Reliance on formal treaties has inhibited progress in arms control.
But contract by convention could create
greater trust and real arms reductions.

Contracts, promises and arms control

This problem with contracts is general and pervasive. Arthur Rosett notes: “The law of contract performance has been recognized for centuries as the most problematic aspect of the law of agreements.” Questions of performance are subject to a basic indeterminacy. Hence, “Any effort to make rules to encompass the vagaries of agreement is inevitably unsuccessful.”

A contract can increase the cost of cheating, especially if the cheated party is willing to incur heavy costs in order to inflict costs; but it can seldom do more than this. As a result, business firms often prefer to rely on reputation and to avoid explicit contracts, especially when dealing with other business firms. But to a business firm, especially to a modern corporation, reputation is a matter of profits, not of morals.

SHOULD WE TREAT arms control with the Soviet Union as business firms often treat one another, or should we strive for explicit treaties? I think that there are some cases in which we should rely on informal devices, while in others we should seek formal treaties. In particular, we should resort to informal devices for achieving actual reductions in arms and should resort to formal treaties to ratify desirable aspects of the status quo. Of course, ratifying the status quo is often desirable as a barrier to expansion and technological innovation. To examine the differing values of informal devices and treaties we should consider the strategic function of contracts.

Contracting occurs when one party must of necessity perform some action after the other party has already performed. The whole concern of the contract is with some future action, and we could avoid the complication of contracting if only we could bring that future action into the present. Thus our exchange could take place on the spot without any further dealings between us. We would then face the sort of idealized discrete exchange that economists love best. The purpose of a contract is to bring as much of the relevant future into the present as possible. As Ian Macneil writes, “The ultimate goal of parties to a discrete transaction is to bring all the future relating to it into the present, or, to use a rare word, to presentiate. They can then deal with the future as if it were in the present.”

Informal devices, on the other hand, take advantage of prospective future actions by one party to motivate actions in the present or nearer future by the other party. Those future actions of the first party will in turn be motivated by prospective actions in the further future by the other party, and so on. So long as the relationship between the two parties is not likely to end soon, this gradual process

by Russell Hardin

TREATIES ARE ROUGHLY analogous to contracts and mutual promises. Like contracts, they are formal; like promises, they are backed by no higher state authority. We enter into promises, contracts and treaties because each party expects to gain as a result. That is what exchange is all about and that is also what arms control is all about. We give up some weapon system if the Soviet Union reciprocates and both sides do so because both think they are better off as a result.

One way to handle an ordinary exchange is to formalize the deal in a very explicit contract, just as the United States and the Soviet Union might formalize an agreement in a very explicit treaty. In many of the contexts in which you and I might use a promise to secure an exchange over time, we might also use a contract, especially if the exchange is a major one and we do not have particularly strong expectations of future involvement with each other. But contracts are notoriously poor instruments for many purposes. In particular they tend to focus expectations on the letter of the contract. But when quality is an issue, we want expectations to focus on the spirit, not the letter, of the contract. We may easily specify that I am to mow your yard within the week, but we cannot so easily specify, in a way that would stand up in court, just what will count as an adequate job of mowing.

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of reciprocal exchange is secured at each step by the threat of ending the series of exchanges. The result is what I have called contract by convention.\footnote{3}

At least since Thucydides it has been recognized that unilateral restraint by one side, even in war, can be prudent just because it will affect the other side's actions. One well known restraint, conspicuously violated in World War I, is against killing by poison. Hugo Grotius, in *The Law of War and Peace* (1625), says, "This consent had its rise in common utility, that is, knowledge of war, which is numerous enough, may not be made too extensive."\footnote{4} Ian Clark generalizes this explanation: "The restraint becomes reciprocal and may embody itself in conventions of limitation when both parties are in a position to do massive damage to each other.\footnote{5}"

Stewart Macaulay and others claim that business firms often prefer such informal devices to formal contracts. The sanctions available under contract by convention — termination of the exchange relationship with its future exchanges — are sufficient to protect each firm's interests so that the costs of explicit contracting can be avoided. According to one of Macaulay's businessmen, "You can settle any dispute if you keep the lawyers and the accountants out of it. They just do not understand the give-and-take needed in business."\footnote{6} Their expectations of future dealings and their need to have reputations for reliable dealing mean that firms can achieve mutual savings by avoiding contracts having more than routine "boiler plate" provisions.

