reciprocity may enhance weaker regimes as well.

An observer of the arms control agreements between the United States and the U.S.S.R. since 1969 could argue that a pattern of interaction beginning with specific reciprocity may have ripened into a complex of dynamic obligations within a strategic arms control regime. In the next section, I explore that argument.

VII. AN ARMS CONTROL REGIME

The arms control agreements resulting from the SALT/START process provide an excellent example of a system of treaties generating dynamic obligations within an evolving security regime. While some authors have noted serious obstacles to the formation of security regimes,219 others are more optimistic about their prospects, suggesting that arms control security regimes can exist between the United States and the Soviet Union.220 One author suggests that the SALT/START process has, to a limited extent, created such a regime.221 The regime was based on principles and norms that included a shared understanding of the need to stabilize strategic parity, the recognition of the existence of mutual deterrence, the awareness of the likelihood that unilateral measures would lead to decreased security at greater cost, and the acceptance of need for a balance between offense and defense.222 The rules of the regime prohibiting the use of nuclear weapons facilitated specific agreements that explicitly limited allowable types of nuclear weapons.223 The regime established a continuing diplomatic process. Within this regime specific agreements established formalized dispute resolution mechanisms to handle compliance claims.224 Though one treaty adopted under the SALT/START regime never came into force, it constrained state behavior by substantially altering weapons deployments of both the

221. Rice, SALT and the Search for a Security Regime, in U.S.-SOVIET SECURITY COOPERA-
222. Id. at 294.
224. ABM Treaty, supra note 39, arts. VI-XIII, at 3442-45 (establishing the Standing Consultative Commission); SALT II, supra note 223, art. XVII (adopting the Commission for Dispute Resolution).
United States and the U.S.S.R. The SALT/START regime generated enough mutual confidence that the provisions of that agreement could be maintained without formal ratification of the treaty.

Specific verification mechanisms established under the SALT/START agreements have contributed to the confidence of the parties in the dynamic obligations created under those agreements. The Standing Consultative Commission ("SCC") was established under the ABM Treaty. Although principally established to look into specific questions regarding compliance with the ABM Treaty, the SCC was also authorized to examine larger issues involving the strategic context within which the treaty obligations were undertaken. Therefore, the SCC provides support for other agreements entered into in the SALT regime.

According to one commentator, "[t]he intentional flexibility of arms control agreements made the creation of a body such as the SCC necessary." The decision of the negotiators to develop the SCC

225. Rice, supra note 221, at 298.


227. Under the ABM Treaty, the parties were to use the SCC to:
(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;
(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;
(c) consider questions involving unintended interference with national technical means of verification;
(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;
(e) . . .
(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty . . .;
(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.


228. Both the SALT I and SALT II agreements referred to the SCC. SALT I, supra note 223, art. VI; SALT II, supra note 223; see also Graybeal & Krepon, supra note 226, at 183-199.

229. G. DUFFY, supra note 57, at 163.
[i]ndicated their recognition that the strategic situation is dynamic and that there is an ongoing need to adapt agreements so that they may endure despite technological change or other developments unforeseen when they were negotiated. The SCC is based on the presumption that the signing of an arms control treaty marks the beginning rather than the end of the arms control process. Written agreements are meaningful to the extent that they are effectively implemented by the signing parties.230

Meeting twice each year in private, the Commission successfully addressed a number of disputes regarding ambiguities under the ABM Treaty.231 Both the discussions and the specific resolutions reached have been held confidential.232 When the parties demonstrated commitment to resolving disputes, the SCC continued to function effectively through periods of increasing tension between the superpowers.233 Only when American political leaders began to doubt the value of arms control agreements did the Commission become a forum for trading accusations.234

