

**TREATY RESERVATIONS AND THE ECONOMICS OF  
ARTICLE 21 (1) OF THE VIENNA CONVENTION**

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## Introduction

The study of the use of reservation in multi-lateral treaties reveals two striking phenomena: 1) the law of reservations, enshrined in Articles 19-21 of the Vienna Convention on the Law of Treaties<sup>3</sup>, favors the reserving state<sup>4</sup> and 2) the number of reservations attached to international treaties is relatively low in spite of that natural advantage.<sup>5</sup> This paper posits that Article 21 (1) of the Vienna Convention is a good place to search for an explanation. This provision establishes the concept that reservations are reciprocal: between a reserving state and a state that objects to the reservation, that provision of the treaty will not be in force.<sup>6</sup> Therefore if a state wants to exempt itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

Game Theory sheds light on understanding the efficacy, and limits, of Article 21 in preserving treaty obligations. After a treaty has been signed, states have an opportunity to attach reservations to it before ratification. Absent Article 21, the traditional prisoner's dilemma paradigm illustrates that a state will always act in its best interest (reserve), thereby prompting other states to

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<sup>3</sup>Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States is not a party to the Vienna Convention, however the international community generally accepts the Convention as an authoritative codification of treaty law. See Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, n. 2 (1994).

<sup>4</sup>See e.g. D.W. Grieg, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 299-300 (1994).

<sup>5</sup>John King Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice*, 74 A.J.I.L. 372 (1980).

<sup>6</sup>The precise language of the treaty is as follows: 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and  
(b) modifies these provisions to the same extent for that other party in its relations with the reserving State. Vienna Convention on the Law of Treaties, Art. 21, concluded May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331.

do the same, resulting in a sub-optimal result for both of them: a fragmented treaty with ambiguous obligations. If a state knows, however, that the mechanism of reciprocity will make its sought-after advantage automatically available to others, then, under most circumstances, the possibility for achieving post- negotiation advantages are precluded and a state will not attach reservations to the treaty.

Article 21 reciprocity only provides a solution to the Prisoner's Dilemma game when both states enter into the negotiations in symmetrical positions and it is unclear how the treaty will regulate their future relationship, as, for example, with an extradition treaty, in which each state does not know whether it will be requesting or surrendering a fugitive. The dominant strategy for states in situations in which they enter with asymmetric positions and the costs and benefits of the treaty are clear in advance, will be to attach reservations to preserve national interests as much as possible. Therefore erosion of the integrity of the treaty will be inevitable unless the parties explicitly preclude reservations as part of the treaty itself. Finally, the observation that reservations are fairly rare does not hold true for human right treaties. The equalizing mechanism of reciprocity cannot function in these instances, as such conventions are not contractual agreements among states but unilateral declarations of a state's intentions concerning the treatment of its own citizens.<sup>7</sup> In this scenario, the players have an irreconcilable clash of values and there is no unique equilibrium point. A nation will not accommodate another position at the cost of its own national interest. Furthermore, reciprocity does not offer a way out of the dilemma. If the Taliban attached a reservation to the Convention on

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<sup>7</sup>The differing nature of contractual and normative treaties was first hinted at in the Genocide Convention Advisory Opinion that set the stage for the Vienna Convention's approach to reservations. The International Court of Justice (ICJ) noted the inherent contradiction between a liberal reservations regime, which would make it easy for states to ratify the Convention, and the need to preserve a strong global condemnation of genocide. For a complete discussion, see Section XX

Elimination of All Forms of Discrimination Against Women allowing them to deny education to girls, it would hardly benefit the United States to have the same “right.” The benefits of a human rights treaty are not tangible enough to motivate a state to give up its right to attach reservations and the political cost for compromise on such issues may be too high for governments to pay. Rather, the search must continue for an effective incentive for states to adhere to their obligations to respect the human rights of their populations.

## **History of Treaty Reservations<sup>8</sup>**

### **Pre-World War I: Unanimity Rule**

Until the late nineteenth century, accession to, and ratification of, multilateral agreements was an all or nothing proposition. Such approach was justified by the fact that ratifying states had an opportunity to negotiate specific treaty provisions before signing a treaty, rendering ex post departures from such agreements prima facie suspect. As a result, if a state had a position on a particular provision which was not adopted, it had the limited choice of accepting that aspect of the treaty, in spite of national concerns, or not being a party to the entire agreement. In this way unanimity was preserved, and any treaty that did come into force had the clear backing of its constituent parties, laying a strong foundation on which compliance could be built. Although this approach first began to change in the late nineteenth century with the series of conventions, starting with the International Sanitary Convention, all of the signing parties had to accept, at least tacitly,

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<sup>8</sup>The description of the history of treaty reservations is based on the classic works outlining this development from the 19th century to the adoption of the Vienna Convention on Treaties. Specifically it draws on IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2d ed. 1984) and SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES 1945 - 1986* (1989).

the reservation before it could be considered valid. Therefore the Netherlands, as the depository government, rejected a reservation made by Great Britain to the 1899 Geneva Convention on Maritime Warfare, firmly blocking an attempt by one country to insist on both participation in the treaty and recognition of its reservation.

Although this practice became increasingly unworkable in light of the increased international cooperation which followed the First World War and establishment of the League of Nations, the leading European nations adhered to this unanimity principle, even forbidding states that signed onto an international convention after its initial entry into force to attach any reservation of any kind.<sup>9</sup> As European nations dominated the world stage, this practice continued until after the Second World War.

### **Inter-War Period: Pan-American Rule**

While the European powers continued their insistence on unanimous consent to treaty provisions, a different approach grew up in Latin America. Known as the Pan-American Rule, articulated in the Havana Convention on the Law of Treaties in 1928,<sup>10</sup> it provided for three levels of reciprocal rights and obligations between signatory states. Between states that did not file reservations to treaty language, the treaty applied as written. Between a reserving state and a state that accepted the limitation, the treaty applied in its modified form. Finally, if a state signed onto the treaty with a reservation after the treaty had entered into force, the agreement would not be in

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<sup>9</sup>2 ROSENNE, *THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW*, 25-7 (1972).

<sup>10</sup>Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 *Iowa L. Rev.* 295, 322 n.121 (1985) (quoting Article 6 of the Havana Convention). See also Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 *AM. U. INT'L L. REV.* 269, 274-75 (2001).

force between it and any other signatory state that did not accept the reservation. This latter provision represented a significant departure from earlier refusal to allow a latecomer state any flexibility. In essence, the Pan-American rule widened the scope of engagement in a multilateral treaty by allowing for a variety of related bilateral sub-agreements under the treaty's general umbrella.<sup>11</sup> The international community therefore had two methods for dealing with reservations leading into the post-War period.

## **Post World War II: International Court of Justice Advisory Opinion**

These two different approaches co-existed until the post-war period, when, in the aftermath of the horrors of the Holocaust, the members of the United Nations negotiated the Convention for the Prevention of Genocide. Although the treaty was meant to stand as an articulation of humanity's universal condemnation of genocide, individual states attached reservations to their ratifications of the treaty itself. The Secretary General was then faced with the dilemma of whether to count signatures with reservations towards those needed for the Convention to enter into force. Accordingly, the General Assembly called upon both the International Court of Justice and the International Law Commission for guidance on this matter.<sup>12</sup>

The foundation for the Vienna Convention's approach to reservations can be found in the International Court of Justice Advisory Opinion on the Genocide Convention, issued in 1951. In that landmark decision, the Court had to balance the need for universal condemnation of genocide with

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<sup>11</sup>Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 Iowa L. Rev. 295, 308 (1985).

<sup>12</sup> GAOR, 5<sup>th</sup> Session, annexes, a.i. 56 (1950) demonstrating that the point of departure for discussion was League of Nations decisions and the Harvard Draft, namely articulation of the unanimity principle, as cited in SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945 - 1986, 425 (1989); Resolution 478 (V) of 16 November 1950.

the mandate to preserve the integrity of the treaty language itself. On the one hand, according states flexibility in accepting the terms of the treaty would promote ratification, but this would contradict both past practice and run the risk of casting the shadow of ambiguity over the treaty language. The ICJ wrestled with the dilemma, which continues to vex states today,<sup>13</sup> setting the framework for negotiating multilateral treaties in the expanded international community that emerged from the wreckage of the War.

In a 7-5 decision, the Court addressed the following two issues at the request of the U.N.

