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**THE DESIGN OF
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ABSTRACT

States entering into international agreements have at their disposal several tools to enhance the credibility of their commitments, including the ability to make the agreement a formal treaty rather than soft law, provide for mandatory dispute resolution procedures, and establish monitoring mechanisms. Each of these strategies – referred to as “design elements” – increases the costs associated with the violation of an agreement and, therefore, the probability of compliance. Yet even a passing familiarity with international agreements makes it clear that states routinely fail to include these design elements in their agreements.

This Article explains why rational states sometimes prefer to design their agreement in such a way as to make them less credible and, therefore, more easily violated than is necessary. In contrast to domestic law, where contractual violations are sanctioned through zero-sum payments from the breaching party to the breached-against party, sanctions for violations of international agreements are not zero-sum. To the extent sanctions exist, they almost always represent a net loss to the parties. For example, a reputational loss felt by the violating party yields little or no offsetting benefit to its counter-party.

When entering into an agreement, then, the parties take into account the possibility of a violation and recognize that if it takes place, the net loss to the parties will be larger if credibility enhancing design measures are in place. In other words, the design elements offer a benefit in the form of greater compliance, but do so by increasing the cost of a violation and the net cost to the parties. When deciding which design elements, if any, to include, the parties must balance the benefits of increased compliance against the costs triggered in the event of a violation.

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I. INTRODUCTION

States enter into international agreements all the time, and these agreements vary widely along several dimensions.¹ Some are formal treaties while others fall short of that classification, being labeled instead “soft law;”² some include dispute resolution procedures while others do not;³ and some provide for sophisticated monitoring mechanisms that are absent from other agreements.⁴ When states design their agreements they often make choices – like the choice of soft law or the decision to omit provisions for dispute resolution or monitoring -- that serve to reduce the credibility of their commitments.⁵ This behavior is puzzling. International law provides few mechanisms through which to enforce commitments, so when states exchange promises it is often difficult to make those promises

¹ This Article offers an explanation for some, but not all of the diversity that exists in international agreements. Some of the other sources of diversity within agreements are discussed in the fall 2001 symposium issue of *International Organization*. See Barbara Koremenos, Charles Lipson, and Duncan Snidal, *The Rational Design of International Institutions*, 55 *Int'l Org.* 761 (2001); Barbara Koremenos, Charles Lipson, and Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 *Int'l Org.* 1051 (2001).

² For example, the North American Free Trade Agreement (NAFTA) is the product of a formal treaty while the Basle Accord is not a treaty. See Basle Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards*, (July 1998), available at <http://www.bis.org/publ/bcbs04a.htm>; See generally, Lawrence Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 *Va. J. Int'l L.* 1 (1998); Thomas Oatley & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 *Int'l Org.* 1, 35-54 (1998).

³ For example, bilateral investment treaties (BITs) typically include dispute resolution procedures, as does the WTO, whereas the United Nations Charter does not. See, e.g., *Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, Nov. 14, 1991, U.S.-Arg., arts. II-V, S. Treaty Doc. No. 103-2, at 3-6 (1993); *Charter of the United Nations* (1945).

⁴ For example, the International Covenant on Civil and Political Rights (ICCPR) provides for the submission of reports by the parties when so requested by the Human Rights Committee (“the Committee”), and the Committee is authorized to review and comment on these reports. See ICCPR, 999 UNTS 171 (1966), art. 40(1)(b), (4). See also Kal Raustiala, *Police Patrols, Fire Alarms & the Review of Treaty Commitments*, mimeo, * 2 (2003).

⁵ A soft law agreement reduces the credibility of the commitment relative to a treaty because it represents a lower level of commitment. Omitting dispute resolution and monitoring procedures has a similar effect because these procedures serve to identify and publicize violations.

credible. Because the ability to make credible promises is valuable, one might expect states to do everything in their power to increase the credibility and “compliance pull” of their agreements.

In the domestic context, for example, the parties to a contract typically want their written agreements to be enforceable. This enforceability allows them to rely on one another’s promises and enter into a more profitable exchange.⁶ States cannot write enforceable promises in the same way as private parties, but one would expect them to use the tools at their disposal to make their agreements more, rather than less, credible. Yet states do not do so. They routinely fail to design agreements to maximize the credibility of their promises. They frequently enter into soft law agreements; most agreements, including treaties, do not include mandatory dispute resolution provisions;⁷ and mechanisms for monitoring and review are often weak or non-existent.⁸ Neither legal nor political science scholars have a theory to explain why states are so hesitant to use these credibility-enhancing strategies.⁹

⁶ This is a simple insight from contracts. It is discussed in detail in Part II.A.

⁷ See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 *J. Legal Stud.* 303 (2002). Domestic contracts do not normally include dispute resolutions provisions either, but unlike international agreements they can rely on the background legal system for enforcement. International contracts provide a better example of private parties seeking to ensure the credibility of their agreements. These contracts typically include a choice of law clause and frequently an arbitration clause which identify the law that is to govern the dispute and the forum in which a dispute will be resolved.

⁸ See Kal Raustiala, *Police Patrols, Fire Alarms, & the Review of Treaty Commitments*, mimeo (2003). Domestic contracts do not always provide for monitoring, but they tend to do so where monitoring is most important. For example, secured creditors will normally include monitoring provisions of some sort in their credit agreements when the amount involved is large enough to justify the costs of monitoring.

⁹ See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, mimeo (2002) (stating that international lawyers “have produced few theories of why states chose to use or avoid legality”); Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31

The central claim of this Article is that state resistance to such strategies is the product of tension between two objectives pursued by states when they enter into an agreement.¹⁰ The first is the desire to make the agreement credible and binding. This is analogous to the desire on the part of private parties to make their agreements enforceable. The “design elements” of hard law, dispute resolution, and monitoring all promote this goal.¹¹ The observation that each of these design elements promotes credibility and compliance yet is often not incorporated in an agreement is the heart of the puzzle addressed in this paper.

The second part of the explanation is related to the sanctions triggered by the violation of an international agreement. In the domestic context, a contractual breach is normally punished through money damages paid by the breaching party to the breached-against party. This is a zero-sum transfer in the sense that what is lost by one party is

J. Leg. Stud. 303, 307 (2002) (“The reluctance of states to include binding dispute resolution clauses in their agreements has received limited attention from international law scholars.”). But see Alan O. Sykes, Protectionism As A “Safeguard”: A Positive Analysis Of The GATT “Escape Clause” With Normative Speculations, 58 U. Chi. L. Rev. 255 (1991) (offering a public choice explanation of the use of escape clause provisions article XIX of GATT).

¹⁰ As this sentence makes clear, this Article embraces an institutionalist view. It is worth noting that there is considerable debate about the proper way to model state behavior, and institutionalism is only one of the possible choices with the other common ones being realism and constructivism. The merits and demerits of these approaches have been exhaustively catalogued, debated, and discussed elsewhere and it serves no purpose to revisit that debate here. For discussions of these approaches, see Kenneth W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers, 14 Yale J. Int’l L. 335 (1989) (institutionalism); Harold H. Koh, Why Do Nations Obey International Law? 106 Yale L.J. 2599 (1997) (constructivism); Harold H. Koh, Transnational Legal Process, 75 Neb. L. Rev. 181 (1996) (constructivism); The Perils of Anarchy: Contemporary Realism and International Security (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1995) (realism).

¹¹ Throughout the paper the term “design elements” will be used to describe the credibility enhancing devices that represent the focus of the Article – hard law, dispute resolution, and monitoring.

gained by the other.¹² When agreements between states are violated, however, the associated sanctions do not have this zero-sum character.¹³

When a state violates an international commitment it suffers, to the extent it faces any sanction, a loss of reputation in the eyes of other states, perhaps combined with some form of direct sanction.¹⁴ These sanctions represent a loss to the state that has violated its obligation, but provide no offsetting gain for the party to whom the obligation was owed. The sanction, therefore, is a net loss to the parties – one party faces a cost that is not recovered by the other.¹⁵

When the parties enter into an agreement, they recognize the potential for this future loss and the fact that credibility-enhancing design elements serve to increase this net loss in the event of a violation. The desire to increase the credibility of commitments, then, is tempered by a desire to avoid this net loss in the event of a violation. It is the tension between these competing goals of credibility and loss avoidance that explains the fact that states use the design elements discussed in this Article – hard law, dispute resolution, monitoring – in some but not all international agreements.

¹² There are, of course, transaction costs including lawyers fees, but these are put to one side. In many cases these fees will be modest and perhaps even zero because most disputes are settled prior to trial, and some are settled before lawyers are even hired.

¹³ See *infra* note 33.

¹⁴ See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Calif. L. Rev.* 1823 (2002).

¹⁵ States could, of course, provide for money damages in their agreements. In fact, they almost never do so. The only non-commercial exception of which I am aware is within the EU, where money damages can be ordered under certain limited circumstances. The reasons for state resistance to money damages is itself something of a puzzle and this article does not attempt to explain this fact. It may be that money payments are not considered an effective deterrent, or that the political costs associated with either paying money damages or accepting them in compensation for a violation are significant. Alternatively, there may be a

The Article proceeds as follows. Part II describes in detail why the failure of states to design their agreements in such a way as to maximize the credibility of their commitments is a puzzle, especially in light of what we know about the exchange of promises in the domestic setting.¹⁶ Part III explains how the desire for greater credibility and compliance interacts with the fear of losses generated in the event of a violation. Part IV explores some of the implications of the theory advanced here, including predictions about when credibility-enhancing devices are most likely. Part V concludes.

II. THE PUZZLING DIVERSITY OF INTERNATIONAL COMMITMENTS

When states enter into an international agreement, they have complete control over what is and is not included. Among the decisions that must be made are the choice between hard and soft law; the decision to include or exclude dispute resolution provisions; and the decision to include or exclude monitoring, reporting, and verification provisions.¹⁷ This Part explains why we would expect states to use these design elements to increase the credibility and effectiveness of international agreements, and shows that the failure of states to use them more often should be puzzling to international law scholars. It also reviews and evaluates existing arguments advanced to explain why these elements are not used more often. Some of these arguments have merit and the explanation advanced here

sense among states that money damages would be ignored too easily. Whatever the reason, this article simply recognizes this fact and assumes that money damages are not available. See Part IV.B.

¹⁶ Along the way, Part II considers existing explanations for the resistance to credibility-enhancing devices in international agreements, including some that rely on domestic political forces.

¹⁷ The choice regarding dispute resolution and monitoring is, of course, not a binary one. There are a wide variety of ways each of these design elements could be incorporated. The Article frequently speaks of

is intended as a complement to these claims, not a substitute. Other arguments advanced in the literature, however, have little to recommend them and should be dismissed.