The Special Verification Commission ("SVC") established under the INF Treaty performs functions similar to those of the SCC.235 Some observers have questioned the reasoning that led to the establishment of a second institution so similar to the SCC.236 However, the SVC differs from the SCC in several respects. First, although the SCC meets in private, the parties intended it to produce public results. Second, the SVC meets as problems arise, avoiding the SCC's semi-annual meetings that allegedly led to posturing rather than problem-solving.237

230. Id.


232. Graybeal & Krepon, supra note 226, at 188.

233. See id. at 199.

234. G. Duffy, supra note 57, at 173-74; Chayes & Chayes, supra note 226, at 204-05. According to two experts, "[t]he SCC has fared no better than the general state of U.S.-Soviet Relations." Graybeal & Krepon, supra note 226, at 183.

235. INF Treaty, supra note 11, art. XIII, at 97. The structure and procedures of the SVC were finalized in the Memorandum of Agreement signed at Geneva on December 21, 1989.

236. The Senate Foreign Relations Committee questioned the need for the establishment of an SVC so similar to the SCC. SFRC INF REPORT, supra note 11, at 51. Administration officials contended that the history of the SCC made that institution suspect. See The INF Treaty: Hearings Before the Senate Comm. on Foreign Relations, 100th Cong., 2d Sess. pt. 1, 32 (1988) [hereinafter Hearings] (statement of Secretary of State George Shultz); see also Graybeal & McFate, Assessing Verification and Compliance, in Defending Deterrence, supra note 226, at 178, 194 (arguing that the function of the SCC and SVC are duplicate).

237. See SFRC INF REPORT, supra note 11, at 52; Hearings, supra note 236, at 32 (statement of Secretary of State George Shultz).
Third, the SVC can rely upon information produced by detailed reciprocal on-site inspections conducted pursuant to the INF Treaty. The INF Treaty involves "the most comprehensive and intrusive verification regime ever established to monitor compliance with a U.S.-Soviet arms control agreement." The United States created the On-Site Inspection Agency ("OSIA") to handle verification inspections under the INF Treaty. As a result of the experiences of United States and Soviet inspectors, cooperation between the superpowers has been established on a professional and routine basis.

These SALT/START institutional structures have served to replace third-party dispute resolution for arms control agreements. Current negotiations for future arms control agreements will follow patterns established under these institutional arrangements. And the terms established for on-site inspections will provide formal patterns for the terms of future agreements. Institutions such as the SCC and SVC may be adopted as the mechanisms for conducting those inspections and resolving any disputes that result. These continuing institutionalized relationships confirm the hypothesis that an arms control regime is developing between the United States and the U.S.S.R.

While the SALT/START process may have generated a security regime, the above analysis of the relationship between regimes and legal obligations underscores the necessity for complementing purely legal analysis with relational and regime-based considerations. Although two of the SALT/START agreements came into force and one generated certain legal obligations, the viability of the regime was seriously threatened by political actions of the Reagan Administration aimed at halting the SALT/START process. Conversely, improved relations between the United States and the Soviet Union may lead to a revival of the regime, because the SALT/START process has laid the groundwork.

238. INF Treaty, supra note 11, art. XI, at 95.
242. See SFRC INF REPORT, supra note 11, at 64-65; Toth, supra note 241; Morrison, supra note 240.
243. The Interim Offensive Agreement and the ABM Agreement both came into force. The signed but unratified SALT II agreement was the subject of a "political commitment" by the United States not to "undercut" the agreement as long as the Soviet Union did likewise. NATIONAL ACADEMY OF SCIENCES, NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 55 (1985).
244. See Rice, supra note 221, at 300-01.
for a step-by-step expansion of the initial limited regime into broader security cooperation.245

After examining relational agreement analysis, regime theory and reciprocity, the anomaly of the INF implementation can be explained. The U.S. response to the discovery of the missiles could have been based on claims that the Soviet Union violated the duty of good faith inherent in the obligation of *pacta sunt servanda*.246 However, other considerations may well have provided important restraints. The United States and the Soviet Union have entered a new phase of cooperative interaction. The Soviet Union has repeatedly made arms control concessions without clear expectations of specific reciprocal responses, in a range of areas.247 In Eastern Europe, Soviet forbearance in the face of the rejection of communism proved that the Soviet Union was concerned about the expectations of other states. In many respects, current Soviet behavior tracks the pursuit of diffuse rather than specific reciprocity. Even Soviet claims that the transfers of SS-23s took place prior to the treaty's execution, implicitly admitting the errors of a different set of circumstances, are credible.