General Assembly:

- Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
  - (A) The parties which object to the reservation?
  - (B) Those which accept it?<sup>14</sup>

The majority started its opinion by restating the basic premises of treaty law, namely that a state cannot be bound without its consent, and therefore another state's reservation to a provision of a treaty cannot be effective against other states without their consent.<sup>15</sup> From this basic rule, the Court then drew the conclusion that, because the terms of a multilateral convention are freely concluded, one state cannot frustrate the purpose of the convention through unilateral action.<sup>16</sup>

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<sup>13</sup>See *Report of the International Law Commission on the work of its forty-ninth session 12 May-18 July* U.N. GAOR, 52<sup>nd</sup> Sess., Supp. No. 10, U.N. Doc. A/52/10 (1997).

<sup>14</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Opinion of May 28).

<sup>15</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (Advisory Opinion of May 28).

<sup>16</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (Advisory Opinion of May 28).

From these premises flow the traditional rule that a state cannot attach a reservation to a treaty unless all parties agree to it.<sup>17</sup>

Acknowledging that this framework works well for contract law, and, by extension a treaty that operates as a contract between nations, the Court continued that in this instance, one must look to the special nature and circumstances of the Genocide Convention to understand fully the best approach to the question of reservations.<sup>18</sup> Because this Convention was intended to be universal in nature, the Court felt that more flexibility was needed in order to allow full participation by member states. Furthermore, in order to compensate for the fact that each provision of the Convention was adopted by majority vote, a broad reservations mechanism was needed in order to keep States whose views were voted down in the drafting process from opting out of the Convention completely.<sup>19</sup> The Court also distanced itself from the theory that a reservation requires at least the tacit assent of all other parties, on the grounds that the absolute integrity of a convention is not a rule of international law.<sup>20</sup>

Although adding some flexibility, the ICJ tried to avoid opening the floodgates for reservations. The ICJ stressed that the Convention does not deal with state private interests, but rather enshrines a universal principle against the destruction of a particular group, and therefore

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<sup>17</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (Advisory Opinion of May 28). This theme of contract vs normative treaty has gained greater prominence in the past decades as the number of human rights conventions has increased. The trade off between flexibility in allowing reservations and integrity of the treaty language as negotiated has been questioned as states have used reservations and declarations essentially to undermine the intent of the treaty itself, at least in some cases.

<sup>18</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (Advisory Opinion of May 28).

<sup>19</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (Advisory Opinion of May 28).

<sup>20</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 24 (Advisory Opinion of May 28).



countries should not stray from the black letter terms of the Convention, as genocide “shocks the conscience of mankind.”<sup>21</sup> This conclusion was supported by the fact that the General Assembly had not created a mechanism for reservations, although the debate suggested that it might “be possible to allow certain limited reservations.”<sup>22</sup>

The Court resolved this apparent contradiction between the desire for universal participation and the need to establish a strong international norm against genocide by finding that states to the Genocide Convention do not have “any interests of their own” but rather are united in “the accomplishment of those high purposes which are the *raison d’être* of the convention.”<sup>23</sup> In an attempt to preserve the moral authority of the Convention itself,<sup>24</sup> the court found that any reservation must be compatible with the object and purpose of the Convention.<sup>25</sup> The Court rejected the view that sovereignty entitled a state to make any reservation it wanted, as this would undermine purpose of the convention.

In sum, the Court opened the door to the solution that was incorporated into the Vienna Convention on Treaties some fifteen years later. By recognizing that some form of reservation was required, but attempting to limit its scope, the Court created the possibility of “subtreaties” because

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<sup>21</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (Advisory Opinion of May 28).

<sup>22</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (Advisory Opinion of May 28).

<sup>23</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (Advisory Opinion of May 28). In so doing, the ICJ eliminated reciprocity, that is the mutual interest among states to adhere to international norms, as a mechanism for promoting adherence to the Convention. Rather, the Court tried to short circuit national interest as an excuse for not ratifying the convention by finding that it functioned on a higher plane, enshrining principles that should not be undermined.

<sup>24</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 24 (Advisory Opinion of May 28).

<sup>25</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 24 (Advisory Opinion of May 28).

each state would judge for itself whether a reservation was compatible with the purpose of the Convention, and, based on its conclusion, either consider the treaty in force between itself and the reserving state, or not.<sup>26</sup> This regime tips the balance in favor of the reserving state, however. First of all, the ICJ noted that it must be “clearly assumed” that a potential objecting state would make every effort to find the reservation acceptable, since it would be “desirous of preserving intact at least what is essential to the object of the Convention.”<sup>27</sup> As a result, the Court ventured the hope that any divergence of views might either not be relevant in the big picture, that the States might enter into some dispute resolution process, or that there would be “an understanding between that State and the reserving States [will allow] the convention to enter into force between them, except for the clauses affected by the reservation.”<sup>28</sup>

What the legal ramifications of that arrangement would be, the Court did not attempt to figure out: “while it is universally recognized that the consent of other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State’s objecting to a reservation.”<sup>29</sup> Mentioning the Pan-American system, the Court merely notes that the European approach is not the only option and that a case by case analysis

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<sup>26</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 26 (Advisory Opinion of May 28).

<sup>27</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 27 (Advisory Opinion of May 28). The ICJ dodged the difficult question of deciding who would have authority to determine if a reservation were compatible with the object of the treaty or not.

<sup>28</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (Advisory Opinion of May 28).

<sup>29</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 25 (Advisory Opinion of May 28).

of how to handle reservations would be the most prudent approach.<sup>30</sup> In spite of these gaps, however, the ICJ shifted the grounds of debate and laid the foundation, shaky as it might be, for Article 21 of the Vienna Convention.

## **Post World War II: International Law Commission**

At the same time that the General Assembly asked the ICJ to offer its guidance on the question of reservations, it also turned to the International Law Commission for its expertise.<sup>31</sup> Even after the Court rendered its opinion, the ILC input still was relevant because the Court, relying on the abstract nature of an advisory opinion, left many questions unanswered about how a regime would work that did not require unanimous acceptance of reservations. The ILC in fact, came to the opposite conclusion of the Advisory Opinion. It advocated the traditional model, calling for the Secretary General to notify all other States that either are, or are entitled to become, parties to the Convention when any State submitted a reservation. If any other State objected within a certain amount of time, then the reservation would have to be withdrawn or the reserving state could not become a party to the treaty.<sup>32</sup> In short, the ILC recommended retention of the European unanimity rule.

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<sup>30</sup>Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 26 (Advisory Opinion of May 28).

<sup>31</sup>The General Assembly asked the ILC to “study the question of reservations to multilateral conventions both from the point of view of codification and from that of progressive development (resolution 478 (V) of 16 November 1950).

<sup>32</sup>Conclusion of ILC (1951) cited in SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945 - 1986, 428-29 (1989).

The General Assembly was thereby faced with the task of reconciling these two opposing recommendations. It passed an initial resolution dodging the problem by instructing the Secretary General simply to inform all member states of any reservations to treaties of which he was the depository and allow them to draw any legal conclusions from the reserving state's statement.<sup>33</sup> This arrangement lasted until 1959, when India demanded clarification of the legal status of a reservation it had appended to a 1948 Convention. It was at that point that the General Assembly was forced to take a clearer stance on the question of reservations and called upon the Secretary General to collect information on practices concerning reservations from different regions of the world and submit the information to the ILC for its further consideration.<sup>34</sup> In this way, the General Assembly signaled that the unanimity rule was a thing of the past. It had become increasingly clear that this kind of rigid system would no longer function in a world where many states were to have a say in the development of world affairs. It is notable that the impasse between the ICJ Advisory Opinion and the ILC was broken based on political, rather than legal, considerations. The General Assembly's resolution thus ushered in the end of the dominance of the European states on the codification of international law.<sup>35</sup> Three years later, Special Rapporteur Sir Humphrey Waldock presented the ILC's new thinking on reservations, ideas that another six years later were to become articles 19 - 23 in the Vienna Convention itself.<sup>36</sup>

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<sup>33</sup>Resolution 598 (VI) of 12 January 1952.

<sup>34</sup>Resolution 1452 (XVI) (1959).

<sup>35</sup>SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES* 1945 - 1986, 434 (1989).

<sup>36</sup>First Report of the *Special Rapporteur*, Sir Humphrey Waldock, (14th session of the ILC (1962))- U.N. Doc. A/CN.4/144 and Add.1 (in Ybk, 1962, vII)

# **The Vienna Convention on the Law of Treaties**

The Vienna Convention on the Law of Treaties was made available for signature in 1969 and came into force in 1980, culminating an effort which began in 1949. The purpose of the Convention was to articulate the framework for treaty-making, codifying practice on how treaties should be concluded, enter into force, applied and interpreted, as well as the procedural rules for treaty administration. It represents a comprehensive set of principles and rules governing significant aspects of treaty law.