The first design element of interest to this Article is the soft law/hard law divide,¹⁸ which will be referred to as the choice of “form.” When states enter into an agreement, they have the option of adopting either form.¹⁹ If they evidence an intent to be “bound,” the agreement is labeled a treaty, and if they do not demonstrate such an intent, it is labeled “non-binding,” or soft law.²⁰ Though the precise place of soft law within the framework of international law is uncertain, it is clear that traditional international law

a choice to include or exclude such elements, but this should be recognized as a shorthand for the actual choice that includes not only whether or not to include the design elements, but how strong to make them.

¹⁸ There is no single agreed-upon definition of soft law. One approach is to identify what soft law is not. It is not “hard law” by which is meant treaties or custom, nor is it a purely political understanding without a legal component. Rather, soft law is what lies between these two alternatives. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *International Organization* 421, 422 (Summer 2000). For more about “soft law,” see Wellens & Borchardt, *Soft Law in European Community Law*, 14 *Eur. L. Rev.* 267 (1989); A Hard Look at Soft Law, 82 *ASIL Proc.* 371 (1988); Gruchalla-Wesierski, *A Framework for Understanding “Soft Law,”* 30 *McGILL L. J.* 37 (1984). The term “soft-law” is used herein to denote law that falls short of the classical definition of international law. See Kal Raustiala, *Form and Substance in International Agreements*, *7 mimeo (2001) (describing the term soft law). This is a common usage of the term, but it is not the only one. Some use the term to describe rules that meet the classical definition but are imprecise or weak. See Prosper Weil, *Toward Relative Normativity in International Law*, 77 *Am. J. Int’l L.* 413, 414 n.7 (1983) (“It would seem better to reserve the term ‘soft law’ for rules that are imprecise and not really compelling, since sublegal obligations are neither ‘soft law’ nor ‘hard law’: They are simply not law at all.”). Brown Weiss & Dupuy, *Soft Law and the International Law of the Environment*, 12 *Mich. J. Int’l L.* 420 (1991); Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in Shelton 2000 at 109-110; Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *I.C.L.Q.* (1989).

¹⁹ See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge 2000).

²⁰ The terms “binding” and “non-binding” are sometimes used as synonyms for hard and soft law respectively but these terms are somewhat misleading because binding commitments – meaning treaties -- often do not include enforcement mechanisms of any kind, let alone the sort of coercive enforcement mechanisms that we are used to in domestic law. Non-binding agreements, on the other hand, are commonly thought to affect the behavior of states and do so in part because they impose some sort of obligation on the signatories. We cannot, therefore, distinguish these two categories of commitment based on whether there is a sanction for non-compliance or whether they affect state behavior. If non-binding agreements affect behavior, a failure to comply must entail some consequences. On the other hand, it is clear that violation of a binding agreement imposes only limited costs on states. The most that can be said about the distinction

scholarship considers soft law less “law” than the “hard law” of treaties and, for that matter, custom.²¹ By this it is meant that soft law is less obligatory than hard law and, presumably, has less impact on behavior.²² This Article accepts as given the conclusion that, all else equal, soft law impact state behavior less than do treaties.²³

But soft law is not the only design element that can affect the “compliance-pull” of an agreement. States also choose whether or not to adopt formal dispute resolution processes. These can range from a framework for consultation to a formal system of binding adjudication.²⁴ Though some high profile agreements such as the WTO²⁵ and the

between binding and non-binding agreements, then, is that a violation of the former will, all else equal, impose greater costs on the violating state than violation of the latter.

²¹ Pieter van Dijk, Normative Force and Effectiveness of International Norms, 30 *German Y.B. Int'l L.* 9, 20 (1987). Perhaps the most traditional position views agreements other than treaties as nothing more than evidence of custom. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 *Mich. J. Int'l L.* 420, 432 (1991). Under another view, soft law “tends to blur the line between the law and the non-law, be that because merely aspirational norms are accorded legal status, albeit of a secondary nature; be that because the intended effect of its usage may be to undermine the status of established legal norms.” Remarks by Professor Handl, *A Hard Look at Soft Law*, 82 *Am. Soc'y Int'l L. Proc.* 371, 371 (1988).

²² One additional clarification is needed here. Some commentators use a definition of soft law that encompasses formal treaties whose substantive obligations are weak. Thus, for example, a formal treaty that has no clear requirements but instead consists of a set of goals, aspirations, or promises to pursue certain general objectives would be considered “soft” under this taxonomy. See R.R. Baxter, *International Law in "Her Infinite Variety"*, 29 *Int'l & Comp. L.Q.* 549, 554 (1980); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *I.C.L.Q.* 850, 851 (1989). It is certainly true that the impact of an agreement is affected by both its form (binding versus non-binding) and by its substantive provisions. That is, a formal treaty can certainly have its impact reduced if the substance of the agreement is watered down. Furthermore, one could talk in general terms about a treaty being “strong” or “weak” based on how much pressure it puts on states to change their behavior, and this would depend on both the form and substance of the agreement. All that said, it remains useful to distinguish between the impact of a choice of form and the impact of a change in the substance of a treaty. For this reason, this Article will retain the terms binding and non-binding; as well as hard law and soft to refer to the formal legal status of an obligation. Treaties will be referred to as binding or hard, other agreements as non-binding or soft. This is done to clarify the discussion and dispute the fact that many binding agreements impact state behavior less than some non-binding agreements.

²³ In other writing I have commented on the conceptual problems that soft law presents for international legal scholars. See Guzman, *Compliance Based Theory*, supra note 14, at 1878-1883.

²⁴ An example of the former can be found in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 12 *I.L.M.* 1085 (1973), which provides for negotiations between disputing parties and which allows for arbitration of dispute, but only with the consent of both parties. See *id.*, art.

Law of the Sea Convention²⁶ include a mandatory dispute resolution mechanism, most do not provide procedures of that sort.²⁷ The conventional view of dispute resolution, and the one adopted in this Article, assumes that it increases the incentive toward compliance because it provides a mechanism to identify violations and may provide for some formal sanction.²⁸ The third design element that increases credibility is the use of monitoring procedures. There are, of course, a wide range of ways to monitor compliance, ranging from self-reporting or occasional and informal statements of state conduct to formal inspections of state behavior and compliance by neutral observers.²⁹

A. International Agreements as Contracts

International agreements are, at root, an exchange of promises among states. This is true whether they are full blown treaties or merely statements of intent; whether they require wholesale changes to domestic practices or merely reflect existing behavior; and whether or not they include provisions for enforcement. Because our understanding of

XVIII. An example of the latter can be seen in bilateral investment treaties (BITs), see. e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., arts. II-V, S. Treaty Doc. No. 103-2, at 3-6 (1993), 31 I.L.M. 124, 129-32; Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

²⁵ See Understanding on Rules and Procedures Governing the Settlement of Disputes.

²⁶ See United Nations Convention on Law of the Sea, art. 188.

²⁷ See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. Leg. Stud. 303, 304 (2002).

²⁸ Dispute resolution may provide an additional benefit in that it serves to reduce the use of costly sanctions, especially when there has been no violation, because a finding that there has been no violation can prevent the unjustified use of such sanctions.

²⁹ See, e.g., *supra* note 4. Kal Raustiala categorizes the different monitoring systems as either strong or weak. His category of strong systems include "police patrols," by which he means investigation and evaluation of behavior by a central authority, and "fire alarms," by which he means a determination by a central authority based on self-reporting or claims by other parties. See Kal Raustiala, *Police Patrols, Fire Alarms and the Review of Treaty Commitments*, mimeo (2002).

promises made at the international level is quite poor, there is much to be gained by looking to other areas of law where we have a better set of theoretical and conceptual tools with which to work. In particular, scholarship on the law of contracts offers a sophisticated understanding of promises made in the domestic context. It is, therefore, helpful to think of international agreements as a form of contract and bring to bear on the study of those agreements some of the insights from the contracts literature. Of course, there are important differences between promises exchanged by states and those exchanged by private parties. In fact, this Article points to one such difference to help explain why states often enter into agreements that are less binding than one might expect. Nevertheless, analogy to contract is useful because it offers a good starting point for the study of international agreements.

Consider one of the most basic ideas from contract theory, the Coase theorem.³⁰ In the absence of transactions costs, the parties will negotiate an efficient contract -- meaning one that generates the maximum possible joint surplus.³¹ The terms of the contract will then provide for some distribution of that surplus. In a contract between a buyer and a seller, for example, the seller will offer higher and higher quality up to the point where the buyer's willingness to pay for higher quality is less than the cost of further quality increases. The ultimate sale will include a price adjustment to reflect this higher quality, though precisely how the gains generated by the contract are divided will vary based on the market

³⁰ R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

power of the parties. Notice that this interaction generates the optimal quality level – higher quality would not be worth the cost, lower quality would reduce the total benefit enjoyed by the parties by more than the cost savings.

This simple theory of negotiation is well established in the contracts literature, but how does it affect the way in which we view inter-state agreements? Before proceeding, we must make some assumptions about state behavior. This Article assumes that states are rational beings; that they act in their own self-interest, at least as that interest is defined by the political leaders of the state; and that states are aware of the impact of their actions on the behavior of other states. These represent standard assumptions about state conduct but our understanding of state behavior remains sufficiently contested that it is worthwhile to identify them explicitly.³² The assumptions imply that when states enter into international agreements they will, like domestic parties entering into a contract, seek to maximize the joint benefits to the parties.³³

³¹ In discussions of international institutions the effort to maximize the total joint surplus of the parties to an agreement is sometimes referred to as “rational design.” See Koremenos, Lipson, and Snidal, *Rational Design*, supra note 1, at 781.

³² The assumptions made here are conventional institutionalist ones. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *Yale J. Int'l L.* 335 (1989); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 27 (1984). Raustiala & Slaughter, *Compliance*, in *Handbook*.

³³ Notice that these assumptions about state behavior are consistent with both a public interest model of governance in which states pursue the welfare of their citizens, and an alternative public choice model in which governmental leaders pursue their own private goals. See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 *Georgetown L.J.* 883, 900 (2002) (discussing how public choice issues can be handled in an international law context). The most able scholar using public choice analysis in the international context is Alan Sykes. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure Of Renegotiation And Dispute Resolution In The World Trade Organization*, 31 *J. LEG. STUD.* 179 (2002); Warren F. Schwartz & Alan O. Sykes, *Toward A Positive Theory Of The Most Favored Nation Obligation And Its Exceptions In The WTO/GATT System*, 16 *INT'L REV. L. & ECON.* 27 (1996); Alan O. Sykes, *Protectionism as A "Safeguard": A Positive Analysis Of The GATT "Escape Clause" With Normative Speculations*, 58 *U. CHI. L. REV.* 255 (1991).