The United States, attentive to the larger pattern developing in the relationship, has so far avoided resorting to claims of INF treaty violations. Instead, it has chosen to adopt the institutionalized practices established in the SVC provision of the treaty. Coupled with the generally good compliance records of both the United States and the Soviet Union under the SALT/START agreements, this response suggests that the possibilities for the development of an arms control security regime cannot be dismissed.

This explanation of the nuclear security regime and the strange case of INF implementation shows that legal doctrines related to international agreements need to be supplemented so that the character of arms control treaty obligations may be understood. Arms control treaties do create international obligations. If the treaty relationship has value as part of a larger pattern of interaction, parties will generally constrain themselves in order not to frustrate the expectations of others. By strengthening the web of treaties and encouraging the establishment of relational arms control agreements, the United States and the Soviet

245. See id. at 305-06.
246. See supra notes 76-80 and accompanying text.
Union may establish a stronger security regime between them. The efficacy of specific arms control agreements depends upon a flexible dispute settlement process that seeks to preserve the relationship established by the agreement. The broader confidence necessary to support dynamic agreements depends in turn on the international environment and on the bilateral relationship between the United States and the U.S.S.R. The nuclear security regime may be the central element of the bilateral relationship. Recognition of these interdependencies provides essential clarification to any discussion based on legal claims alone.

More broadly, the example of arms control illuminates the idea of international obligation. The unique characteristics of arms control agreements place them at the outer edge of traditional ideas of enforceable legal agreements. But to the extent that these agreements are thought of, spoken of, and implemented by the parties as if they create obligations, they possess binding force. Even without neutral tribunals to undertake dispute resolution, the processes established by the treaty relationship provide alternative enforcement mechanisms. Authoritative formal determinations of non-compliance contribute little to the arms control treaty relationship. However, the parties, supported by the institution of an international regime, recognize the supervening importance of the treaty relationship. If each state has confidence that its basic interests are protected, it will seek to preserve the arms control treaty relationship despite putative violations by the other party. In this respect, relational arms control agreements may create binding obligations even stronger and more durable than those understood in purely legal terms.

**VIII. CONCLUSION**

The example of arms control illuminates the idea of international obligation. Unique characteristics of arms control agreements have placed them at the outer edge of traditional ideas of enforceable legal agreements. I have chosen to examine arms control treaties because they are formed within a context where there seems to be little chance for cooperation. Bilateral arms competition could engender particularly difficult collective action problems. But to the extent that these agreements are thought of, spoken of, and implemented by the parties as if they create obligations, they possess binding force. Those who pronounce authoritative formal determinations of treaty noncompliance will contribute little to the arms control relationship between the parties. However, the parties, supported by the institutional arrangement of a regime, will recognize the supervening importance of the treaty relationship. If
each state has confidence that its basic interests are protected, it will seek to preserve the arms control treaty relationship despite putative violations by the other party. Even without neutral tribunals to undertake dispute resolution, the processes established by a strong treaty relationship provide alternate mechanisms for resolving disputes. The SALT/START experience shows that a series of mutually reinforcing formal agreements can engender patterns of reciprocal interaction even in difficult contexts. In this respect, relational arms control agreements may create binding obligations even stronger and more durable than those understood in purely legal terms.