## **The Vienna Convention Rules on the Issue of Reservations**

The Vienna Convention itself represents a combination of codification of customary international law and creation of new legal norms through progressive development, although the line between the two is not necessarily clear. The Articles concerning reservations, Articles 19 -23, are fairly clearly a result of progressive development, rather than codification, reflecting the troubled history of the issue of reservations and the gradual move away from unanimous acceptance of reservations as the ICJ articulated in the *Genocide Convention*.<sup>37</sup>

The Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their

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<sup>37</sup>IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 12-13 (2d ed. 1984).

application to that State.”<sup>38</sup> Article 19 allows states to include reservations in their acceptance of treaty obligations, unless the treaty itself expressly forbids reservations, or the reservation is incompatible with the object and purpose of the treaty, echoing the Genocide Convention language.<sup>39</sup> Article 20 outlines the circumstances under which reservations must be accepted by the other parties; otherwise if a state does not object to a reservation from another state within a set amount of time, its silence is construed as tacit acceptance. An objection to a reservation does not, however, preclude entry into force between the two states. Rather, Article 21 allows for the states to tailor the relations between them through the mechanism of reciprocity. If a state does not object to a reservation, it modifies the treaty relations between the two states according to the scope of the reservation; the limitation imposed by the reserving state applies to both parties to an equal extent. If a state objects to the reservation, however, then the entire provision does not apply between the two parties; the objecting state may also declare the entire treaty not in force between the two countries.

In light of the relatively liberal approach to reservations in the Vienna Convention, one might think that the number of reservations appended to multilateral treaties would be relatively high, but in fact few States actually do attach reservations to their accession to a treaty. It could be argued that, in balance, the integrity of the treaty is more important than the ability to tailor the agreement to a state’s particular point of view through the use of reservations. We suggest that the reciprocity mechanism of Article 21 (1) plays an important role in limiting the number of reservations. If one State can exempt itself from a particular provision, and thereby not enjoy its benefits, the another

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<sup>38</sup>The Vienna Convention on the Law of Treaties, May 23, 1969, Art. 2(1)(d). For a drafting history of the definition of reservation, see Alain Pellet, Special Rapporteur, Third Report on Reservations to Treaties, UN Doc. A/CN.4/491/Add. 1 (1998).

<sup>39</sup>The Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331.

State may be tempted to do the same. If a treaty gets too burdened with reservations, in essence becoming a network of bilateral treaty obligations, States will simply back away from the accord altogether. Although the percentage of treaties with reservations rose after World War II, when reservations became more widely accepted, the high point, as of 1980, was only six percent of treaties in force.<sup>40</sup> This means that a state makes, on average, one reservation to a multilateral treaty every ten years.<sup>41</sup> In all, 85 percent of multilateral treaties in 1980 had no reservations and only 61 treaties had more than three.<sup>42</sup>

The fact that there has been no explosion of the number of reservations to treaties supports the intuition that the threat of a reservation may be useful as a bargaining chip in negotiations. In the end, however, a reservation is a double-edge sword, as other parties to the treaty are also exempt from treaty obligations to the extent of the reservation, meaning that states in the end may hesitate to append a reservation.

The new regime in the Vienna Convention was designed to introduce necessary flexibility into treaty making given the rise of multinational agreements in the 20<sup>th</sup> century, and the increased number of nations involved in such agreements. To achieve this goal, the Convention drew on the concept of reciprocity, one of the basic principles of international law that makes diplomatic relations possible.<sup>43</sup> Reciprocity is the foundation of diplomatic immunity, the laws of war, and as

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<sup>40</sup>John King Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice*, 74 A.J.I.L. 372, 378 (1980)

<sup>41</sup>John King Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice*, 74 A.J.I.L. 372, 379 (1980).

<sup>42</sup>John King Gamble, *Reservations to Multilateral Treaties: a Macroscopic View of State Practice*, 74 A.J.I.L. 372, 379 (1980).

<sup>43</sup>See Harvard's 1932 Research Project in International Law, calling diplomatic relations the "normal functioning of states" and pointing to reciprocity as the means by which such functioning is made possible. *Diplomatic* (continued...)

a mechanism for dealing with breaches of treaty provisions.<sup>44</sup> Although Article 21 also produced a significant number of complications,<sup>45</sup> its principle of reciprocity contributes significantly to resolving the inherent tension between treaty flexibility and integrity that the ICJ first identified in its Genocide Advisory Opinion. As explained in the section below, the Prisoner’s Dilemma game illustrates how reciprocity provides a natural brake to the appendage of reservations to multilateral contract-type treaties.

## **Treaty Reservations and the Economics of Art. 21**

Game theory is a useful tool for the understanding of the effects of reciprocity on States’ reservations to treaties. Signing a treaty gives a state the *option* to be bound by the treaty but until ratification, the state has no enforceable obligation to be bound by the agreement. Absent effective contractual constraints in the pre-ratification phase, states have a clear opportunity for strategic behavior and therefore would rationally introduce unilateral reservations at the time of ratification.<sup>46</sup> Left unconstrained, this strategy would dominate in equilibrium. To cope with this reality, basic

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<sup>43</sup>(...continued)  
*Privileges and Immunities*, 26 Am. J. Int’l L. 15, 26 (Supp. 1932).

<sup>44</sup>D.W. Grieg, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT’L L. 295, 299-300 (1994).

<sup>45</sup>Although discussion of them is beyond the scope of this paper, chief concerns includes the creation of a patchwork of differing relations between states within the same general framework of a treaty; difficulties in setting standards for how to determine if a reservation is contrary to the purpose of a treaty, and therefore forbidden. Another difficulty arises from the fact that states should not be able to use reservations to treaties to circumvent obligations that they have in any case under customary international law. Arguments are also made that even the principle of reciprocity cannot counterbalance the fact that an objecting state cannot *restore* a provision to which another state has included a reservation; the most drastic “defensive” action that a state can take is to declare the treaty not in force between it and the reserving state, a step that most nations are reluctant to take.

<sup>46</sup>Standards of compliance in treaty implementation also rely heavily on the subsequent practice of states. The post-contractual behavior of states can shape and modify the content of an already finalized agreement, or even abrogate a treaty.



norms of reciprocity have emerged as international law. In particular, Art. 21(1)b of the 1969 Vienna Convention creates a mirror-image mechanism to counteract unilateral reservations.<sup>47</sup> The effects of this automatic reciprocity mechanism are similar to a tit-for-tat strategy with the added advantage that states do not need to retaliate actively: whenever one state modifies a treaty unilaterally in its favor, the reflexive result will be a de facto across-the-board introduction of an identical reservation against the reserving state. In the following section we will illustrate how, by imposing a symmetry constraint on the states' choices, this rule offers a possible solution to Prisoners' Dilemma problems<sup>48</sup>.

## **Prisoner's Dilemma, Reciprocity and Incentive Alignment**

Given a perfect alignment of incentives, no state would want to introduce unilateral reservations, nor would it have a reason to fear that other signatory states would introduce them. In such an ideal world, stable treaty relationships of mutual cooperation would preclude the need for international treaty reservations and the equilibrium would converge towards mutually desirable outcomes. Because strategies that maximize individual states' expected payoffs would also maximize the interest of other states, no player would have any reason to challenge the emerging equilibrium.

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<sup>47</sup>The specific language is as follows: "Legal Effects of Reservations and of Objections to Reservations: A reservation established with regard to another party . . . modifies those provisions to the same extent for that other party in its relations with the reserving state."

<sup>48</sup>In the classic Prisoner's Dilemma scenario, two perpetrators are arrested by the police and held in isolation from each other. If neither confesses, the D.A. will have to cut a favorable plea bargain in which each will serve one year in prison. If one confesses and the other does not, the silent one will receive a ten year sentence and the confessor will go free. If both confess, then both will receive a five year sentence. Although it would be in their interest to keep quiet, neither can trust the other not to try to opt for the best deal by confessing and therefore they will inevitably end up with five year sentences, a less than optimal outcome for both. Eric Rasmusen, *Games and Information: An Introduction to Game Theory*, 2<sup>nd</sup> ed. 17-19 (1994)

The perfect alignment of states' incentives can be induced either (i) endogenously, or (ii) exogenously. In the former case, signatory states naturally find themselves in such a heavenly relationship.<sup>49</sup> The latter case, exogenous constraints induce the parties to behave "as if" their incentives were perfectly aligned, thereby overcoming any underlying conflict of interests.

The Article 21 (1) reciprocity constraint is an important example of such exogenous force because it shapes states' strategic choices. Although each player can cause the joint enterprise of the international agreement to fail by unilaterally defecting (i.e., introducing unilateral reservations), no state can, in fact, obtain the unilateral reservation (temptation) payoff: withholding complete ratification of the treaty triggers a mirror-image reduction in the other states' implementation of the treaty with respect to the reserving state. By the same token, no state can unilaterally determine the success of the treaty (because the ratification by other states is out of the control of any single signatory state), but each individual state can determine its failure.