With the above assumptions in mind, imagine two (or more) states engaged in negotiation over some set of issues. For example, Mexico and the United States might be concerned about a set of environmental issues that affect both states. The states may have different priorities and different goals, and each pursues its own interests without regard for the interests of the other. Whatever they ultimately agree to, however, our assumption that they will reach an efficient agreement ensures that there is no alternative agreement that could make both parties better off. Suppose, for instance, that the United States prefers tougher environmental standards than does Mexico. If those standards are sufficiently important to the U.S., it will get the standards it wants in exchange for some other concession – perhaps better treatment for illegal immigrants within the United States. Alternatively, if the cost to Mexico of higher standards is greater than what the U.S. is willing to pay, lower standards will prevail in the agreement because the compensation demanded by Mexico for its acceptance of higher standards would exceed the willingness to pay of the United States. The parties will increase the level of agreed upon standards as long as the U.S. is willing to pay more than Mexico demands – leading them to an agreement that maximizes their joint welfare. No other agreement could, when combined with some transfer payment, make both parties better off.

The domestic contract law story ends at this point – it is assumed that, having reached an agreement that maximizes joint welfare, the parties will enter into a binding legal contract. The contract would reflect the efficient bargain; disputes between the parties would typically be resolved by the domestic court system or, perhaps, some form of mandatory private arbitration; and monitoring would be provided for up to the point where

the marginal benefit of additional monitoring is outweighed by its costs. Entering into such a contract encourages both sides to uphold their end of the agreement, permits greater reliance by each party, and allows the parties to achieve the joint gains that motivated the contract in the first place.³⁴

A glance at international agreements reveals that they appear inconsistent with the above description.³⁵ Specifically, agreements among states frequently do not make use of familiar and accessible mechanisms to increase the credibility of commitments. States often enter into soft law agreements rather than treaties, typically fail to provide for any dispute resolution procedures,³⁶ and frequently require little or no monitoring or verification of performance.³⁷

³⁴ A fully efficient contract will provide for damages that encourage breach when that is efficient. See TAN 40.

³⁵ Variance in the use of credibility-enhancing devices is almost certainly related in part to the subject matter of the agreement. For example, it is conventional wisdom that dispute resolution is more common in trade and human rights than in, for example, arms agreements. See, e.g., James M. Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 *International Organization* 137 (2000). Similarly, it is said that monitoring is more common in the environmental context. See, e.g., Weiss & Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accord* 91 (1998). This article does not attempt to evaluate these empirical claims or to test the theory against them in a formal way. Part IV.E, however, discusses when the theory predicts credibility-enhancing devices are most likely and offers some suggestive comments about how well these predictions accord with what we observe. More formal testing of the theory is left for future work.

³⁶ And they almost never provide for dispute resolution procedures that attempt to impose something analogous to expectation damages.

³⁷ To illustrate the basic difference between what analogy to domestic contracting suggests and what we observe in the international context, consider how odd it would seem to see sophisticated business parties enter into negotiations, expend significant resources, produce a complex agreement, and then intentionally make that agreement non-binding and unenforceable. Similarly, one would be surprised to see an agreement that is legally binding, but that declares itself unenforceable before any court or tribunal. Indeed, the use of agreements that are intentionally not adjudicable before any body is so alien to conventional contract law that it is hard to even know what it means for a contract to be legally binding if there is no enforcement. See Uniform Commercial Code § 1-201(3, 11) (defining "Contract" and "Agreement"). Finally, a lawyer who negotiated a complex, long-term agreement and then failed to provide for the use of available and cost-effective monitoring procedures would be criticized for an error of judgment. Not only do all of these things happen in the world of inter-state agreements, they represent standard operating procedure.

Before proceeding, it is important to recognize that all the design elements discussed in this Article are related.³⁸ Each of them alters the extent to which an agreement provides an incentive for states to comply. Signing a treaty rather than soft law, including mandatory dispute resolution, and choosing to put monitoring procedures in place, all increase the impact of an agreement on state behavior. Furthermore, it is possible to trade the compliance benefits of one of these elements off against those of another. For example, a treaty that has stringent monitoring and reporting obligations but no dispute resolution procedures could have the same impact on behavior as an agreement with limited monitoring and reporting but a mandatory dispute resolution procedure.

That there is a trade-off among these elements, however, does not explain state behavior because from a contracting perspective, one would expect states to use each of the elements to increase the credibility of their commitments.³⁹ Like the parties to a domestic contract, states wish to maximize the joint benefits from an agreement. Consistent with that desire, the parties will adopt enforcement techniques that ensure performance unless the total joint cost of performance is greater than the total joint benefit. Specifically, they want to provide an incentive to perform, even if it turns out that performance is costly to one of the parties, as long as performance yields net benefits to the

³⁸ I am not the first to make this observation. In a recent draft article, Kal Raustiala has observed the choice of form (i.e., treaty v. soft law) can be traded off against the substance of an agreement. See Raustiala, *Form and Substance*, supra note 9, at *34.

³⁹ As already discussed, see supra TAN 33-34, contract theory tells us that states should increase the level of commitment up to the point at which the costs of violation are equal to the benefits thereof. If some combination of design elements generates excessive commitment states would provide for some lower level of commitment. In the international arena, however, it is hard to believe that any combination in the design elements can generate optimal, let alone excessive disincentives to a violation.

parties taken together. In domestic contracts, of course, the law attempts to provide a system of damages and other remedies that leads to efficient results. It is for this reason that expectation damages represent the standard remedy for contract violation – they encourage efficient breach.⁴⁰

In the context of agreements among states, however, the sanction for a failure to comply with a legal obligation is almost always less than would be necessary to prevent excessive breach. Absent some enforcement scheme provided in the agreement itself, a violation triggers no formal sanction at all.⁴¹ One might expect, then, that international agreements would include mechanisms designed to heighten compliance. In fact, many agreements provide very few such mechanisms and few sanctions in the event of breach. Where sanctions are provided, they are often not severe, and often only prospective.⁴² Simply put, in many agreements, the tangible sanctions for a failure to comply with international law are very weak. Though there may also be a reputational sanction,⁴³ there is no reason to think that reputation is sufficient to provide for an efficient level of breach

⁴⁰ See Richard A. Posner, *Economic Analysis of the Law* 117-26 (4th ed. 1992); John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 *J. Legal Stud.* 277, 283-89 (1972); Steven Shavell, *Damage Measures for Breach of Contract*, 11 *Bell J. Econ.* 466 (1980). But see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 *J. Leg. Stud.* 1 (1989) (challenging the claim that expectation damages yield an efficient outcome).

⁴¹ A violation by one party may give the other party the right to terminate its own performance. See *supra* note 114. To the extent treaties are enforceable in domestic courts the statement in the text must be qualified. For example, if a human rights commitment is credibly enforceable in local courts this may provide a meaningful sanction in the event of a violation.

⁴² See, e.g., *The WTO Dispute Settlement Understanding*, art. 22(4) (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”).

⁴³ See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 105-108 (1984); Robert Axelrod, *The Evolution of Cooperation* (1984); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, *Calif. L. Rev.* 1823 (2002).

between states. Reputational sanctions are limited in magnitude and can be unpredictable, and even a total loss of reputation may not be enough to deter a violation of international law.⁴⁴ Reputational sanctions are also likely to under-deter breach because the actions of the parties may not be observable to third parties. In the absence of a disinterested adjudicator, the breached-against party cannot credibly demonstrate that the other party was at fault.

It is, of course, hardly news that international law provides few enforcement mechanisms.⁴⁵ Indeed, I am not aware of any commentator who argues that enforcement measures in international law are sufficient to secure optimal levels of compliance.⁴⁶ But when one considers that the international system provides so few sanctions for violations of international law, it is puzzling that states do not do more to increase the credibility of their agreements.

To illustrate the basic puzzle, consider the following example. Suppose that the United States and Canada face a common environmental problem. Both countries generate pollution that causes acid rain, and pollution on one side of the border has effects

⁴⁴ See George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 J. Leg. Stud. S95 (2002) (discussing reputation as it affects international law).

⁴⁵ See, e.g., Lori Fisler Damrosch, Enforcing International Law Through Non-Forcible Measures, 269 *Recueil des Cours* 19 (1997) (“A fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement.”); Falk, The Adequacy of Contemporary Theories of International Law – Gaps in Legal Thinking, 50 *Va. L. Rev.* 231, 249 (1964) (“Among the most serious deficiencies in international law is the frequent absence of an assured procedure for the identification of a violation.”); Thomas M. Franck, Legitimacy in the International System, 82 *Amer. J. Int’l L.* 705, 705 (observing “[t]he surprising thing about international law is that nations ever obey its strictures” because “the international system is organized in a voluntarist fashion, supported by so little coercive authority.”).

⁴⁶ But see Lori Fisler Damrosch, Enforcing International Law Through Non-Forcible Measures, 269 *Recueil des Cours* 19-22 (1997) (arguing that there are more sanctions for violation of international law than is generally recognized).

that are felt on both sides. Both states are interested in reducing the problem of acid rain within their own country, but neither is concerned with the environment on the other side of the border, so each state will adopt pollution controls that maximize its own welfare, without regard for the other.

Consider the policy decision of Canada in the absence of cooperation. Policy makers must balance the economic costs of higher environmental standards against the benefits of a reduction in acid rain. The economic costs – in the form of more stringent pollution controls -- are borne entirely by Canadians while the environmental consequences are borne in part by Americans. So, keeping the example simple, if 30% of the acid rain caused by Canadian pollution falls on the United States, Canada will consider only the remaining 70% when it designs its policy. Because the Canadian government ignores the impact of its legislation on the United States, and because it feels all the costs but only a portion of the benefits from its policy, Canada will impose more modest regulation than it would if all the benefits from that regulation were felt in Canada. The United States, of course, faces the same set of incentives, so both states will adopt pollution controls that are less protective of the environment than would be the case if each country could capture the full benefit of their regulations.

Without an agreement, then, both countries have policies that are weaker than they would choose if there were no externalities, and both countries endure the consequences of pollution that crosses the border. Put another way, both states would prefer a regime in which pollution standards are tougher and the impact of acid rain is correspondingly reduced.

In an attempt to improve on this outcome, Canada and the United States can enter into negotiations. There is clearly room for joint gains from such negotiations because both countries would prefer a regime with stricter environmental regulations. To keep the analysis simple, assume that negotiators agree on a set of substantive environmental provisions with clear responsibilities for each state that require an increase in the level of environmental regulation on both sides of the border.⁴⁷

Because both states prefer a cooperative outcome, one might expect them to agree on a formal treaty. This represents the most reliable form of commitment,⁴⁸ and by signing a treaty the parties maximize the probability of compliance and, therefore, the expected benefits of the agreement. If the states choose instead to enter into a soft law agreement some of the compliance benefits are lost. Even a non-binding agreement may, of course, affect behavior, but the “compliance-pull” of such an agreement is less than would be the case with a treaty.

Similarly, one might expect the parties to include provisions for mandatory dispute resolution. Like the choice of a treaty over soft law, the decision to include dispute resolution increases the costs of violating one’s commitment and, therefore, increases the expected benefits of the agreement. The same argument holds true for monitoring provisions. Monitoring provisions, whatever form they take, serve to generate accurate information about the behavior of the parties. This increases the likelihood that violations

⁴⁷ By assuming that agreement is reached and that agreement would require each state to undertake substantive changes in their laws, we are able to isolate the question of how the states choose to design their international agreements.

will be detected and reduces the risk that compliant behavior will be perceived as violative. Including such provisions, then, makes it more costly for a state to violate its commitment, which increases the expected value of the agreement.