Market exchanges that must necessarily be spread over time can be, to use Macneil's term again, as nearly as possible presented under the law of contracts to make them appear to be merely discrete market exchanges. Alternatively, they can be left spread over time and can be governed by contract by convention, just as nonmarket exchanges are commonly governed. Indeed, to insist on a completely specified contract may guarantee performance to the letter, which is likely to be minimum performance.

An example of the use of contract by convention in nuclear arms control may help clarify how it works. On June 10, 1963, President Kennedy, in his "A Strategy of Peace" speech, announced that the United States was unilaterally ending nuclear tests in the atmosphere and would resume them only if another nation did so. At that time, test ban negotiations had long been under way with no clear prospect of success. Soviet Premier Khrushchev immediately reciprocated and went further, announcing that the Soviet Union would unilaterally cease production of strategic bombers. Numerous other unilateral steps were then taken, and in August the Limited Test Ban Treaty was signed.

In this relatively happy instance, contract by convention actually led to a treaty. But even if it had not, it might well have been effective in blocking atmospheric tests by the United States and the Soviet Union. Either the contract by convention or the treaty was possible, of course, only because both nations shared an interest in ending atmospheric tests. But it was easier to initiate the cessation of tests by the informal device of contract by convention than by treaty.

Perhaps, however, one might suppose that a treaty is a more powerful barrier to a later change of heart. And no doubt it is. But one should not underestimate how effective contract by convention can be. Indeed, the only real sanction backing treaties also backs contracts by convention. The only sanctions available for any arms control agreement are "those implicit in the general framework of international politics and in the fact of agreement itself. The strongest practical sanctions are for innocent nations to terminate the agreement, to resume the building of weapons forbidden by the agreement, and to undertake any other military and diplomatic countermeasures that might help compensate for the violation."\footnote{7} There is no small claims court for redressing failure to perform as agreed, no state police power to compel restitution for bad faith, no formal mechanisms comparable to those available to citizens who enter into contracts. That is to say, even formal treaties are necessarily enforced, if at all, only by contract by convention. This is more or less true of all treaties. But it is especially and explicitly true of arms control treaties, which, beginning with the Limited Test Ban Treaty of 1963, commonly include a very easy withdrawal clause. We comply because we want them to comply. The chief value of a treaty is to make clear what is expected of all parties.

Quite apart from its value in enforcing treaties, contract by convention has governed a very large part of all our successes in arms control to date. Several otherwise important treaties have never been formally ratified, but their provisions are generally followed. Both sides still observe the unratified 1979 SALT II Treaty. The Threshold Test Ban Treaty of 1974 and the Peaceful Nuclear Explosions Treaty of 1976 both continue to be observed despite the lack of ratification. Even more impressively, the SALT I Interim Agreement, which formally lapsed in 1977, continues to be honored. It and the SALT II agreement have been major obstacles to deploying the MX missile because many American opponents of the MX think it irrational to give up the gains of SALT I and SALT II.

Clearly, informal contract by convention can work very well, but it has not been deliberately tried often enough because of a myopic concern to get hard treaties. Although most lawyers think that the term "international law" is an oxymoron, they almost universally insist on treaties. Like Macaulay's businessmen, we might be better off if we kept the lawyers out of it—a policy that Soviet leaders evidently would welcome.

Ironically, Americans want to have both arms control by hard treaties only and the prerogative of judging the Soviet Union by the spirit of cooperative effort. The Soviet intervention in Afghanistan was utterly unrelated to the terms of SALT II, but that intervention finally wrecked ratification of the Treaty.

At about the time SALT II was dying, President Brezhnev might have initiated a new round of mutual reductions with
his 1979 offer to withdraw some forces from Eastern Europe if new Pershing missiles were not installed in Western Europe. But President Carter's instant dismissal of the proposal must have killed any hope of contract-by-convention arms reductions on that occasion. The episode, however, is instructive. Brezhnev handled his own part badly. He should have acted sooner, before arrangements on Pershing had gone so far. And he should have declared unilateral action. Instead, his proposal was for a deal, a deal that Americans would have insisted on negotiating rather than merely consummating. Indeed, negotiation would have been necessary to determine reciprocal numbers. But negotiations would necessarily have involved the Europeans and the U.S. Senate. If Brezhnev had simply acted unilaterally, he would have forced Carter to save face by following suit in some relevant way. Like Khrushchev in 1963, Carter could easily have met Brezhnev's move and gone further, thus pushing Brezhnev to further action.