Under most circumstances, this reciprocity mechanism prevents unilateral defection and free-riding strategies from dominating in equilibrium because states can only *reduce* the anticipated benefit of the treaty for other states, and, by doing so, for themselves. In short, any adjustment to the negotiated agreement invariably results in a net loss of benefit, e.g. loss of integrity in the treaty's terms, thereby bolstering the likelihood that a cooperative solution will prevail. In the end, the unilateral veto effect of the reciprocity rule only creates an illusion that the agreement is fragile; in reality, it makes the negotiated cooperative solution more robust.

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<sup>49</sup> The perfect alignment of individual interests, however, rarely occurs in real life situations. In the absence of proper enforcement mechanisms, even a Pareto improving exchange opportunity creates a temptation for shirking and *ex post* opportunism. When shirking and post-contractual opportunism becomes a dominant strategy for one or both players, the exploitation of opportunities for mutual exchange becomes difficult or unobtainable (Kronman, 1985).

However, we should point to the important fact that, while the principle of reciprocity of Art. 21 (1) solves conflict situations characterized by a Prisoners' Dilemma structure (in both symmetric and asymmetric cases), reciprocity is on its own incapable of correcting other strategic problems. When a conflict occurs along the diagonal possibilities of the game (such that the obtainable equilibria are already characterized by symmetric strategies), a reciprocity constraint will not alter the dynamic of treaty ratification. Reciprocity constraints are effective only if there are incentives for unilateral defection. As will be discussed below, reciprocity will be ineffective in other strategic situations (e.g., in asymmetric cooperation games, Battle of the Sexes games, and pure conflict situations).

### **Article 21 and the Game-Theory of Reciprocity in Symmetric Situations**

Reciprocity constrains states' action. The well-known Prisoner's Dilemma game illustrates in interesting ways how Article 21 (1) can influence states' incentives related to treaty ratification because it aptly depicts the ratification problem faced by sovereign states. Unlike the atomistic world of non-strategic economics, the ability to introduce unilateral reservations may produce suboptimal equilibria. Game theory teaches that such strategic problems result when players are only allowed to choose strategies, but cannot single-handedly determine outcomes, as in our situation when states can only choose their level of ratification and cannot unilaterally compel full ratification by the other states. If there were no reciprocity constraints, each state would try to gain national advantage by accessing the off-diagonal unilateral reservation payoffs through introducing unilateral reservations, thereby submitting to the temptation to defect from optimal strategies. The combined

effect of such unilateral strategies would generate outcomes that are Pareto inferior for all states, as in the classic Prisoner's dilemma setting.<sup>50</sup>

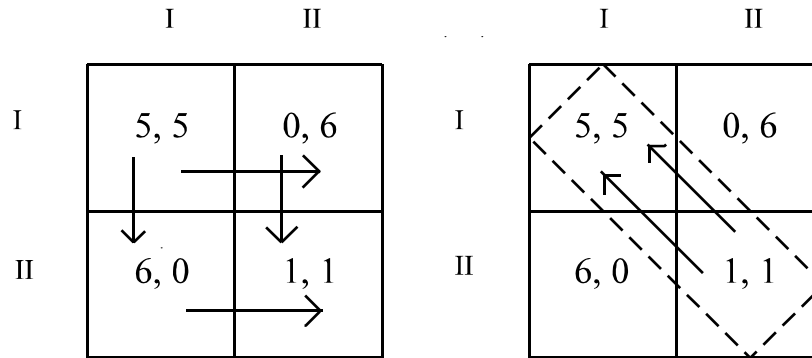
By eliminating access to asymmetric outcomes of the game, Article 21 (1) induces states to choose ratification strategies that take into account the reality of reciprocity, namely that of the reward for unilateral defection is unobtainable. As a result, no rational state would employ defection strategies (unilateral reservations) in the hope of obtaining higher payoffs, nor would it select reservation strategies as a merely defensive tactic. Automatic reciprocity mechanisms thus guarantee the destabilization of mutual defection strategies and the shift toward optimizing cooperation in the ratification of international treaties.<sup>51</sup>

This mechanism of automatic reciprocity produces effects that are similar to a tit-for-tat strategy without any need for active retaliation by other states. Whenever one state makes a unilateral modification in its own favor, it will be as if all the other states had introduced an identical reservation against the reserving state. This rule imposes a symmetry constraint on the parties' choices and offers a possible solution to Prisoners' Dilemma problems. In Figure (1) the equilibrium obtained in the absence of reciprocity (left) is contrasted with the outcome induced by a reciprocity constraint (right).

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<sup>50</sup> For an insightful discussion, see Buchanan (1975).

<sup>51</sup> For a similar argument relying on tit-for-tat strategies in iterated games, see Axelrod (1981) and (1984).



**Figure (1):** *Reciprocity Constraint for a Treaty Ratification Problem with Symmetric States*

For the sake of graphical clarity, Figure (1) depicts the simplest scenario of two states faced with a ratification problem, although the results also hold in the more complex case of multilateral treaties, described in the present paper. In Figure (1) we consider the choices of two states faced with a treaty ratification problem. State 1 (the column-mover) chooses between two strategies (strategy I and II) each yielding the payoffs marked on the right side of each box. Likewise, State 2 (the row-mover) chooses between strategy I and II, yielding the payoffs marked on the left side of each box. For both states, strategies I and II respectively represent a choice of full ratification and a choice of unilateral reservation.

As shown by the payoff matrix on the left, in the absence of a reciprocity constraint similar to the one introduced by Article 21(1) of the Vienna Convention, each state would be better off if

able to obtain the ratification of the other state, while introducing a unilateral reservation itself. Thus, as shown by the direction of the arrows, the Nash strategies of the parties tend to produce the outcome that both states introduce reservations, which in turn yields the lowest aggregate payoff for the two states. Indeed, both states face dominant strategies of unilateral reservation (i.e., reservation amounts to an unconditionally-best response to the other state's action). Similar to a Prisoner's dilemma, this yields a single Nash equilibrium<sup>52</sup> of bilateral defection (in our context, the equilibrium would be characterized by mutual reservations of all states).

The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. By eliminating the accessibility of asymmetric outcomes, reciprocity compels the parties to take into account the effect of the opponent's reciprocal choice when selecting their optimal strategy. In this way, the dominant strategy of attaching reservations, obtained in the absence of reciprocity, is transformed into a dominant strategy of full ratification, producing optimal levels of treaty ratification for the signatory States.

## **Treaty Reservations in Practice**

### **ICJ and the Enforcement of Reciprocity**

The following cases illustrate how the principle of reciprocity has worked in practice and demonstrate how, in cases of uncertainty, reserving states have in fact been disadvantaged by putting limitations on their adherence to a treaty.

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<sup>52</sup>The Nash equilibrium is reached when no player can improve his position as long as the other players adhere to the strategy they have adopted.

## Norwegian Loan Case

The International Court of Justice in considering cases related to reservations has raised the price of attaching one to a treaty, and thus perhaps discouraged their use. The concept of reciprocity has played an important role in this, as the Court has been generous in allowing others states to take advantage of an exception insisted upon by a particular signatory. For instance, in *Norwegian Loans*, Norway was able to use France's reservation against it to forestall international adjudication of a loan repayment dispute.<sup>53</sup> In that instance, the Court found that it did not have jurisdiction to hear dispute between France and Norway over repayment of loans that Norwegian banks made to France.<sup>54</sup>

Both France and Norway had submitted to the jurisdiction of the International Court of Justice, but with differing declarations. Specifically, the French added the following language to its declaration: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."<sup>55</sup> As Norway took the position that the resolution of the loan repayment dispute was a question governed by municipal, not international, law,<sup>56</sup> it sought to avail itself of the French reservation blocking the Court from considering questions within national jurisdiction. Accordingly, it insisted that, although it "did not insert any such reservation in its own Declaration, . . . it has the right to rely upon the

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<sup>53</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9 (July 6).

<sup>54</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 11 (July 6).

<sup>55</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 23 (July 6). It is worth noting that the validity of the reservation itself was not in doubt, although it did aim to circumscribe the jurisdiction of the Court and therefore perhaps enter the zone of the "essential function" of the Statute creating the court, as envisioned in the Genocide Advisory Opinion. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 27 (July 6).