A believer in the power of international law might wonder if including all three design elements might make violation excessively costly, thereby inducing inefficient compliance.⁴⁹ This is possible as a matter of theory, but it seems unlikely that sanctions for violations of international commitments are sufficiently severe to have this effect. In any event, even if use of all three elements would generate excessive incentives toward compliance, there remains a puzzle inasmuch as many international agreements fail to adopt even one of these design elements.

B. Existing Explanations

1. Explanations for the Presence of Soft Law⁵⁰

This Article is not the first to ask why states use soft law, and there are a number of existing explanations for why states enter into soft law agreements.⁵¹ The two most salient

⁴⁸ See Abbott & Snidal, *supra* note 18, at 421-22.

⁴⁹ If violations are punished too severely, then states will comply with the treaty even when doing so imposes total costs on the parties that outweigh the total benefits of compliance.

⁵⁰ There is a significant literature on the subject of soft law. See sources cited *supra* note 18. The general view of soft law in international law is that it is in some sense less “binding” than traditional sources of international law, and states are accordingly less likely to comply. Pieter van Dijk, *Normative Force and Effectiveness of International Norms*, 30 *GERMAN Y.B. INT’L L.* 9, 20 (1987). Perhaps the most traditional position views agreements other than treaties as nothing more than evidence of custom. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 *MICH. J. INT’L L.* 420, 432 (1991); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *Int’l Org.* 339, 340 (2002) (“[M]ost public international lawyers, realists, and positivists consider soft law to be inconsequential.”).

– flexibility and domestic issues -- are presented below. The flexibility argument is largely unconvincing but the claims about domestic politics are surely an important part of the explanation for soft law.

a) Flexibility

The basic flexibility argument is that “[s]oft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text. This provides for flexibility in implementation.”⁵² In simple terms, states choose soft law because it is less binding on them and, therefore, gives them greater flexibility.⁵³ This flexibility is said to be desirable for a variety of reasons, including to help states deal with an uncertain world,⁵⁴ to reduce the costs of termination or abandonment,⁵⁵ or to make renegotiation easier.⁵⁶

⁵¹ See H. Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 EJIL 499; Charles Lipson, Why are Some International Agreements Informal?, 45 International Org. 495, 500 (1991); Abbott & Snidal, supra note 18, Gruchalla-Wesierski, supra note 18; Raustiala, Form and Substance, supra note 18.

⁵² Abbott & Snidal, supra note 18, at 445; Charles Lipson, Why are Some International Agreements Informal?, 45 International Org. 495, 500 (1991) (“[I]nformal bargains are more flexible than treaties. They are willows not oaks.”).

⁵³ To the extent the argument here is that it may at times be desirable to have weaker or less precise substantive provisions in an agreement, it is a question of what in this Article is defined as the “substance” of the agreement, and is discussed in Part III.D. This Article uses a definition of “soft law” that turns entirely on questions of form – an agreement is soft if it is not a formal treaty. Given this definition, there is no a priori reason why soft law instruments (meaning instruments that fall short of formal treaty status) must be less precise. States could negotiate a detailed set of terms but have that exchange of promises take the form of soft law. Similarly, states can enter into formal treaty commitments that lack precision. Other scholars, in particular Abbott and Snidal, who are quoted above, see supra TAN 52, use a different definition of soft law. As a result, some arguments made by other authors about “soft law” may in fact be referring to characteristics of agreements (such as the precision of the substantive obligations) that are defined in differently in this Article.

⁵⁴ See Abbott & Snidal, supra note 18, at 441 (stating that soft law helps states to deal with the fact that “[t]he underlying problems may not be well understood, so states cannot anticipate all possible consequences of a legalized arrangement”); Lipson, supra note , at 518 (arguing that soft law “is useful if there is considerable uncertainty about the distribution of future benefits under a particular agreement”); Raustiala,

The merit of flexibility, then, turns on the fact that soft law is less binding on states, allowing them to respond to unexpected future events. The problem with the argument is that flexibility of this sort reduces the value of the agreement to the parties. Though a state prefers that its own commitments be “flexible” in this way, it would prefer that its counter-party be held to its promise. In conventional contract language, an efficient treaty compels performance unless the joint costs of performance exceed the joint benefits.

Put another way, the additional flexibility that exists when credibility-enhancing devices are excluded from an agreement increases the risk of inefficient breach. A state faced with an unexpected situation may regret its international commitment, and if the costs of compliance exceed the costs of violation the state will violate its obligation. Whether this is a desirable outcome, of course, depends on the costs a violation imposes on the other party to the agreement. If the total costs of violation – including the costs felt by both parties – exceed the benefits, then there is in contracts would be termed inefficient breach.

Under this reasoning, the flexibility offered by the use of soft law is beneficial only if a treaty would impose sanctions so severe as to over-deter violations. Given the weakness of sanctions in international law, such over-deterrence is implausible. It is similarly

Form and Substance, *supra* note 9, at 18 (“governments need not predict the future and can easily adjust the agreement or renege”).

⁵⁵ See Lipson, *supra* note 51, at 518.

⁵⁶ See Abbott and Snidal, *supra* note 18, at 435.

implausible that soft law is chosen for its flexibility.⁵⁷ Doing so reduces, rather than enhances, the value of an agreement.⁵⁸

b) Domestic Law and Politics

A different explanation for the use of soft law instruments concerns the domestic processes by which international agreements are approved. The use of a soft law instrument rather than a treaty will trigger a different set of domestic practices which may affect the choice of form. These arguments, whatever the merits of any particular claim, are surely part of the explanation for the use of soft law. These issues are put aside in their

⁵⁷ One might attempt to save the flexibility argument by assuming that states are risk averse. A risk averse state would be willing to reduce the expected benefits from agreement if doing so also reduced the associated risk. Risk aversion, however, is an unsatisfactory explanation for the choice of soft law for at least two reasons. First, states enter into many agreements and interact with other states on a regular basis. Because each individual commitment represents only a small fraction of the total set of interactions, it is hard to see why risk aversion would be a sensible strategy. It would make more sense to maximize the expected value of each agreement and rely on the large number of agreements to diversify the total benefits to the state. Second, entering into a treaty may, in fact, reduce the level of risk. A treaty increases the probability of compliance which, depending on range of future states of the world, may reduce the overall risk of the agreement. It is also worth noting that there are a number of alternative ways to deal with the risk of an agreement. States could, for example, build in escape clauses triggered by poor economic performance or other national crises, or other contingencies that concern the parties. This strategy reduces the exposure to risk without reducing the agreement's effectiveness in those states of the world in which the parties want compliance. An alternative strategy would be to weaken the substantive requirements of the agreement. This reduces the benefits of the agreement, but also reduces the level of commitment. Taken together, this may generate a higher expected return to the parties than an agreement with greater substantive provisions. Each of these strategies provides flexibility to the parties in a more nuanced and targeted way than the simple choice between hard and soft law.

⁵⁸ Some of the specific arguments about the merits of flexibility have additional problems. The claims that soft law is desirable because it makes renegotiation or termination easier seem wrong on their face, except inasmuch as they relate to matters of domestic politics, as discussed in Part II.B.1.b). When negotiating an agreement, the parties remain free to include any termination provisions and renegotiation they wish, and can do so independently of the choice of form. They could, for example, provide for termination without notice, or with short notice, or on whatever conditions they choose. Similarly, the parties can provide any amendment provisions they wish, regardless of the form of the agreement. For example, the UN Charter can be amended "by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all permanent members of the Security Council." See United Nations Charter, art.

Article, however, to isolate the arguments advanced herein. This section simply mentions three prominent explanations for soft law that turn on matters of domestic law and politics.⁵⁹

Soft law agreements differ from treaties in that they can be implemented more quickly because they do not require formal ratification;⁶⁰ and they lie more completely within the domain of the executive branch of government.⁶¹ These traits may cause soft law instruments to be used when speed is important or when legislative support is lacking or uncertain. Soft law also differs from treaties in that the treaties serve to two types of “commit [different] domestic agencies (especially legislatures) or political groups when those officials are able to make international agreements with little interference or control.”⁶² Thus, an executive that wants to enter into an agreement can use treaties to more effectively bind these other actors. Finally, the choice between a treaty and soft law is also likely to be influenced by domestic political interests. International agreements reflect, among other things, the demands of domestic groups. When interest groups pressure a government to enter into negotiations, they typically want a treaty rather than

108. To the extent that soft law agreements are easier to renegotiate, it is because of the domestic law issues discussed in II.B.1.b).

⁵⁹ This section is only intended to offer a glimpse and the domestic law arguments. It is not in any sense exhaustive or comprehensive. For more on the subject see Abbott & Snidal, *supra* note 18; Lipson, *supra* note 51.

⁶⁰ Lipson, *supra* note 51, at 500.

⁶¹ See Lipson, *supra* note 51, at 516 (“It is plain . . . that executives prefer instruments that they can control unambiguously, without legislative advice or consent.”).

⁶² See Abbott & Snidal, *supra* note 18, at 430.

soft law.⁶³ This is what we would expect from a contractual perspective – those who push for an international agreement want it to be in the most credible and binding form possible. There is, of course, no guaranty that interest groups pushing for a treaty will get what they want. Governments entering into the agreement may decide to enter into a soft law agreement for any number of reasons, including the fact that other interest groups may oppose a treaty. The point here is that the political balancing of political interests may cause a state to enter into a soft law agreement as a form of compromise between groups seeking a treaty and those seeking to avoid any commitment.

2. Explanations for the Rarity of Dispute Resolution

A small number of writers have commented on the reluctance of states to enter into dispute resolution procedures,⁶⁴ but they have failed to advance a convincing explanation for this behavior. Two main arguments have been advanced.

The first proposed explanation turns on the desire of states to retain control over disputes. When a dispute arises, the argument goes, states prefer to resolve the dispute through bargaining and diplomacy rather than third party adjudication.⁶⁵ Though this

⁶³ See Raustiala, *Form and Substance*, supra note 9, at *28 (“[M]any domestic and transnational interest groups focus on bindingness – on contractual form – as a necessary factor in international cooperation.”).

⁶⁴ See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, *4, mimeo (2001) (“States are particularly unwilling to enter into broad commitments to adjudicate future disputes, the content and contours of which cannot be foreseen.”); Arthur W. Rovine, *The National Interest and the World Court*, in 1 *The Future of the International Court of Justice* 462-73 (Leo Gross ed. 1976); J.G. Merills, *International Dispute Settlement* (3d ed. 1998).