Even if Brezhnev handled his part badly, Carter could have salvaged the moment by taking a serious unilateral action and forcing Brezhnev to follow through. In a period when what was most desperately needed was an opening, Carter offered only a closing. Why? Zbigniew Brzezinski, Carter's national security advisor, asserts that this was because Brezhnev's opening "was clearly a propaganda move. . . . It was the beginning of a campaign to mobilize public opinion against new NATO weapons." 8

The arms control process is frequently said to have failed, and there clearly is some truth in that claim. In the decade after the 1963 Limited Test Ban Treaty, many other treaties were negotiated and most were ratified. But in the subsequent decade few have been negotiated, and no nuclear weapons treaty has been ratified. The principal reason for this dismal trend is that the whole process of sequential treaty-making has become subject to strategic manipulation and is now overwhelmingly adversarial rather than cooperative. Indeed, many of our most aggressive escalations in weapons systems are promoted as so-called "bargaining chips" for future negotiations. They are also, one reasonably suspects, hastened along in order to get them in place before they can be negotiated away.

The cruise missile is one particularly disheartening example: With no clear idea of its military value, American strategists, with strong support from Henry Kissinger, promoted it as a useful bargaining chip for the next round of negotiations. 9 Brzezinski later proposed that 572 Pershing and cruise missiles be placed in Europe. He proposed such a large number in the expectation "that we would probably be asked by NATO to scale down or that we would have to engage eventually in some arms control bargaining with the Soviets." While Brzezinski doubted that there was any military need for these weapons, he felt that this dubious need "had to be balanced against internal NATO politics, various numbers dictated by a variety of actors (both domestic and foreign), and the need for numbers high enough to give the U.S. bargaining leverage with the Soviets." 10 Like wage bargainers, we begin with high bids to be able to "compromise" down to what we wanted in the first place. To date, however, none of the 572 missiles has been traded away and all are scheduled for installation. Hence, we will have more new warheads in Europe than even one of the most hawkish security advisers really wanted. And we have them all in the supposed cause of cooperative arms control. This is the result of our legalistic, adversarial approach to arms control.

If one looks at what treaties have actually achieved, one must quickly suspect that Brzezinski's ploy was bound to fail. The overwhelming point of almost all treaty provisions is to ratify some aspect of the status quo. We bargain away only future, not present, weapons systems. Where there is a clearly defined, agreeable status quo, we can easily agree to a treaty. For example, once the United States and the Soviet Union had stopped atmospheric testing, a treaty was quite easy to negotiate because it only had to ratify the new status quo.

But treaties are ultimately not sufficient. If there is no overall effort through the informal devices of contract by convention, treaties will do little more than determine the direction of future arms escalations. They will not easily lead to major reductions, principally because nuclear arms are subject to extraordinary technological innovations, which cannot be sufficiently foreseen to be controlled by treaty.

A fairly typical case of business exchange illustrates the value of informal contracts. In the early days of transistors, the International Business Machines Corporation (IBM) returned a very large shipment to Texas Instruments, claiming that, in testing some of the transistors, they had found that not all were perfect. To accept the return of the shipment meant a major financial loss to Texas Instruments. But they did so, because transistors were undergoing rapid innovation and the company's market was based on its effort to be at the forefront of innovation. Hence, there could be no commonly accepted standards of quality of the sort that lie behind most contracts. Under those circumstances, Texas Instruments might have invoked the principle of caveat emptor (Let the buyer beware) with some hope of getting a court to rule against IBM. But that was precisely what Texas Instruments did not want to do. Rather, it wanted to be held accountable to standards that could only be specified later in order to secure its place in an innovative market.

The United States and the Soviet Union likewise should want to be held accountable to standards that cannot fully be articulated today. They should both want to take cooperative steps toward peace. But what constitutes a cooperative step cannot be well defined into even the near future of half a decade. It is pointless to expend years in negotiating treaties whose lifetime should be subject to quick reconsideration. And to treat all our resolutions as though they included the warning caveat emptor is destructive of the whole point of arms control.