<sup>56</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 22 (July 6).

restrictions placed by France upon her own undertakings.”<sup>57</sup> The Court agreed that the basis of its jurisdiction was the voluntary, reciprocal submission of the parties, and so “ consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation.”<sup>58</sup> Accordingly, Norway, taking advantage of France’s reservation, could shield from the court cases involving issues which, in its view, were under the purview of its national jurisdiction, although it originally has not restricted its participation in ICJ proceedings in such a manner.<sup>59</sup>

The International Court of Justice set down the guiding principle for handling reservations to submission to the Court’s jurisdiction in *Interhandel*, a dispute between the United States and Switzerland over unfreezing Swiss assets after the Second World War.<sup>60</sup> The Court found that “Declarations accepting the compulsory jurisdiction of the Court enable a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration.”<sup>61</sup> This would seem to be in keeping with the Pan-American Rule, which later was reflected in Article 21 of the Vienna Convention, that a reserving state must share the advantage that it is trying to preserve within the framework of its bilateral relations with other parties to the treaty. In *Interhandel*, the Court turned this approach on its head, by essentially limiting the benefit of the reservation to the other states, rather than the reserving state. The Court went on to state that “Reciprocity enables the State which has made the wider acceptance of the

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<sup>57</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 23 (July 6).

<sup>58</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 23 (July 6).

<sup>59</sup>Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J 9, 24 (July 6).

<sup>60</sup>*Interhandel*, 1959 I.C.J. 6 (Mar.21).

<sup>61</sup>*Interhandel*, 1959 I.C.J. 6, 23 (July 6).



jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.<sup>62</sup> Seen against the backdrop of the Advisory Opinion effort to prevent reservations that would contradict the “essential object of the treaty,” the Court would want to limit as much as possible the natural tendencies of States to hedge their submission to the jurisdiction of the Court when another State was trying to press its case.

### **UK/French Continental Shelf Arbitration**

The 1956 Continental Shelf Convention allowed reservations, except for any restriction that pertained to Articles 1 - 3 of the agreement. France ratified the Convention on July 30, 1965, adding several specific reservations, to which the United Kingdom objected upon ratification in January of 1966. The arbitration panel had to decide between France’s argument that Article 6, to which it had attached its reservations, was simply not in force between the two countries as a result of the UK’s objection. Conversely, the UK argued that the reservation was not allowable and therefore the treaty was in force as written.

The Arbitration panel found that the reservations themselves were allowable and that the treaty was in force between the two countries since both had agreed to an optional protocol for dispute resolution, and therefore had to find another route for resolving the differences between the

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<sup>62</sup>Id. *Interhandel*, 1959 I.C.J. 6, 23 (July 6).

two. Although the United Kingdom would have to accept some form of reservation,<sup>63</sup> as it was aware that they were allowable under the terms of the Convention, France could not use Article 12, the provision that allowed reservations in general terms as “a license to write its own treaty.” The panel looked to Article 21 of the Vienna Convention and determined that under the circumstances of one party objecting to the reservation of another, the treaty would not be in force between the two to the extent of the reservation. This, of course, brings up the question of what objective an objecting state could achieve by protesting a reservation if it did not want to take advantage of its only remedy, precluding entry into force. In essence, the final legal effect of protesting and accepting a reservation are the same, as long as the objecting state wants to maintain some level of obligation.

The game must therefore be played out before ratification. The objecting state can have recourse by threatening to attach reservations to other provisions of the Convention that are important to the reserving state in order to enhance its bargaining position. Another strategy would be to invoke good faith in negotiation as a basis for rejecting the reservation and hope that the reserving state backs down, at least as the reservation applies between the two nations.<sup>64</sup>

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<sup>63</sup>The UK also stated that it did not intend to preclude entry into force between the two countries as a result of the reservations.

<sup>64</sup>D.W. Grieg, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 322 (1994).

# **The Limits of Reciprocity and Emerging Problems in Treaty Reservations**

## **Heterogeneous States and Asymmetric States' Interests: Ex-Ante Preclusion of Reservations**

States often find themselves with asymmetric treaty interests and, unlike treaties in which it is unclear how and when states will benefit from the terms, such as agreement to submit to the jurisdiction of the International Court of Justice, often the asymmetric interests of states are obvious at the time of treaty ratification. This enables states to calculate how they and other nations will benefit from the agreement. Once this veil of uncertainty about the effects of treaty terms is lifted, then the costs and benefits of attaching reservations to the treaty become much clearer. In such situations, states may face incentives for unilateral reservations, in spite of reciprocity constraints. We suggest that the principle of reciprocity, while solving conflict situations characterized by a symmetric Prisoners' Dilemma structure, may by itself be incapable of correcting other strategic problems. Whenever the conflict takes place along the diagonal possibilities of the game (such that the obtainable equilibria are already characterized by symmetric strategies), the effect of a reciprocity constraint will not alter the dynamic of the game.

In spite of the reciprocity constraint of Article 21 (1), states can find it valuable to introduce reservations that impose asymmetric costs and benefits on the various participants.

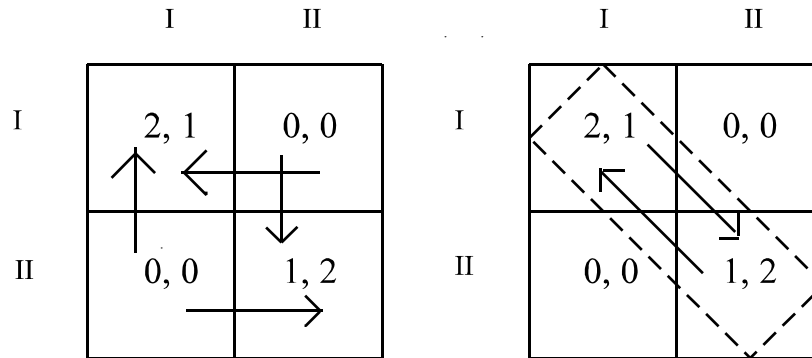
Reciprocity constraints are, indeed, effective only in those cases that generate incentives for unilateral defection. Figure (2) illustrates a situation where reciprocity is ineffective. The matrix

depicts a Battle of the Sexes game,<sup>65</sup> but the same conclusion would hold for a pure-conflict (i.e., zero-sum) situation. Also in this illustration, for the sake of graphical clarity, we consider the simplest scenario of two states faced with a ratification problem, although here too the results hold in the more complex case of multilateral treaties, considered in the present paper. In Figure (2) we illustrate the choices of two states faced with a treaty ratification problem. Recall that state 1 (the column-mover) chooses between strategies I and II, yielding the payoffs marked on the right side of each box. Likewise, state 2 (the row-mover) chooses between those two strategies, attempting to maximize the payoffs marked on the left side of each box. For both states, strategies I represents a choice of full ratification, while strategy II represents a choice of unilateral reservation.

The payoff matrix on the left shows the states' optimal strategic choice in the absence of the reciprocity constraint found in Article 21(1) of the Vienna Convention. Similar to a Battle of the Sexes game, this mixed coordination and cooperation problem yields multiple Nash equilibria. The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. The reciprocity constraint introduced by such rule eliminates the accessibility of asymmetric outcomes, and compels the parties to take into account the effect of the opponent's reciprocal choice. Yet, Figure (2) illustrates the limits of the reciprocity, as both scenarios produce identical results, unaffected by the presence of the reciprocity constraint.

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<sup>65</sup>In the classic Battle of the Sexes scenario, the husband wants to go to a sporting event and the wife to the opera, yet both want to spend time together. There is no uncertainty in this situation, yet also no solution that will avoid some loss of enjoyment for one of the parties (either one will have to go to an unenjoyable event or both will have to forego the pleasure of each other's company. Eric Rasmusen, *Games and Information: An Introduction to Game Theory*, 2<sup>nd</sup> ed. 25-26 (1994).



**Figure (2): A Case of Ineffective Reciprocity**

This limitation on reciprocity to constrain the strategic action of states explains the emergence of other legal mechanisms to prevent the unraveling of treaty terms due to unilateral reservations attached at the time of treaty ratification. As discussed in the following sections, the emergence of concepts such as “package deal” helps promote optimal levels of treaty ratification when multiple states with substantial asymmetries in their interests are involved.

### **Asymmetric Reservations and the Concept of “Package Deal”**

When, in the course of treaty negotiations, states discover they have asymmetric interests, they have an opportunity to introduce reservations that, in spite of the reciprocity constraint of Article 21 (1), would create asymmetric costs and benefits for the various participants. This limitation in constraining the strategic action of states explains the emergence of the concept of “package deal” to ensure ratification of treaties involving multiple states with substantially different

underlying interests. Articles 309 and 310 of the Law of the Sea Convention offer an important illustration of this concept.