⁶⁵ “It is one thing to show that resort to the [International Court of Justice] is preferable to armed conflict; it is quite another matter to demonstrate that judicial processes are as valuable as ordinary out-of-court bargaining and discussion.” Rovine, supra note 64, at 314. “[T]here is a more fundamental reluctance to submit to third-party adjudication that rests on the perceived advantages to States in some circumstances

argument may explain why states do not refer cases to third party tribunals after disputes arise, it does not shed light on the question of why dispute resolution is not included in agreements when they are signed.⁶⁶ The presence of dispute resolution, even if it is mandatory, does not prevent negotiation between the parties. Until one of the parties turns to the dispute resolution procedures and, indeed, even after the formal mechanism of dispute settlement has been put into motion, the parties are able to discuss the dispute and enter into any settlement they choose. The idea that dispute settlement procedures somehow prevent diplomatic negotiation is simply wrong. It may affect the outcome of the negotiation because it changes the consequences of a refusal to settle, but it does not prevent the negotiation itself.

A second explanation sometimes advanced for the refusal to adopt dispute resolution clauses relies on the notion that states are afraid of losing a case.⁶⁷ Without a larger theory of state behavior it is hard to know why a state's fear of losing a case would outweigh its interest in winning a case. The most likely explanation for such behavior is risk aversion on the part of states.⁶⁸ Risk aversion, however, is an unsatisfactory

of retaining control over the resolution of disputes." Morris, *supra* note 64, at 17 (citing Rovine, *supra* note 64.)

⁶⁶ Because commentators attempting to explain the absence of dispute resolution provisions frequently fail to distinguish the inclusion of mandatory provisions in an agreement and the decision to submit disputes to third party arbitration at the time of the dispute, it is impossible to know if they seek to explain only the latter, in which case the arguments advanced seem right but the question asked is of less interest to this Article; or if they hope to explain the former, in which case the arguments are flawed.

⁶⁷ "Most obviously, but most fundamentally, states resist judicial settlement because they fear losing." Rovine, *supra* note 64, at 317.

⁶⁸ "[T]he more uncertain the adjudicated outcome of a particular dispute would be, the less willing a State will be to seek binding third-party adjudication." Morris, *supra* note 64, at *8; Merrills, *supra* note 64, at 293-94 ("when the result is all important, adjudication is unlikely to be used because it is simply too risky.").

explanation for the choice of soft law for at least two reasons. First, states enter into many agreements and interact with other states on a regular basis. Because each individual commitment represents only a small fraction of the total set of interactions, it is hard to see why risk aversion would be a sensible strategy. It would make more sense to maximize the expected value of each agreement and rely on the large number of agreements to diversify the total benefits to the state. Second, the uses of a dispute resolution clause may, in fact, reduce the level of risk. Such a clause increases the probability of compliance which, depending on range of future states of the world, may reduce the overall risk of the agreement.⁶⁹

3. Explanations for the Rarity of Monitoring Strategies

There is only a small literature on monitoring and review mechanisms,⁷⁰ and virtually no discussion of why these mechanisms exist in some agreements but not in others.⁷¹ There does not appear to be any available explanation of why states do not use

⁶⁹ It is also worth noting that there are a number of alternative ways to deal with the risk of an agreement. States could, for example, build in escape clauses triggered by poor economic performance or other national crises, or other contingencies that concern the parties. This strategy reduces the exposure to risk without reducing the agreement's effectiveness in those states of the world in which the parties want compliance. An alternative strategy would be to weaken the substantive requirements of the agreement. This reduces the benefits of the agreement, but also reduces the level of commitment. Taken together, this may generate a higher expected return to the parties than an agreement with greater substantive provisions. Each of these strategies provides flexibility to the parties in a more nuanced and targeted way than the simple choice between hard and soft law.

⁷⁰ See Kal Raustiala, *Police Patrols, Fire Alarms, and the Review of Treaty Commitments*, mimeo (2002); Kal Raustiala, *Review Institutions in Ten Multilateral Environmental Agreements*, in UN Environment Programme (forthcoming, 2002).

⁷¹ See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832, 1841 (2002) (pointing out that even with the single field of human rights there is considerable diversity in human rights monitoring mechanisms).

monitoring mechanisms more often to increase the credibility of their promises and why the mechanisms used are often weak.⁷²

III. SEEKING CREDIBILITY, AVOIDING COMMITMENT

A. The Joint Costs of Agreement

Because we have assumed that states are self-interested and seek to maximize some measure of domestic welfare, it follows that states seek to enter into efficient contracts.⁷³ This implies that the observed design of international agreements must, despite the fact that it is different from what analogy to contract would suggest, deliver more value to states than the available alternatives. So when states enter a soft law agreement without dispute resolution provisions or monitoring, this arrangement must maximize the joint welfare of the parties.

Imagine two states entering into an agreement and deciding what, if any, credibility enhancing design elements to put in the agreement. For the purpose of considering this decision, it is helpful to categorize the set of all possible states of the world into three categories. The first category includes those states of the world in which the parties to the agreement will comply whether or not the agreement includes design elements intended to enhance the credibility of the commitments. In this category, the parties are neither better

⁷² See, e.g., Brett Frischmann, *A Dynamic Institutional Theory of International Law*, draft, at *47 (observing the most international environmental agreements that include a monitoring system rely on self-reporting by states).

⁷³ See *supra* Part II.A.

nor worse off if they decide against the use of the design elements discussed in this Article.⁷⁴

The second category consists of all circumstances in which there would be compliance if the agreement included some credibility enhancing elements, but violation otherwise. This is the category of all cases in which the increased compliance pull of the design elements affects state behavior. Because compliance is preferred to violation, the parties are worse off in this category of cases if they fail to include design elements to increase the costs of a violation.⁷⁵

The final category of cases includes those cases in which there is a violation even if credibility enhancing design elements are used. Notice that if, as the previous few paragraphs indicate, the agreements we observe are value maximizing for states despite the frequent failure to use hard law, dispute resolution procedures, and monitoring; and if the omission of those features leaves the states no better off when there is compliance regardless of what elements are included, and if it leaves them worse off if there is compliance only when credibility enhancing elements are included, then it must be the case that states are better off without such measures in this final category. In fact, not only must the parties benefit from their choice to omit compliance enhancing design elements, these benefits must exceed, in expected value terms, the costs generated by the fact that violation will occur more often in this environment.

⁷⁴ If the use of, for example, a monitoring mechanism entails costs in implementation, then the parties would be better off in this category if they chose not to include such a mechanisms.

With this in mind, consider the payoffs received by parties when a legal commitment is violated, and consider how these payoffs differ in the domestic as compared to the inter-state context. In a typical domestic contracts case between private parties, a contractual violation gives the aggrieved party the right to damages from the violating party. These damages normally take the form of a cash transfer from one party to the other. Because the penalty is a transfer, it has no impact on the joint welfare of the parties – what is lost by one party is gained by the other. For this reason, when private parties enter into a contract the fact that damage payments may have to be paid in the future does not affect the expected benefits of the contract.⁷⁶

In the international arena, however, the consequences of a violation are quite different. When an agreement is violated the offending state is almost never penalized through money damages paid from one state to the other. In fact, violations are almost never compensated in any direct fashion.⁷⁷ One can think of examples in which a form of compensation is provided, but even these examples rarely represent the sort of zero-sum transfer that exists in the domestic case. For instance, the WTO's dispute resolution procedures have provisions for the suspension of concessions previously granted to a violating party.⁷⁸ The suspension of concessions, however, does not represent a transfer from one state to another because it is permitted only as a tool to encourage compliance

⁷⁵ For this result to hold we must assume that the international system has sub-optimal incentives to promote compliance.

⁷⁶ What is meant here is that the actual transfer of funds from one party to the other does not itself affect the value of the contract. The level of damages may, of course, affect the behavior of the parties and this, in turn, may affect the value of the agreement.

⁷⁷ See supra note 15.

with the rulings of WTO panels and appellate panels.⁷⁹ A party is permitted to impose sanctions only up to the point where the cost imposed on the violating party equals the ongoing costs of the violation, and the sanctions must stop when the violative measure is ended.⁸⁰ There is no compensation for past violations.⁸¹

That violations are not penalized through a transfer of money or other assets from the violating party to the aggrieved state, however, does not mean that they are not penalized at all. If international law matters at all, it is because there is some sanction for its violation.⁸² There are two primary ways in which a state can suffer harm as a result of its violation of international law: direct sanctions and reputational sanctions.⁸³ Direct sanctions are those that are imposed by other states against a violating state because it violated the agreement. They are explicit punishments for the violation. Direct sanctions are important to some international agreements,⁸⁴ but most agreements do not provide for explicit sanctions of this sort.⁸⁵ This leaves reputation as an important factor in the compliance decision of states.

⁷⁸ See Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) art. 22.

⁷⁹ See *id.*

⁸⁰ *Id.* at art. 22(4).

⁸¹ See *id.*

⁸² Guzman, *Compliance-Based Theory*, *supra* note 14.

⁸³ See Guzman, *Compliance Based Theory*, *supra* note 14 for a detailed discussion of why states comply with international law and the impact of both direct and reputational sanctions.

⁸⁴ For example, bilateral investment treaties provide for direct sanctions in the form of compensation to investors who have been mistreated by a host state. See Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties that Hurt Them*, 38 *Va. J. Int'l L.* 639 (1998); Robin Patricia McKinstry, *The BIT won't Bite: The American Bilateral Investment Treaty Programme*, 33 *Am. U.L. Rev.* 931 (1984); Rudolf Dolzer & Margarete Stevens, *Bilateral Investment Treaties* 97-117 (1995).

⁸⁵ See Guzman, *Cost of Credibility*, *supra* note 7, at 304 & n. 3 (observing that of 100 treaties surveyed only 20 included dispute resolution provisions, and of those, 12 were BITs).

A state that violates an international commitment signals to other states that it does not take its international promises seriously and that it is willing to ignore its obligations. When that state seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions of their own in exchange for promises from that country. If there is enough suspicion, potential partners may simply refuse to deal with the state. A violation of international commitments, then, imposes a reputational cost that is felt when future agreements are sought. A state that is known to honor its agreements even when doing so imposes costs can extract more for its promises than a state that is known to violate agreements easily. When making a promise, a state pledges its reputation as a form of collateral. A state with a better reputation has more valuable collateral and, therefore, can extract more in exchange for its own promises.

The key to explaining why states do not always enter into binding, well-specified treaties with dispute resolution provisions is recognizing that reputational losses felt by one party are not captured by the other party to the agreement. Imagine, for example, that the United States and Russia enter into an arms agreement under which both parties agree to reduce their stockpile of nuclear weapons. If Russia subsequently violates the agreement, that violation will be observed by countries around the world and Russia will suffer a reputational loss as a result. This loss is not captured by the United States.⁸⁶ When the

⁸⁶ The United States may benefit from its now more accurate estimate of Russia's willingness to comply, but this represents only a small fraction of the harm suffered by Russia whose reputation is harmed worldwide. This example is given in the context of a bilateral agreement. In the case of multilateral

agreement is violated, then, one party suffers a loss but the other party does not enjoy an offsetting gain.⁸⁷

Now, consider once again the decision of the parties when they enter into an agreement. To keep the analysis simple, suppose they must choose between a treaty and a “non-binding accord.” The difference between these instruments is that the treaty is more likely to induce compliance – this is why treaties are considered the most effective instrument of cooperation.⁸⁸ A treaty, however, is a double-edged sword. If there is a compliance benefit, it must be that a violation of the treaty imposes greater costs than a violation of the accord – that is, the reputational and direct harms associated with a violation must be greater for a treaty.