My discussion of dynamic obligations has implications that extend beyond the context of arms control agreements. I have attempted to develop tools for understanding a broader class of international agreements that respond to growing problems that mandate cooperation between states. Many areas of potential international cooperation require different understandings of the nature of international agreements and formalized but changing obligations. Analysts of treaty obligations relying on traditional doctrinal approaches will be less likely to appreciate the richness of commitments involving dynamic obligations. Those analysts usually base their inquiries on standard doctrinal notions of express, inferred or implied consent. They may not appreciate the strengths of systems of specific agreements that, although legally indeterminate if considered individually, will reinforce each other within an over-arching regime structure. Conventional analysis may not adequately value legally indeterminate agreements that promote patterns of interaction able to generate diffuse reciprocal cooperation.

Collective action problems involving international trade, environmental management, and technology will generate new and different types of formal agreements. If current patterns provide any indication, those agreements will engage larger numbers of states. As states enter these formal multilateral commitments, the potential complexity of patterns of interaction between the parties will increase. On the other hand, the strength of the collective expectations as to acceptable state action may make compliance problems more tractable. States can choose to enter agreements that generate dynamic obligations so as to affirm their commitment to collective and consensual adaptation to uncertainty, new information, or changing technologies. Through exploring groups of agreements involving dynamic obligations, negotiators will see that specific treaties will provide stronger commitments within a broader regime of cooperation, and that diffuse reciprocity provides an essential norm for
continuing interaction between states. By adopting dynamic obligations analysis, we may discover a tool for understanding how flexible commitments can enhance the viability of cooperative international action so as to avoid collective action problems.

Arms control provides one provocative example of the trend toward dynamic obligations. International environmental agreements provide another example. States must undertake cooperative endeavors in the face of uncertainty to preserve biological diversity, respond to global warming, limit ozone depletion, and control interstate distribution of hazardous materials. Officials of governments must have confidence that other states will carry out mutual obligations although specific implementation duties may depend on the results of ongoing scientific inquiry.

Legal scholars studying international trade relations need a different set of tools than they currently possess to respond to new arrangements in global markets. Governments must establish sufficient predictability in their trade practices for private economic actors to succeed in spite of the increasing complexity of global markets in capital, labor, and technology. National leaders must maintain the confidence of their trading partners as they respond to domestic social dislocation forced upon home markets by international competition.

Changing technologies enable individuals to send information across national borders with increasing facility. Individuals and multinational corporations can avoid traditional border controls assumed to be part of national sovereignty. With these new technologies, foreign-based entities may accumulate more information about circumstances within a state's territory than may be available to the national government. Developed states must reassure less advanced states that acceptance of new high technologies will not facilitate to surreptitious intervention into the internal affairs of those developing nations.

By adding structures that enhance the adaptability of new agreements, international negotiators can enhance the prospects for successful international collaboration. Through establishing general patterns of cooperation through groupings of specific mutually reinforcing agreements, states can promote the convergent expectations that produce international regimes. In turn, such regimes can simplify further specific agreements and reinforce transactions based in diffuse reciprocity.

By combining the teachings of law with the insights of international relations theory, a more complete understanding of new methods for approaching global collective action problems can be gained. If states
were to rely only upon formal legal commitments, they would not have sufficient flexibility to respond to the inherent uncertainty that surrounds many international problems. On the other hand, if states were to rely on isolated political representations alone, those states that were the targets of the representations could have little confidence in the continued viability of those commitments. By encouraging networks of related and mutually reinforcing commitments, national leaders can introduce both flexibility and durability into their international commitments.

Through sensitivity to the subtleties of dynamic obligations, analysts of international commitments can begin to appreciate the creativity and shrewdness shown by the diplomats who negotiate agreements between states. Simultaneously, negotiators can appreciate the value of building clusters of related agreements, enhancing the aggregate viability of those agreements by establishing systems of reciprocal dynamic obligations. Ultimately, we can see that the phrase "cooperation under anarchy" holds much less paradox than we might think. With proper understanding, we can increase the chances for cooperative international endeavors that will benefit all of humanity.