For example, a state that has extensive coastlines may have a different substantive interest in the definition of territorial water limits than states with coastlines of average length. Likewise, a state with uniquely configured coastal contours may have different preferences than the majority with respect to rules defining bays, straits, archipelagoes, and so on. Finally, geological configurations of the Continental Shelf vary across regions, rendering the definition of uniform boundaries problematic in a multilateral treaty, and thus vulnerable to unilateral reservations mechanisms.

#### **“Package Deal” under Articles 309 and 310 the UN Convention on the Law of the Sea**

Until the late nineteenth century, the law of the sea operated on the basis of customary norms, but it too was touched by the trend towards codification at the end of the 1800s that continued into the twentieth century. Milestones in this process included the Hague Codification Conference of 1930, the Geneva Conventions of 1958 and finally the United Nations Convention of the Law of the Sea, which ended with a Convention text in 1982 that is widely seen as reflecting existing customary rules pertaining to the law of the sea.<sup>66</sup>

Although the Convention itself may reflect customary international law, the negotiations themselves reflected an important shift towards treaty drafting by consensus. The negotiations were therefore necessarily drawn out as agreement had to be reached on a large number of extremely complex and technical issues. The General Assembly set the tone with a resolution recognizing that

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<sup>66</sup>Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT’LL. 871 (1985).

the main issues, such as territorial waters, the continental shelf, and the ocean floor beyond national jurisdiction are “closely linked together,” leading to the concept that they should all be treated as a “package.”<sup>67</sup> The Rules of Procedure enshrined this consensual approach.

The Final Clauses of the Treaty were seen as critical for preserving the integrity of the Convention.<sup>68</sup> A report of the Australian delegation noted that solution on the substantive issues and agreement on the prohibition on reservations were linked, as states were not willing to give up the latter until they were convinced that they had secured every advantage in the former.<sup>69</sup> Although states attempted to use the final clauses as a bargaining chip to secure favorable language in the substantive provisions, there was an underlying understanding that, in the end, acceptance of the treaty would have to be an all or nothing proposition.<sup>70</sup> The United States was even more direct: “Since the Convention is an overall ‘package deal’ . . . . to permit reservations would inevitably permit one State to eliminate the ‘quid’ of another State’s ‘quo.’ Thus there was general agreement in the Conference that in principle reservations could not be permitted.”<sup>71</sup>

A 1979 President’s note outlining the discussion at an August 1 informal plenary also drew the link between the substantive provisions of the treaty and states’ willingness to give up their right to append a reservation. Describing the realization of the delegates that the question of reservations

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<sup>67</sup>Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT’LL. 871, 874 (1985).

<sup>68</sup>Department of Foreign Affairs, *Report of the Australian Delegation, 9<sup>th</sup> Session*, 3d UN Conference on the Law of the Sea (1980). Page 25

<sup>69</sup>Department of Foreign Affairs, *Report of the Australian Delegation, 9<sup>th</sup> Session*, 3d UN Conference on the Law of the Sea (1980). Page 25

<sup>70</sup>Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: the Ninth Session*, 75 A.J.I.L. 211, 248 and n.172 (1980).

<sup>71</sup>Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea, 449 (M. Nordquist & C. Park eds. 1983)

was both “delicate” and “complicated,” the report captured the consensus that the “basic and overriding policy” would be to preserve the “package deal” and that could be fatally undermined by allowing a wide range of reservations.<sup>72</sup> Discussion ensued on how best to achieve that objective. A 1976 Report by the Secretary General listed four options for handling reservations.<sup>73</sup> The informal plenary discussed the possibility of allowing reservations under limited circumstances, although no state specified to what provision it might attach a reservation.<sup>74</sup> The current of the discussion ultimately ran against allowing reservations, however. For instance, concern was raised about permitting reservations “not incompatible with the treaty,” a relatively broad standard, because there was no agreed mechanism for determining which reservations would meet that standard. Protecting from reservation any provision that was “an essential part of the central package” raised the same problem of determining which terms would fit into that category.<sup>75</sup> Other arguments for not allowing any reservations centered around the unique character of the Convention as a whole and a variety of global policy considerations.

In the end, Ambassador Evensen, the chief drafter of the Final Clauses, followed the Convention’s overall approach of negotiation by consensus to introduce a draft text of a one paragraph prohibition on all reservations: “no reservations or exceptions may be made to this

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<sup>72</sup>President’s Note, Informal Plenary on Final Clauses, FC/6 7 August 1979.

<sup>73</sup>The delegates had four options for their consideration: 1) no reservations 2) allow reservations only on specific provisions of the treaty, thereby balancing the need for consensus with the rights under the Vienna Convention to apply reservations 3) designate a limited number of provisions to which reservations may be attached and 4) not include any provisions on reservation, allowing Article 19 of the Vienna Convention to be the default. A/CONF.62/L.13. Another suggestion was to preclude reservations for 25 years after the treaty went into force and then to hold a review conference to identify which provisions could be accepted as customary international law or integral parts of package deals.

<sup>74</sup>Department of Foreign Affairs, *Report of the Australian Delegation, 9<sup>th</sup> Session*, 3d UN Conference on the Law of the Sea (1980). Page 26

<sup>75</sup>Department of Foreign Affairs, *Report of the Australian Delegation, 9<sup>th</sup> Session*, 3d UN Conference on the Law of the Sea (1980). Page 25



Convention unless expressly permitted by other articles of this Convention.”<sup>76</sup> This approach mirrors the general agreement among the states that they would have to accept the good and bad of the Convention because the “rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations.”<sup>77</sup> It does not appear that this approach precluded participation in the treaty itself because the question of reservations were barely mentioned in the official declarations that were made after the negotiations were concluded.<sup>78</sup> Even the United States did not mention the reservation issue, in spite of the fact that more flexibility might have induced the Reagan Administration to change its policy and sign the Convention.<sup>79</sup> Finally, 157 States signed the Convention, certainly a strong turn-out, 35 of which added declarations. The treaty entered into force on November 16, 1994 and currently has 137 ratifications, 50 of which include some sort of declaration.<sup>80</sup>

Although the language of Article 309 prohibiting reservations mirrors the approach of the treaty as a whole, the states did preserve the right to attach declarations and other indications of national understanding of the treaty and its ramifications. This ability was then reflected in the language of Article 310, which allows states to make declarations states explain how the Convention

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<sup>76</sup>20 Va. J. Int’l. L. 347, 365 (1980); United Nations Convention of the Law of the Sea, Article 309, *done* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Convention]. LOS

<sup>77</sup>Statement of UNCLOS III President Tommy Koh, quoted in Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT’L L. 871, 886 (1985).

<sup>78</sup>For instance, Tommy Koh, President of the Third Conference of the Law of the Sea, only alluded to reservations in his remarks encouraging signature of the treaty. Statements of other countries either indicated that, on balance, the Convention promoted national interests, and so the lack of reservation provision was not a problem. John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A “Midstream” Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV 627, 630-31 (1987).

<sup>79</sup>John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A “Midstream” Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV 627, 631 (1987).

<sup>80</sup>Statistics available at [http://www.un.org/Depts/los/reference\\_files/status2001.pdf](http://www.un.org/Depts/los/reference_files/status2001.pdf)

will mesh with “its laws and regulations . . . with the provisions of [the] Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of [the] Convention in their application to that State.”<sup>81</sup> There was some concern that Article 310 would be used as a vehicle for states to declare reservations to the treaty under another label, thereby winning for themselves an advantage without the restraint that the principle of reciprocity offers in a straightforward reservation. Where the admonition of the President of the Convention was gentle,<sup>82</sup> the warning of the delegate from the Ukrainian Soviet Socialist Republic was blunt: “we are going to object categorically to the proposals aimed at amending by any pretext the provisions of the Conventions. . . the Ukrainian S.S.R. will abstain from the declarations provided for in Article 310 of the Convention. We expect the same approach from other delegations.”<sup>83</sup> Given that the republics of the then-Soviet Union were particularly sensitive to their sovereign right to refuse to be bound by treaty provisions perceived not to be in their national interest, the position of the Ukrainian S.S.R. is particularly noteworthy.

An analysis of the declarations themselves, done five years after the treaty was completed, revealed that few of them could be interpreted as reservations in fact, if not in form, that is few

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<sup>81</sup>United Nations Convention of the Law of the Sea, Article 310, *done* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted* in 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Convention]. For a discussion of these declarations, finding that about a dozen of the 146 declarations may, in fact, cross the line into de facto reservations, see John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A “Midstream” Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV 627,644 (1987).

<sup>82</sup>Statement by Tommy T.B. Koh, U.N. Press Release SEA/MB/1/Rev.1, Dec. 6, 1982, at 6.