When choosing between a treaty and a soft law instrument, then, the parties face a trade-off. A treaty generates higher levels of compliance, which increases the joint payoff, but in the event of a violation it imposes a larger penalty on the violating state. This means, for example, that if there is a high probability that an agreement will be violated, it is less attractive to use the treaty form. An increase in the probability of a violation makes it more likely that a reputational sanction will be imposed which, in turn, makes the treaty form less attractive. The same reasoning applies to the use of dispute resolution clauses

agreements a similar but more complex reasoning applies. See Guzman, *Cost of Credibility*, *supra* note 7, at 319-320.

⁸⁷ Similar reputational effects may be at work in domestic law, but the presence of zero-sum damages create a separate incentive to enter into contracts with efficient terms. Furthermore, the role of reputation is diminished in the domestic environment because credibility is provided by the legal system – parties do not have to rely as heavily on their reputations when they wish to enter into agreements.

⁸⁸ See Lipson, *supra* note 51, at 508 (“The effect of treaties, then, is to raise the political costs of noncompliance.”).

and monitoring requirements. Each of these design elements has the beneficial effect of increasing the probability of compliance, but does so at the cost of a lower joint payoff if there is a violation.

B. A Numerical Example

The above discussion is somewhat abstract, so the following numerical example is provided to illustrate the main argument regarding the choice of design elements. To keep the example simple, only one design element – dispute resolution procedures -- is considered. The analysis of the other design elements discussed in the paper would be identical.

Assume that there are two countries, labeled A and B. They face a prisoner's dilemma, which they are attempting to resolve through an international agreement. For concreteness, imagine that the agreement imposes obligations on each party with respect to domestic environmental policies. The question at hand is not whether or not the states should enter into the agreement, but whether the agreement should include a dispute resolution provision.⁸⁹

Assume that if both parties comply with the terms of the agreement, they each receive a payoff of 5.⁹⁰ If one or both of the parties violate the agreement, the payoffs are

⁸⁹ For simplicity we assume that the parties are choosing whether or not to include an established set of dispute resolution provisions. In reality, of course, states may be able to construct any number of different dispute resolution mechanisms. The example captures this wider set of options if one imagines the states choosing between any pair of approaches to the question of dispute resolution.

⁹⁰ The game as presented should be thought of as the present discounted value of a repeated game rather than a one shot game. This is important because the game must be repeated for cooperation to emerge as a possibility in the absence of an enforcement mechanism.

affected by the presence or absence of a dispute resolution clause. If there is no such clause and both parties violate their commitments, they each earn zero. If one party violates the agreement while the other complies, the complying party faces a loss of 5 while the party that violates the agreement receives a positive payoff. These payoffs reflect the fact that the violating party avoids the costs of domestic changes but may still get the benefit of compliance by its counter-party. The complying party, on the other hand, makes costly changes to its domestic regime but does not get the expected benefit of compliance by the other state.

This size of the payoff received by the breaching party is a random variable, labeled N . The range of possible values of N are such that the agreement will be breached in some cases, but not in others.⁹¹ In the absence of a dispute resolution clause, then, the game can be represented as follows:

		Country B	
		Cooperate	Defect
Country A	Cooperate	(5, 5)	(-5, N)
	Defect	(N , -5)	(0, 0)

If the states include a dispute resolution clause, a breached against party can bring the breaching party before a neutral tribunal which has the authority to declare that the

⁹¹ This variable could represent any number of factors exogenous to the discussion, including economic shocks, domestic political developments, international events, and so on.

state is in violation of the agreement.⁹² The presence of this dispute resolution procedure increases the likelihood of compliance because a state that loses before the tribunal suffers a reputational loss.⁹³ The loss comes about because the state that loses before a tribunal finds it more difficult to establish international agreements in later periods with either its counter party in this agreement or third parties.⁹⁴ Assume that this reputational loss imposes a cost of 2 on a state.

If the parties adopt the dispute resolution clause described above, the game can be represented as follows:

		Country B	
		Cooperate	Defect
Country A	Cooperate	(5, 5)	(-5, N-2)
	Defect	(N-2, -5)	(-2, -2)

Finally, assume that the probability of compliance in the absence of a dispute resolution procedure is 50%, and the addition of such a procedure increases that probability to 60%. Now consider whether the states prefer to include a dispute resolution mechanism or not when they negotiate the agreement. If they conclude the agreement without

⁹² One could imagine stronger dispute resolution provisions, for example the tribunal could be authorized to impose some form of sanction. All that matters for present purposes is that the dispute resolution provisions work to increase the costs of a violation.

⁹³ See Guzman, Compliance-Based Theory, *supra* note 14.

⁹⁴ Without a dispute resolution clause, it is assumed for simplicity that there is no reputational loss in the event of a violation. It is straightforward to incorporate a positive reputational loss even in the absence of a dispute resolution clause.

providing for dispute resolution, they each expect to earn 5 with 50% probability (i.e., if there is compliance), generating an expected payoff of 2.5.⁹⁵

If instead they provide for dispute resolution, they expect to earn 5 with 60% probability and lose 2 with 40% probability, yielding an expected payoff of 2.2 ($3 - 0.8$). Thus, even taking into account the increased compliance generated by the dispute resolution clause, the parties are better off without such a clause. This is so because when there is a violation, a net cost is imposed on the parties (meaning that one suffers a loss that is not offset by the other's gain). In this example, the benefits of increased compliance are outweighed by that loss.

With a small change in the assumptions, one can generate the opposite result. Assume that everything remains the same except the dispute resolution clause increases the probability of compliance to 70% rather than 60% as previously assumed. In that case, the parties still expect to receive 2.5 if they do not have dispute resolution, but if they provide for dispute resolution, they can expect to enjoy a gain of 5 with 70% probability and a loss of 2 with 30% probability, yielding a net expected gain of 2.9 ($5 * 0.7 - 2 * 0.3$). With this modified set of assumptions, a dispute resolution clause is beneficial to the parties.

The intuition behind this result is straightforward. A dispute settlement clause is attractive because it increases the likelihood of compliance and, therefore, the probability of the cooperative outcome. As the impact of dispute resolution on compliance increases,

⁹⁵ By assuming that the variable N is the same for both states we ensure that if one violates the

so does the use of dispute resolution clauses. On the other hand, even in the presence of a dispute resolution clause, breach will sometimes occur. Because the reputational loss is a net loss to the parties rather than a transfer between them, increasing that loss reduces the payoff to the parties in those states of the world in which there is a breach.

When negotiating an agreement, therefore, the parties must take into account both the increase in compliance that is generated by the dispute resolution clause and the resulting joint loss that occurs when there is a breach. These offsetting effects will lead them to include dispute resolution provisions in some agreements but not in others.

C. Public Choice

The above discussion has proceeded on the assumption that injuries to one state that take the form of reputational losses or direct sanctions represent a net loss to the parties – that is, the harm to the violating party is not offset by a gain to the other party. There is one context in which that assumption may be problematic, and that is if one assumes a particular form of political economy is at work in the sanctioning state.

When direct sanctions are applied, it is at least conceivable that the political leaders applying those sanctions may benefit. Thus, for example, if a government imposes sanctions in retaliation for what is perceived to be a violation of the trade obligations of another state, this may enhance the political support of the government, despite the fact that it harms the citizens of the sanctioning state.

agreement the other one does as well. This assumption is not necessary for the results.

To the extent that sanctions generate benefits to the sanctioning party, their influence resembles that of transfers. That is, the loss to one party is at least partially offset by benefits to the other party. Where this is true, the parties have a reduced incentive to avoid the use of sanctions because they are able to get the compliance benefits of the sanctions with a lower cost in the event of a violation. If this is the case, the design elements of interest in this Article – hard law, dispute settlement mechanisms, and monitoring -- are less costly to include in the agreement.

D. The Interaction of Design Elements and Substantive Provisions

The design elements discussed in this Article are procedural or structural aspects of agreements. The Article intentionally limits the discussion to a small number of procedural issues because their use can be observed directly in an agreement, and because the observed practice of states seems especially surprising. The discussion is also limited to procedural issues because the practice of states in this area is more surprising at first glance. It is hard to say, a priori, what substantive obligations one would expect to find in an agreement. The substantive terms are the product of bargaining between the states and the positions of the states are the product of a complex domestic political dynamic. On the procedural side, however, the case for an efficient design is much more compelling, as previously discussed.⁹⁶

⁹⁶ See supra Part II.A.

The same theory, however, could be applied to any aspect of an agreement that increases credibility but impose a net loss on the parties in the event of a violation. This includes both other procedural provisions of agreements and substantive provisions.

Like the elements already discussed, the substance of international agreements varies widely from one agreement to another. By substance I refer not to the particular topic or subject matter of an agreement, but rather to what is sometimes referred to as “depth.”⁹⁷ Depth can be defined as “the extent to which [an agreement] requires states to depart from what they would have done in its absence.”⁹⁸ The notion of depth is intended to capture the fact that some agreements place a considerable burden on states and demand significant changes in behavior, while other agreements do little more than “codify” what states are already doing.⁹⁹

There are obviously many other ways in which the substance of an agreement may vary, but this Article restricts itself to a discussion of depth. It might be argued that the notion of depth is itself unsatisfactory because it requires speculation about a counterfactual set of actions, because it is impossible to quantify, and because a single agreement may demand large changes in some states and virtually no changes in others.¹⁰⁰ Without resisting any of these critiques, the concept is useful for our purposes, which are limited to a

⁹⁷ See George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News about Compliance Good News About Cooperation?*, 50 *Int'l Org.* 379, 383 (1996); Raustiala, *Form and Substance*, supra note 9, at *7.

⁹⁸ See Downs, Rocke, and Barsoom, supra note 98, at 383.

⁹⁹ See Raustiala, *Form and Substance*, supra note 9, at *7.

¹⁰⁰ For example, the TRIPs Agreement required substantial changes to the law of intellectual property in many states, including most developing countries, but was largely consistent with the existing regimes in the United States and Europe.

discussion of the fact that the depth of an agreement between states may diverge from what the states would choose if they were able to commit themselves more credibly.¹⁰¹

As with the other design elements, states are free to adopt whatever substantive provisions they wish. Under a traditional model of contracting, one would expect them to select terms that maximize the value of the agreement. Such terms generate an efficient contract when combined with efficient penalties in the event of default. Unlike the design elements discussed in the Article, however, there is no simple way to observe the relationship between the chosen terms of an agreement and the efficient terms.

