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## The Object and Purpose of a Treaty: Three Interpretive Methods

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## The Object and Purpose of a Treaty: Three Interpretive Methods

David S. Jonas\*  
Thomas N. Saunders\*\*

### ABSTRACT

*This Article examines the three most prominent uses of the term “object and purpose” within the Vienna Convention on the Law of Treaties and, in each instance, offers a new method for applying the term. First, the rule that a treaty be interpreted “in light of” its object and purpose requires a process of interpretation that oscillates between a treaty’s individual provisions and the logic of all its provisions as a whole. Second, for reservations, the term exists to preserve “rule coherence[,]” as that term has been developed by Professor Thomas Franck. Lastly, states are required upon signature not to “defeat” the*

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*object and purpose of a treaty, and this rule is best understood as a means of facilitating domestic legislative review of new treaties by preserving the status quo at the time of signature. In sum, this Article examines a term of art that has perplexed scholars and practitioners for decades, and, in three specific contexts, it offers an understanding of the term refined beyond what other writers have offered.*

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## I. INTRODUCTION

The phrase “object and purpose” is used relatively frequently in the law of treaties, and the phrase’s meaning could be decisive in resolving multiple current international law controversies. Yet, object and purpose is a term of art without a workable definition. Broadly speaking, it refers to a treaty’s essential goals, as if a treaty’s text could be boiled down to a concentrated broth—the essence of a treaty.<sup>1</sup> Beyond this general idea, scholars have failed to create a definition with adequate clarity and detail to serve lawyers who must apply the term in practice. Those who have attempted to do so admit “with regret” that it remains an “enigma” that, “[i]nstead of reducing the potential of future conflicts . . . [i] plants the seed of them.”<sup>2</sup>

The ambiguity of the term object and purpose creates problems in a range of current international law contexts. For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) governs and affirms women’s fundamental right to equal treatment,<sup>3</sup> but some states party attempted to attach broad reservations that would have eviscerated CEDAW’s protections.<sup>4</sup> The conflict over whether such reservations were permitted hinged on whether they were “incompatible” with CEDAW’s object and purpose.<sup>5</sup>

Another example of a current object and purpose issue involves the Comprehensive Nuclear Test-Ban Treaty (CTBT).<sup>6</sup> The United

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1. Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIA REV. INT’L & EUR. L. 311, 343 (1998) (suggesting that a treaty’s object and purpose are the sum of the treaty’s essential elements separated from the unessential ones).

2. *Id.*

3. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

4. *Infra* Part IV.B.4 (providing a more detailed discussion of these reservations); see also William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79, 82–89 (1997) (stating that thirty-nine states that were party to the Women’s Convention made reservations to its substantive provisions and describing the reservations).

5. *Infra* Part IV.B.4. For another example of how object and purpose complicates treaty making in the context of reservations, see the insightful discussion in Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 677–80 (2008).

6. Comprehensive Nuclear Test-Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439; see also David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U.

States signed the CTBT in 1996 but has not yet ratified it.<sup>7</sup> Signature alone does not bind the United States to all provisions of the treaty, but signature nevertheless triggers an obligation not to defeat the treaty's object and purpose.<sup>8</sup> Regrettably, there is no conclusive understanding of the extent of this obligation. One may reasonably believe, for example, that the United States government may conduct one nuclear test—or ten—without defeating the treaty's object and purpose, leaving the CTBT in a state of “legal limbo.”<sup>9</sup>

A third example involves the United States' relationship to the International Criminal Court (ICC).<sup>10</sup> The ICC is the international tribunal established to prosecute war crimes, genocide, and crimes against humanity.<sup>11</sup> From December 2000 to May 2002, the United States was a signatory to the Rome Statute, the treaty establishing the ICC, but did not ratify it.<sup>12</sup> Then, in May 2002, President Bush authorized the “unsigned” of the treaty.<sup>13</sup> During the interim

J. INT'L L. & POL. 1007, 1031 (2007) (outlining the Author's interpretations regarding the CTBT and the obligations imposed under Article 18, Vienna Convention).

7. Jonas, *supra* note 6, at 1019, 1029.

8. See Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .

*Id.*

9. Jonas, *supra* note 6, at 1029. “[T]he CTBT has been rejected by the Senate and there are no immediate plans for Senate reconsideration. Meanwhile, the United States continues its unilaterally-imposed nuclear testing moratorium.” *Id.* at 1029–30.