<sup>83</sup>Statement by V.N. Martynenko, Chairman of the Ukrainian S.S.R. Delegation, made at the LOS Convention Plenary Session of Dec. 7, 1982 at 3, quoted in John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A “Midstream” Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV 630 (1987).

appeared to have the potential of changing the legal effect of the treaty itself.<sup>84</sup> It appears that Article 310 fulfilled its purpose as a platform for national interpretations of the treaty, but that the basic commitment held to preserving the terms of the treaty in their entirety, showcasing the general understanding that individual state interest on specific items would have to be set aside in favor of the consensual comprehensive regime that had been worked out.

The package deal solution in essence returned the approach to reservations to the Pre-World War II norm of the unanimity rule. Although the solution was voluntary, the result was the same: each state had to accept the treaty as written and no latecomer to the agreement could change the treaty as applied to itself by appending a reservation. States were willing to give up the ability to append reservations because it was easy to do the cost-benefit analysis of treaty ratification and quantify how the material situation of each state would improve by adhering to the terms of the Convention. Therefore states are willing to give up unilaterally the right to make reservations in order to gain a clear national advantage, providing solution to asymmetric strategic problems in which reciprocity alone is not a sufficient disincentive for states to attach reservations to a treaty in order to maneuver for unilateral advantage. This solution, however, is dependent on states' voluntary actions; in the arena of human rights conventions, which are also characterized by asymmetric interests and negotiating positions, states are not willing to give up the Vienna Convention right to make reservations. The treaties themselves are therefore vulnerable to erosion and the international community still needs a mechanism to encourage adherence to this kind of international agreement.

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<sup>84</sup>John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A "Midstream" Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV 630 (1987).

## Limitations on Reciprocity: Human Rights Conventions

Although reciprocity is a fundamental principle of international law that governs treaty relations between states, it does not form the foundation for human rights treaties. These conventions do not represent agreements among states but often amount to unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens.<sup>85</sup> As a result the mechanism of reciprocity is not a direct factor in their implementation.

The International Court of Justice drew this distinction in *Barcelona Traction*, in considering whether Belgium had the right to press for compensation for shareholders of a Canadian company who were Belgian nationals.<sup>86</sup> The ICJ distinguished between the “obligations of a State towards the international community as a whole,” and those arising out of bilateral relations between states.<sup>87</sup> The court listed as examples of such universal obligations “outlawing of acts of aggression, and of genocide, . . . [and enforcement of ] rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>88</sup> Because of the importance of these objectives, they are “obligations erga omnes” and all states have the legal authority to bring action against other states who violate them. As a result, the basic reciprocal nature of treaty rights breaks down and nations ratify, or encourage enforcement, of treaties based on political calculations and value

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<sup>85</sup>Curtis Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, CHICAGO PUBLIC LAW AND LEGAL WORKING PAPER NO. 10 at 3 (2000).

<sup>86</sup>*Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

<sup>87</sup>*Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). In the latter case, a state must demonstrate a basis for a right to bring action against another state in a dispute.

<sup>88</sup>*Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

judgements, rather than the desire to maintain the status quo through recognition of bilateral rights and responsibilities.<sup>89</sup>

Because of this essential difference, the circumspection with which countries approach reservations in the context of contractual treaties does not hold in the arena of human rights conventions. For instance, the Convention on the Elimination of Discrimination Against Women, although negotiated and adopted very quickly, came into force with at least 23 of 100 states attaching a total of 88 significant reservations.<sup>90</sup> While some commentators have offered strategies for forestalling reservations to human rights conventions,<sup>91</sup> the basic fact remains that human rights treaties do not represent agreements among states but rather are unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens. A human rights treaty often nets the signing state little in concrete benefits, but rather is an assumption of obligations for purposes of image or prestige. The mechanism of reciprocity is simply not a factor; the state is rather acquiescing in accepting absolute obligations.

By their very nature, human rights treaties touch on sensitive cultural issues, meaning that states may hesitate to object to a reservation for fear causing unnecessary tension in existing bilateral

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<sup>89</sup>See e.g. the Nuclear Tests cases and the East Timor Case, in which Australia and Portugal, respectively, asserted the right to represent the international community in a dispute.

<sup>90</sup>Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

<sup>91</sup>See Lord McNair, *The Law of Treaties*, 169 (1961) (arguing that the best solution is to address explicitly what kind of reservations will be allowed in the treaty itself); 1 Oppenheim's *International Law* 583 at 1204 (Sir Robert Jennings & Sir Arthur Watts, 9<sup>th</sup> ed. 1992) (theorizing that human rights treaties are designed to take on a life of their own so that eventually the terms of the treaty will be accepted as an international norm, in which case the reservation will become invalid.)

relationships.<sup>92</sup> The focus is on a state's individual actions and the extent to which it meets international standards, or fails to do so, so that other states generally do not have a vested interest in closely policing how closely a reserving state is respecting the letter of the convention.<sup>93</sup> Other states may object to a reservation, but the tension really lies between the ratifying state and the international body overseeing the convention.

As a result, states generally do not hesitate to attach reservations to ratifications of human right treaties. For example, the United States ratified the Covenant on Political and Civil Rights but attached five reservations, five understandings, and four declarations to the 12 Articles of the agreement, essentially insulating itself from any obligation to change its laws to comply with the agreement.<sup>94</sup> Where reciprocity forced states to assess the pluses and minuses of attaching reservations in a contractual setting, acting as a general deterrent for reservations, this mechanism is absent in the human rights arena, leading to obvious abuses of the system and reservations that arguably violate the Vienna Convention prohibition against reservations that are contrary to the object and purpose of the treaty.<sup>95</sup>

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<sup>92</sup>For instance, when criticisms of the reservations that some Islamic states attached to the Convention to End All Discrimination against Women was portrayed as a Western attack on Islamic states, other countries from the developing world rallied to the reserving states, although initially it appeared that they had concerns about the reservations as well. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 284 (1991).

<sup>93</sup>Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERK. J. INT'L LAW 277, 312 (1999).

<sup>94</sup>John Quigley, *Symposium: the Ratification of the International Covenant on Civil and Political Rights: Article: the International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1289-90 (1993).

<sup>95</sup>Not only do the terms of the Vienna Convention favor the reserving state, as objecting states' only options are 1) not to accept the reservation, meaning that the provision is not in force between them or 2) declare the entire treaty not in force between reserving and objecting state, but theoretically a state could attach a reservation to an obligation that it would otherwise have under international norms, thereby potentially circumventing an obligation that it would otherwise have under customary international law. See Daniel N. Hylton, Note, *Default Breakdown: The Vienna* (continued...)

## **Searching for a Solution: Curbing Reservations Without Reciprocity or Voluntary Unanimity Rule**

Because of the ambivalent feelings states have toward human rights treaties, and the desire for universal acceptance of norms of international behavior to preserve basic human rights, the reservations regimes for normative conventions have been very lax in order to encourage participation. International organizations have had to take the lead in devising ways to curb the use of reservations and so fill the gaps caused by reservations to human rights treaties. In particular, the United Nations Human Rights Committee has attempted to maintain for itself the right to determine whether a reservation is compatible with the object and purpose of the four covenants that make up the foundation of international human rights law, in essence creating an enforcement mechanism. The General Assembly appointed a Special Rapporteur to consider, among other things, if a special reservations regime should be established for human rights treaties.

### **Comment 24**

In reaction to the high number of reservations to treaties related to human rights, the United Nations Human Rights Committee assigned itself the responsibility of reviewing the reservations to determine if they were in harmony with the object and purpose of the treaty and, if they were not, disallowing the reservation while still holding the country in question accountable for compliance with the treaty as a whole. This approach would help redress the imbalance inherent in the Vienna Convention, which simply does not enforce the objectionable provision<sup>95</sup> between the

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<sup>95</sup>(...continued)

*Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 441 (1994).

reserving and objecting state, essentially imposing the will of the reserving state on the other party. Other than the shadow that a reserving state casts on an aspect of human rights law that another state may value highly, non-reserving states are not directly affected by a reservation and have no leverage to prevent it.