The theory advanced in this Article, however, suggests that states may select substantive terms that are systematically weaker than those that would maximize the benefits to the states if an efficient system of damages were available. To see why this is so, consider a simple example. Suppose that the United States and India wish to enter into an agreement that will facilitate the practice of using Indian residents as telephone support for the U.S.-based customers of American firms. The American government wants to enter

¹⁰¹ A clear example of how the theory presented here might impact the substance of an agreement is the common use of escape clauses. An escape clause allows the parties to an agreement to suspend their compliance if certain conditions are satisfied. For example, article XIX of the GATT and the WTO's Agreement on Safeguards allow WTO members to suspend their obligation under certain circumstances. Like the design elements discussed throughout this Article, the use of escape clauses is influenced by two offsetting effects. First, it reduces the level of commitment of the states in a manner analogous to how the omission of a dispute resolution clause reduces the incentive to comply with the terms of the agreement. Second, because the escape clause allows a state to suspend its commitment, it reduces the sanction for doing so in a manner analogous to the way in which the omission of a dispute resolution clause reduces the sanction for a violation. When drafting an agreement, then, states must consider both the reduced likelihood of compliance with the (other) terms of the agreement and the reduction in total loss if there is such non-compliance. There are, of course, other explanations for the use of escape clauses and the explanation offered here is intended to be complementary to these earlier theories. See Alan O. Sykes, *Protectionism as a "Safeguard,"* 58 *Chi. L. Rev.* 255 (1991); B. Peter Rosendorff & Helen Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape,* 55 *Int'l Org.* 829 (2001).

into the agreement to assist its firms in the computer, airline, and other industries that rely heavily on telephones for customer service. India is interested in the agreement for the obvious reason that it will provide employment to its residents. Imagine that the states agree on the preferred substantive terms of the agreement, which deal with the provision of training programs by India, access for U.S. companies to recruitment opportunities, a commitment by the United States to underwrite some of those programs and a promise to support and permit American firms to use Indian phone operators.

Having established the value-maximizing terms, the states could incorporate them into the agreement, as would be expected if they were private parties negotiating a contract. The states, however, are concerned about the possibility of future violations. In particular, the United States is concerned that the agreement may be criticized by domestic constituencies that would prefer that the jobs be in the United States.

If this were a private contract, the parties would either proceed with the contract and include the value maximizing terms or abandon the contract altogether.¹⁰² If they proceeded with the contract, they would rely on an efficient sanctions regime to ensure that the United States would breach if and only if it were efficient to do so. In the event of such a breach, India would receive damages in compensation.

Because India and the United States are entering into an international agreement, however, and because we assume that the agreement cannot provide for money damages,¹⁰³

¹⁰² They would proceed with the contract if its total expected value, taking into account the costs and benefits incurred by both parties and the risk of a breach, were positive.

¹⁰³ See *supra* note 15.

they do not behave like private parties. In particular, they must concern themselves with the fact that if the United States violates its commitment under the agreement, the relevant sanction will not be a transfer from the U.S. to India. To keep the example simple, assume that the only sanction will be a reputational one, and that the harm to the U.S. from that sanction would be more than de minimus. To the other costs and benefits of the agreement, then, the parties must add the cost borne by the United States in the event that it violates the agreement. This reduces the total expected value of the agreement. If the parties choose a weaker set of substantive commitments – perhaps eliminating the American funding of some training programs -- it is less likely that the United States will violate its commitment, and less likely that it will suffer the reputational harm. In drafting the agreement, then, the parties must balance a desire to include the efficient terms against a desire to avoid the consequences of a violation. This may lead them to enter into an agreement with weaker substantive terms.

The intuition behind this example is easiest to see with some concrete numbers. Suppose that the efficient terms yield a total benefit to the countries of 100, but if the United States violates its commitment, this imposes an additional loss of 30.¹⁰⁴ Furthermore, the parties believe that there is a 50% chance that the U.S. will violate its commitment. Entering into the agreement, then, yields an expected benefit of 85. Now suppose that the parties could enter into a watered-down version of the agreement that would yield 95 in benefits (ignoring the reputational costs of violation), but reduce the risk

of a U.S. violation to 10%. This yields an expected benefit of 92. The states, therefore, will select the weaker substantive terms because they yield a higher total expected payoff, despite the fact that they are not the efficient terms.¹⁰⁵

IV. IMPLICATIONS

The main purpose of this Article is to explain why states are reluctant to use credibility enhancing tools such as hard law, dispute resolution mechanisms, and monitoring. The explanation provided, however, has implications for a range of questions related to international agreements. This section highlights a few of these implications. It is not intended as either an exhaustive cataloging of implications or a complete discussion of the ones mentioned. Rather, it simply seeks to identify some of the consequences of the theoretical argument made in the Article.

A. The Interpretation of International Agreements

Each of the design elements discussed offers negotiators a tool to modulate the level of credibility and probability of compliance, but increased compliance comes at the cost of a loss to the parties in the event of a violation. Because the design elements all feature this trade-off they are, to some degree, substitutes. For example, the decision to include a dispute resolution mechanism may generate compliance incentives that resemble those of a

¹⁰⁴ Remember that we only care about the joint costs and benefits. The parties seek to maximize the joint value of the agreement and then distribute that value between them as they wish.

¹⁰⁵ None of this is to suggest that the theory advanced herein is the only, or even the dominant, determinant of the substantive content of an agreement. The more modest point is that the theory impacts on the substance of international agreements.

monitoring system, and one may be chosen over the other because of their respective impacts if one party violates the agreement.

Recognizing the interdependence of the various elements of treaty design sheds light on how one should interpret and evaluate international agreements. The simple lesson for drawing normative judgments about agreements is that one cannot evaluate a treaty by looking at a single design element. A human rights treaty, for example, cannot be judged a success simply because it was signed. Rather, it is necessary to look at the substantive provisions of the agreement along with its form and enforcement mechanisms, if any.¹⁰⁶

The same is true when interpreting an agreement. If interpretation is to be based on the intent of the parties, it must take into account all aspects of design. To see this, consider the example of the International Labor Organization (ILO) Declaration on Fundamental Labor Rights, which imposes a set of international labor standards.¹⁰⁷ The Fundamental Declaration is binding on all member states of the ILO, and has become a focal point in the discussion of international labor rights. It is particularly important in the debate about the proper relationship between trade and labor. Among the arguments in

¹⁰⁶ Even looking at all of these elements if, in fact, insufficient to evaluate the success of a treaty because one should really look at how the treaty affects behavior in order to judge its merits.

¹⁰⁷ These standards include:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, art. 2, 86th Session, Geneva, June 1998 [hereinafter ILO Declaration].

this debate is the claim that trade sanctions are necessary to enforce the rights laid out in the Fundamental Declaration because no other effective mechanism exists.

The claim that no other effective enforcement strategy exists is quite possibly correct. The ILO itself provides no enforcement mechanism beyond some monitoring procedures,¹⁰⁸ and unilateral strategies of enforcement such as boycotts, military intervention, diplomatic protests, social labeling, and so on, either lack credibility or good

¹⁰⁸ See Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. Int'l & Comp. L. Rev. 213, 222 (2002).

evidence that they influence state behavior.¹⁰⁹ For present purposes, then, assume that trade is the only available tool and that threats of trade sanctions are, in fact, effective.¹¹⁰

The question for trade and labor, then, is whether states should be permitted to impose trade sanctions on states that violate the ILO Declaration.¹¹¹ This is, of course, a

¹⁰⁹ See Trebilcock, *Trade Policy and Labour Standards*, supra note 3, at *16-18; Janelle Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labeling and Investor Initiatives*, 138 INT'L LABOR REV. 99 (1999); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentralized State: A Labour Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUDIES 401 (2001); See Howse, *Workers' Rights*, supra note 12, 159-161. Compensation-based strategies involve the making of some form of payment to states that achieve a positive change in their practices. They are criticized both because they involve the dubious practice of compensating states that have tolerated the worst labor practices, and because they generate perverse incentives. Compensation for improvement that is not accompanied by a scheme for penalizing a deterioration in those same standards generates an incentive for states to lower their standards so they can subsequently be improved and the state can capture the payment. Howard F. Chang, *Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

The effectiveness of social labeling – the placing of a label on products that are produced by workers able to exercise their core labor rights – is also subject to significant limitations. The primary weakness of labeling is the voluntary nature of compliance and the lack of enforcement mechanisms. See Heidi S. Bloomfield, “Sweating” the International Garment Industry: A Critique of the Presidential Task Force’s Workplace Codes of Conduct and Monitoring System, 22 HASTINGS INT’L AND COMP. L. REV. 567 (1999) (discussing more generally problems of enforcement and monitoring in voluntary codes of conduct for multilateral corporations); Alicia Morris Groos, *International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34 TEX. INT’L L.J. 379, 408 (“WTO rules mandate that goods cannot be subject to statutory labeling requirements or differentiated on the basis of how they are produced”). To the extent that enforcement stems from consumer preferences, social labeling also suffers from a collective action problem. The individual consumer has an incentive to purchase lower priced goods produced under poor labor conditions, relying on other consumers to bear the cost of the higher priced goods produced under core labor standards. See Trebilcock, *Trade Policy and Labour Standards*, supra note 3; Katherina Van Wezel, *To the Yukon and Beyond: Local Laborers in a Global Market*, 3 J. SMALL & EMERG. BUS. L. 93 (1999); Anjali Garg, *Child Labor Social Clause: Analysis and Proposal for Action*, 31 N.Y.U. J. Int’l L. & Pol. 473, 504-05.

¹¹⁰ There is actually serious debate about whether trade sanctions are an effective tool to influence labor policies. The most important empirical evidence on the question is in GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* (2d ed. 1990). This work is at times cited in support of claims that sanctions often fail, see, e.g., Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective*, * 16-17 (mimeo 2002); Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERG. BUS. L. 131, 158-162 (1999).

¹¹¹ It is assumed that the WTO does not already provide an exception of this sort. This is the dominant view, but it is challenged by some scholars. See Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy* (February 20, 2002), <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>; Howse, *Protection of Workers’ Rights*, supra note 111.

complex question and a full discussion is beyond the scope of this Article.¹¹² For present purposes it is only necessary to consider if the absence of effective enforcement other than trade advances the case for such trade sanctions. The lesson from this Article is that, far from supporting a claim for a trade exception, the ILO's failure to adopt enforcement procedures or other sanctions should be viewed as evidence that no such exception should be created. States did not simply agree to the substantive provisions of the Fundamental Declaration, they consented to an agreement that included a particular set of enforcement measures. The agreement does not feature dispute resolution procedures and sanctions.¹¹³ This Article emphasizes that states enter into agreements, including the enforcement mechanisms, intentionally and attempt to design those agreements in such a way as to maximize their value. If enforcement mechanisms were omitted it should be presumed that this was done because the states did not feel the compliance benefits of those mechanisms were large enough to justify the costs that would be imposed in the event of a violation.