Formal treaties, in sum, can be workable in contexts like those in which formal contracts are workable: when speci-
fication of what counts as performance is relatively easy. In the innovative realm of nuclear arms technology, the easiest things to specify are what now exists and what can be absolutely prohibited. Efforts to specify particular changes in present systems will be more complex and therefore harder to agree on. When it becomes difficult to agree at all on what counts as performance, it also becomes difficult to agree on what would be a fair exchange. Hence, the process naturally becomes adversarial and perversely legalistic. These tendencies then influence the longer-run strategic development of further arms control efforts. One-shot treaties to solve specific problems may generally work well. But a sequence of piecemeal treaties about our generally expansive military policies cannot sensibly be treated as though it were merely a collection of isolated actions. Since each of the treaties will be influenced both by likely future policies and by actual present policies, these policies naturally will be strategically and, alas, adversarially geared to prospective treaty negotiations.

**CONTRACT** by convention can overcome such problems because its incentive structure is nearly the reverse of that of the system of one-by-one treaties. It is specifically geared to take advantage of the sequencing of moves into the future. And each move, to influence the other side of some value to the other side. Moreover, any kind of move which involves nuclear weapons necessarily is a move in the contract-by-convention system. If, for example, the United States must decide whether to upgrade or replace deteriorating weapons systems in Europe, it must automatically take for granted that introducing 108 Pershing IIs and 464 cruise missiles will negate many positive moves. Hence, a much more modest renewal program, coupled with simultaneous reductions in some other system, would result in continuous technological improvements in the midst of general arms reductions.

But contract by convention is not a panacea—it cannot handle all problems. The viability of the contingent choosing of contract by convention requires clear knowledge of what one side has done so that the other side may react to it. Oddly, this means that contract by convention has a peculiar bias: Its main focus in arms control will be on reductions of extant systems since removal of weapons from the field will generally be verifiable by the other side. Deciding not to develop a new system will generally not be so easily verified. Hence, deliberate decisions not to develop new systems, which have been central to some treaty efforts, will play a much smaller role in contract by convention. On the other hand, deploying any new system could massively affect arms control by convention; there would therefore be strong incentives not to deploy, or to deploy only in conjunction with offsetting reductions. While treaties could not be expected to foresee all plausible new developments, arms control by convention could be expected to deal with developments as they occurred.

We should use contract by convention to govern the general pace, scope and direction of arms control and should rely on explicit treaties chiefly to ratify and further secure what we have achieved through contract by convention. This approach runs against recommendations by international lawyers and others that we strive to centralize arms control with open judicial proceedings to enforce agreements or that we focus reform efforts on international institutions rather than on arms issues directly.\textsuperscript{11} It recommends instead that we treat nuclear weapons as the political problem that they are. In his memoirs, Nikita Khrushchev grasped the structure of that problem. Speaking of Kennedy, he said: "He was, so to speak, both my partner and my adversary."

The sad legacy of the Carter Administration is that the roles of adversary and partner were split between the president's principal foreign policy advisors: Brzezinski and Secretary of State Cyrus Vance. Vance advised Carter that the primary focus of exchanges with Brezhnev at the 1979 Vienna summit meeting "should be to reaffirm the basic framework of U.S.-Soviet relations, which is based on substantial common interest in strategic stability." Brzezinski counters that, "While the Soviets should share a substantial common interest with us, I felt that recent Soviet behavior demonstrated that such a common interest did not yet exist, and that we should make it clear to the Soviet leaders that their actions were not consistent with the notion of a stable and increasingly cooperative relationship" (emphasis added).\textsuperscript{12} For some decades now we have surely shared a very substantial interest in the avoidance of nuclear war.

While it may be true that the chief current problem with nuclear weapons is the obstinence and short-sightedness of national leaders, it is also true that nuclear weapons technology has become an almost autonomous force for harm. To create trust in the presence of these weapons will be extremely difficult. To do so through the adversarial structure of treaty negotiation may be nearly impossible. National leaders must renew the recognition that the United States and the Soviet Union are not only adversaries—to survive they must also be partners.