The obvious drawback to the Committee's approach is that it violates state sovereignty and the consensual basis of international treaty law because the Committee is essentially enforcing a treaty against a state in spite of its expressed unwillingness to take on that obligation. Because the Committee was contradicting this basic premise of international law, its approach met with a great deal of protest and its declaration of a right to review reservations has never been tested.<sup>96</sup>

### **Rejection of a Revised Vienna Convention**

Also in response to concerns about the high number of reservations to human rights treaties, the General Assembly appointed a Special Rapporteur to consider whether the Convention itself should be changed to protect the integrity of human rights treaties. The Report of the International Law Commission<sup>97</sup> affirmed the basic framework of the Vienna Convention and rejected the idea of having special rules for human rights treaties as no compelling argument had been put forward

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<sup>96</sup>The sole exception was a decision by the European Court of Human Rights, *Belilos v. Switzerland*, that adopted the Committee's logic in holding that Switzerland's reservation to the European Convention on Human Rights concerning rights to a fair trial was invalid both because it was not sufficiently specific and because Switzerland had not followed proper procedures. The Court then held Switzerland to the Convention obligations as written, in spite of the fact that it had clearly not intended to be bound to the letter of the agreement. *Belilos v. Switzerland*, European Court of Human Rights, Docket no. 20/1986/118/167 at <http://hudoc.echr.coe.int/hudoc>. The Plaintiff had been arrested and fined by a Police Board for taking part in an unauthorized demonstration. She argued that this action violated the European Convention on Human Rights because the same municipal authority had charged, judged, and fined her in violation of the due process rights afforded her under the convention.

<sup>97</sup>The Report of the International Law Commission on the Work of the Forty ninth Session, 12 May - 18 July 1997, UN GAOR, 52<sup>nd</sup> sess., PP 75 -79, U.N. Doc. A/52/10 (1997). Available at: <http://www.un.org/law/ilc/reports/1997/97repfra.htm>



on which to base such an exception. He rather found that the lacunae and the ambiguities of the Vienna regime that caused concern in the human rights context were also applicable to contract-type treaties as well.<sup>98</sup>

The Special Rapporteur suggested that the “package deal” solution might ameliorate the problem of excessive reservations. As human rights treaties also are negotiated under asymmetric conditions among states, expressly limiting the opportunity to make reservations in the treaty itself and carefully defining the object and purpose of the treaty to forestall incompatible reservations would certainly help resolve the problem, assuming that the political will is there for such an agreement. The Special Rapporteur also pointed to facilitating mediation and negotiation between reserving and objecting states and continued monitoring for compliance with the Vienna convention by human rights bodies as important tools for ensuring treaty compliance.<sup>99</sup>

## Conclusion

Our study of the history and evolution of the law of treaty reservations has revealed conflicting policy goals. On the one hand, allowing unilateral reservations at the time of signature or ratification facilitates broad participation in major international treaties. On the other, the

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<sup>98</sup> Specifically he rejected the idea of exempting human rights treaties from the Vienna Convention regime for the following reasons:

(a) The Vienna regime was designed to be universal and, in fact, is derived from a ruling on a human rights treaty (Genocide Convention);

(b) No state or international body, include the Human Rights Committee in its Comment 24, had challenged the applicability of the Convention to human rights treaties and the majority of such treaties contained specific provisions outlining how reservations would be handled, providing further clarity. The Report of the International Law Commission on the Work of the Forty ninth Session, 12 May - 18 July 1997, UN GAOR, 52<sup>nd</sup> sess., PP 75, 76 U.N. Doc. A/52/10 (1997). Available at: <http://www.un.org/law/ilc/reports/1997/97repfra.htm>

<sup>99</sup>The Report of the International Law Commission on the Work of the Forty ninth Session, 12 May - 18 July 1997, UN GAOR, 52<sup>nd</sup> sess., PP 77, U.N. Doc. A/52/10 (1997). Available at: <http://www.un.org/law/ilc/reports/1997/97repfra.htm>

unconstrained introduction of unilateral reservations risks corroding the unity and cohesiveness of multilateral treaties, reducing the net benefits of treaty participation for potential signatory states.

These conflicting goals explain some of the salient features of reservations section of the Vienna Convention, such as provisions dealing with inadmissible reservations (Article 19) and the enumeration of reservations that fall outside the default acceptance rule of Article 20(4). Article 20 (2)<sup>100</sup> demonstrates that, in general, the pressing need for unity and cohesiveness over the need for broad participation in the treaty agreement.<sup>101</sup> Likewise, the need for unity and cohesiveness are paramount for treaties that create international organizations, since the introduction of unilateral reservations would likely impede the ability of the organization to function under uniform rules. This explains the solution in Article 20 (3), which requires “the acceptance of the competent organ of that organization” to accept any unilateral reservation before it can become effective.<sup>102</sup>

The exceptions carved by the Vienna Convention to the default rules governing unilateral treaty reservations create the possibility of a large number of situations in which states would choose to make reservations in an uncoordinated way, leading to negative results. Although the great majority of cases covered by Articles 19-21 of the Vienna Convention favor the reserving state, it is striking that the number of reservations attached to international treaties is relatively low in spite of that natural advantage. In this paper we have tried to explain this phenomenon by positing that Article 21 (1) of the Vienna Convention establishes an effective reciprocity constraint on the

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<sup>100</sup>The actual language reads: “application of the treaty in its entirety is an essential condition of the consent of each [state] to be bound” Vienna Convention on the Law of Treaties, Art. 20 (2), concluded May 23, 1969, entered into force Jan. 22, 1980, 1155 U.N.T.S. 331.

<sup>101</sup> The language of Article 20 (2) indeed indicates that the dominance of goals unity over broad participation can be inferred “from the limited number of negotiating States” in the original treaty negotiation.

<sup>102</sup> Vienna Convention on the Law of Treaties, Art. 20 (3), concluded May 23, 1969, entered into force Jan. 22, 1980, 1155 U.N.T.S. 331.

uncoordinated reservation choices of states: if a state wants to exempt itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

The economic model of reciprocity identifies the strengths and weaknesses of the Article 21(1) solution. The problematic results of most strategic interactions stem from the fact that players can only select strategies: outcomes are beyond the control of any individual player and are generated instead by the combination of strategies which each player selects. The reciprocity constraint introduced by Article 21(1) eliminates this problematic feature of the game by preventing asymmetric combinations of strategies. Under Article 21(1), players know that by selecting a strategy they are actually determining the outcome of the game. The incentives for unilateral reservation are substantially reduced because the reciprocity constraint transforms a situation of unilateral reservation into one of reciprocal reservation with mutual losses for all states. In symmetric strategic problems, the expected costs and benefits of alternative rules are the same for all group members and each has an incentive to agree to a set of rules that benefits the entire group, thus maximizing the expected return from the treaty relationship.

However, the game-theory analysis of reciprocity under Article 21 reveals that such mechanisms only provide a solution to the symmetric strategic problems, such as when states enter into the negotiations with similar interests or when the way the treaty will affect states' future relationship is sufficiently unclear as to make their position statistically symmetrical. This analysis thus unveils the limits of reciprocity in situations where states have asymmetric interests and so have reason to introduce unilateral reservations in spite of the automatic reciprocity effect of Article

21(1)(b). In such cases, erosion of treaty integrity may be inevitable unless the parties explicitly preclude reservations in the treaty itself.<sup>103</sup>

This analysis further explains some additional peculiarities related to international reservations. Human right treaties have a much higher rate of unilateral reservations than other categories of treaties because concerns for broad treaty participation are paramount. This calls for a liberal reservations regime which makes it easy for states to ratify human rights conventions. Yet states' interests are often asymmetric, and a liberal approach to reservations often frustrates the need to preserve a strong global condemnation of human right violations. The different formative process of such conventions impedes the equalizing mechanism of reciprocity, leading to unilateral declarations of a state's intentions concerning the treatment of its own citizens. Furthermore, human rights conventions are quite peculiar because they obligate states to benefit third parties, thereby rendering the automatic reciprocity effect of reservations less effective than usual, if not actually counterproductive. The wide range of asymmetric interests of states in the face of human rights protection, coupled with the automatic reciprocity effect of Article 21(1)(b), risks creating a multiple unilateral reservations at the direct expense of a strong and uniform condemnation of human right violations.<sup>104</sup> In this scenario, the players have an irreconcilable clash of values and there is no unique equilibrium point. Reciprocity does not offer a way out of the dilemma. In the face of a unilateral reservation of one state, it would hardly benefit the other non-reserving states to have the

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<sup>103</sup> Clearly, the problem of opportunistic pursuit of states' idiosyncratic interests will be minimized by the fact that states generally act as long-lived players, faced with a long horizon of repeat international interactions. In such an ideal world of long-term international relations, states may have incentives to refrain from engaging in opportunistic reservation strategies. Yet, such ideal conditions may be disrupted by the action and short-sighted interests of states' governments.

<sup>104</sup> See above under Section XX, our discussion of the Genocide Convention Advisory Opinion, which points out the inherent contradiction between the aims of a liberal reservations regime and the needs to preserve a strong global condemnation of genocide.

same “right” to deny human right protection under similar circumstances. The search must continue for an effective mechanism to induce states to adhere to multilateral treaty obligations, and yet refrain from introducing piecemeal reservations, even when specific aspects of the treaty may not be optimal from the point of view of every state.<sup>105</sup>

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<sup>105</sup> See *Id.*