And there is certainly no reason to infer from the existence of the Fundamental Declaration that states consented to comply with its provisions in any environment except

¹¹² I have expressed my views on the subject elsewhere. See Andrew T. Guzman, Trade, Labor, Legitimacy, forthcoming, *Calif. L. Rev.* (2003). The key articles in the trade and labor include Alan O. Sykes, International Trade and Human rights: An Economic Perspective, *World Trade Forum* 2001; Michael J. Trebilcock, Trade Policy and Labour Standards, Michael J. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments and Institutions*, University of Toronto Law and Economics Working Paper No. 02-01 (2002); Steve Charnovitz, The Influence of International Labor Standards on the World Trading System: An Historical Overview, 126 *INT'L LABOR REV.* 565 (1987); Robert Howse & Makau Mutua, Protecting Human Rights in a Global Economy (February 20, 2002), <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>; Virginia Leary, Workers' Rights and International Trade: The Social Clause, in *FAIR TRADE AND HARMONIZATION*, (Jagdish Bhagwati and Robert Hudec, eds., 1996); Brian Langille, Eight Ways to Think About International Labour Standards, 31 *J. World Trade* 27 (1997); Robert Howse, The World Trade Organization and the Protection of Workers' Rights, 3 *J. SMALL & EMERG. BUS. L.* 131 (1999).

the one established by the ILO. In particular, there is no evidence that they would have consented to the substantive provisions if they faced trade sanctions in the event of a violation or if their behavior was subject to dispute resolution procedures.

B. Damages and International Law

The basic puzzle of why states do not increase the credibility of their commitments has been explained in this Article by the fact that in the event of a violation the parties to an agreement suffer a net loss rather than simply a transfer from one party to the other. As a result of this system of sanctions, states may fail to enter into value maximizing agreements. In other words, the absence of a system of transfers between states makes international cooperation less valuable than it otherwise could be.¹¹⁴

If it were possible to eliminate the loss to the parties that results from a violation and, instead, have damages take the form of a transfer from one party to the other, more efficient forms of cooperation would be possible. In fact, even if reputational and direct sanctions could not be eliminated, the presence of transfers would reduce their importance by increasing the credibility of and compliance with international agreements without adding to the disincentive that the former sanctions generate.

¹¹³ See Fundamental Declaration.

¹¹⁴ This is part of the reason why a credible threat to withdraw one's own compliance can serve as an effective mechanism to induce compliance. When compliance is costly for the complying state but yields benefits for a counter-party, the withdrawal of compliance in response to a violation is a form of transfer – the sanctioning state is better off because it no longer bears the costs of compliance, and the other state is worse off because it no longer receives the benefits. Though this is more indirect than a cash transfer, and there is no guarantee that the impact will be zero-sum, it can often enhance credibility without causing a net loss in the event of a violation. This may also explain why states normally accept this credibility-enhancing device --

The ideal form of damages would, of course, be money damages. These represent pure transfers from one state to the other, can be made in any amount, and payment is easily verifiable. Despite these advantages, states appear reluctant to call for the use of money damages in their agreements. I have no explanation for why they are so resistant, and am aware of no compelling theory on the subject, but the observed resistance to money damages cannot be ignored.¹¹⁵

Despite this resistance, however, there are at least some instances where states have accepted the use of money damages, suggesting that they might be encouraged to do so more often. Bilateral investment treaties (BITs), for example, typically provide for the payment of money damages from states to private parties whose investment has been expropriated.¹¹⁶ Though the recipients here are private parties, the treaties create an obligation between states. Given the benefits of money damages, states should consider adopting at least some form of monetary sanction for other violations. The easiest to imagine are those with relatively direct financial effects such as injury resulting from violations of trade obligations. In these cases the use of money damages may be palatable because the harm is closely tied to economic harms.

which they could opt-out of through the language of their agreement -- when they are less likely to include, for example, dispute resolution provisions.

¹¹⁵ See Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 *Int'l Aff.* 15 (2001).

¹¹⁶ Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *VA. J. INT'L L.* 639 (1997); Kenneth J. Vandavelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 *MICH. J. INT'L L.* 621 (1993).

C. The Role of Soft Law

This Article advances a new explanation for why states choose soft law when they could choose to make their commitments through treaties. The merit of a treaty is that it provides a relatively high level of commitment – allowing a state to rely on the promises made by its treaty partner. In other words, the commitment is more credible. The credibility provided by a treaty, however, comes at a price in the form of a higher cost associated with breach. When deciding between a treaty and other forms of commitment, then, the parties take that loss into account.

There is considerable confusion and ambiguity in how international law views soft law. This is, in part, due to the fact that commentators have tried to reconcile soft law with classical definitions of international law, which do not mention this form of agreement. This doctrinal approach is awkward because it implies that soft law is not law at all, leaving little room for discussion among legal scholars.

A more promising approach starts with the question of how international agreements of all kind affect the incentives and behavior of states. In this sense, we begin with an eye toward compliance issues.¹¹⁷ Although one can find discussions of compliance in both the legal and international relations literature,¹¹⁸ I am unaware of any well developed attempt to address soft law in this way.¹¹⁹

¹¹⁷ I have written on compliance issues in the past. See Andrew T. Guzman, *International Law: A Compliance Based Theory*, 90 Cal. L. Rev. 1823 (2002).

¹¹⁸ See Louis Henkin, *How Nations Behave* 46-48 (1979); Abram Chayes & Antonia Chayes, *On Compliance*, 47 Int'l Org. 175, 176 (1993); Thomas M. Franck, *Fairness in International Law and Institutions* (1995); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997);

The discussion in this Article suggests that soft law is simply another form of legal promise. Like a decision to exclude dispute resolution provisions, soft law represents a choice by the parties to enter into a weaker form of commitment. Just as the absence of dispute resolution does not imply that an agreement is not “law,” the decision to use soft law should not exclude the agreement from study or somehow render it less relevant.

Rather than focus on doctrinal questions of what is soft or hard law, scholars should recognize that states design their agreements to lie at a particular point on a spectrum of credibility and effectiveness. In doing so, they are trading off the credibility of their commitments against the cost of a violation. Ultimately, then, the study of international law should treat soft law in much the same way it should treat treaties – as a device that promotes international cooperation. Along the way the differences between treaties and soft law – for example, the significant differences in their domestic effect -- should be taken into account, but both should be considered legal commitments with the potential to affect behavior.

In addition, soft law should not be viewed as a “second-best” outcome.¹²⁰ The fact that states have reached an agreement does not imply that it in some sense *should* be a

Kal Raustiala & Anne-Marie Slaughter, International Law, International Relations and Compliance, in *The Handbook of International Relations* (2002); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 25 (1984).

¹¹⁹ See Steven R. Ratner, *Does International Law Matter In Preventing Ethnic Conflict?*, 32 *N.Y.U.J. Int'l L. & Pol.* 591, 654 (2000). But see *International Compliance with Nonbinding Accords* (Edith Brown Weiss ed., 1997); *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Dinah Shelton, ed. 2000) (analyzing “soft law” in environment and natural resources, trade and finance, human rights, and multilateral arms control).

¹²⁰ See Oscar Schacter, *The Twilight Existence of Nonbinding International Agreements*, 71 *Am. J. Int'l L.* (1977) (“nonbonding agreements may be attainable when binding treaties are not”).

treaty. States may prefer to enter into soft law agreements as a way of maximizing their joint benefits, and there is no a priori reason why this should be viewed as a less desirable form of cooperation.

D. Designing Agreements

This Article explains why states enter into agreements that contain quite limited enforcement mechanisms. This need not mean that they are disingenuous about the commitment being made. It may instead mean that they are reluctant to accept the joint loss that would be triggered by a violation. This point has implications for the way in which we view agreements and the ways in which agreements should be structured. The importance of using damages or some other sort of transfer has already been discussed, and as pointed out there, a system of damages would go a long way toward overcoming state resistance to more credible or binding commitments.¹²¹

If damages are not available, however, other strategies must be considered. One lesson from this Article is that states should not be discouraged from entering into agreements that appear weak and fail to make use of available design elements to increase the incentives toward compliance. It is possible that such agreements represent the highest value form of cooperation for the states involved, and it should therefore be pursued.¹²²

¹²¹ See *supra* Part IV.B.

¹²² The major caveat to this conclusion relates to the public choice issues that are always present in international relations. Depending on one's public choice assumptions, it may be unwise to give negotiators the ability to enter into agreements that do not include rigorous obligations and enforcement strategies. For example, if one believes that those who negotiate agreements have a strong incentive to achieve some concrete agreement, even when the substantive impact of the agreement is virtually nil, then it may be desirable to impose discipline on negotiators by forcing them to choose between truly effective agreements

E. Predictions of the Theory

[To come – this section will discuss when one would expect more rather than less use of credibility enhancing devices such as those discussed in the paper. Among the results (some of which need explanation) are the predictions that such devices are more likely to be present in (i) multilateral rather than bilateral agreements; (ii) agreements in which compliance is a low stakes issue rather than a high-stakes issue; (iii) dispute resolution is more accurate (subject to some qualifications); and (iv) agreements for which the probability of a violation is relatively low.]

V. CONCLUSION

International agreements are at the foundation of international cooperation and international law. Yet we have no more than a crude understanding of why states structure agreements as they do. This Article explains why states are not more enthusiastic about including credibility enhancing devices in their agreements. The paper has explicitly addressed the choice of soft versus hard law, the inclusion or exclusion of dispute settlement, and the provision or omission of monitoring mechanisms, but the same reasoning could apply to any credibility enhancing strategy that improves the probability of compliance but also increases the joint loss in the event of a violation.

and no agreement at all. See, e.g., Paul B. Stephan, *The Political Economy of Choice of Law*, 90 *Geo. L.J.* 957, 961 (2002) (“[T]he people who negotiate international agreements, as well as the people who serve the institutions that promote these negotiations, have powerful incentives to achieve some kind of agreement regardless of substantive outcome.”).

The insight of this Article represents only a small piece of the larger set of questions such as: why do states behave the way they do; how do international agreements affect behavior; when will international law succeed and when will it fail to constrain states; and what institutional strategies might be used to increase the power of international law? Though much more work remains to be done on all of these questions, this Article has lessons for the way in which we view agreements. It is clear, for example, that the commitments made by a state in an international agreement should be viewed as a single undertaking that includes not only the substantive commitments, but also the procedural elements of the agreement. It is also apparent that mechanisms to allow for zero-sum sanctions in the event of a violation should be investigated and pursued. This Article mentions the advantages of money damages, but other forms of sanction may exist that would increase the credibility of commitments without reducing the total benefits of the agreement in the event of a violation. More generally, further research is called for on a wide range of questions that relate to international agreements and the ways in which states make commitments. These are fundamental questions for international law whose answers will greatly increase our understanding of the discipline.