10. See generally Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC'Y. INT'L L. INSIGHTS, May 2002, [http://www.asil.org/insigh87.cfm#\\_edn4](http://www.asil.org/insigh87.cfm#_edn4) (“On May 6, 2002, the Bush Administration announced that the United States does not intend to become a party to the Rome Statute of the International Criminal Court.”). Secretary of State Hillary Clinton signaled a potential willingness of the Obama administration to re-sign the Rome Statute when she recently said, “This is a great regret that we are not a signatory.” Ewan MacAskill, *US May Join International War Crimes Court, Clinton Hints: Secretary of State Regrets Failure to Sign Up: Obama Advisors Still Urge Caution After Bush Ban*, GUARDIAN (London), Aug. 7, 2009, at 17 (internal quotation marks omitted). Nevertheless, U.S. ratification appears unlikely. See John B. Bellinger, Editorial, *A Global Court Quandary for the President*, WASH. POST, Aug. 10, 2009 at A13 (“Although the Obama administration will undoubtedly make greater efforts to engage with the court, the United States is unlikely to join the ICC anytime soon.”).

11. Bellinger, *supra* note 10, at A13.

12. Bradley, *supra* note 10.

13. *Id.*; Jonas, *supra* note 6, at 1043. “Unsigned” is not a legal term; no attempt was made to physically remove the United States' signature, and the Bush Administration did not use the term unsigned when it announced its intention not to become a member of the Rome Statute. *Id.* Rather, the term was applied only later by commentators. *Id.*

between signature and unsigning, the United States was bound not to “defeat the object and purpose” of the Rome Statute.<sup>14</sup> Yet, the extent of this obligation was (and remains) undefined. Signature might have created an obligation to cooperate with the ICC, including surrendering suspects on U.S. territory to the ICC.<sup>15</sup> Signature might have also waived certain objections to the ICC’s jurisdiction to prosecute U.S. citizens.<sup>16</sup> The Bush Administration took the unprecedented step of unsigning the treaty because of these vague and potentially significant obligations.<sup>17</sup> By unsigning, the United States demonstrated that it no longer desired to become a party to the treaty, and thus the obligation not to defeat the object and purpose of the treaty no longer applied.<sup>18</sup>

Leaving such a vital term undefined risks undermining the strength and legitimacy of international law. Scholars debate why states comply with their international law obligations despite the lack of strong enforcement mechanisms, and one of the critical factors recognized by multiple theories is whether the law is *clear*.<sup>19</sup> Vague terms such as object and purpose erode the law’s capacity to guide state behavior. This erosion is especially worrisome for the term object and purpose because it is used so frequently within the international legal regime.<sup>20</sup> It is used eight times in the Vienna Convention on the Law of Treaties (Vienna Convention) alone.<sup>21</sup> It is

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14. Vienna Convention, *supra* note 8, art. 18.

15. Bradley, *supra* note 10.

16. *Id.*

17. *Id.*

18. See BARRY E. CARTER ET AL., INTERNATIONAL LAW 102 (5th ed. 2007) (“The United States . . . signified that since it no longer intended to become a party . . . it was not obligated under Article 18 of the Vienna Convention ‘to refrain from acts which would defeat the object and purpose.’”).

19. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 124–28 (2005) (discussing traditional attacks on Customary International Law). Guzman argues that states obey international law based on the consequences that will result from compliance or noncompliance. *Id.* at 131–39. Indeterminate laws are less likely to be obeyed, because they are less likely to trigger negative effects when violated. *Id.* For the paradigmatic example of a legitimacy-based theory, see THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). Franck argues that the key to understanding when a law is obeyed is the law’s legitimacy, and a primary factor affecting whether a law is perceived as legitimate is whether the law is clear. *Id.* at 52 (“The preeminent literary property affecting legitimacy is the rule text’s *determinacy*: that which makes its message clear.”). For a realist example, see Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L.R. 1110, 1129 (1982). For a transnational legal process model, see Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT’L L. & POL. 303, 305–09 (2005).

20. See, e.g., Vienna Convention, *supra* note 8, art. 31.1 (providing for a treaty to be interpreted in accordance with its “object and purpose”).

21. Vienna Convention, *supra* note 8, *passim*.

discussed in multiple decisions of the International Court of Justice,<sup>22</sup> as well as other domestic<sup>23</sup> and transnational courts.<sup>24</sup> The term is also used in numerous treaties.<sup>25</sup> In light of the term's prevalence, importance, and enduring ambiguity, this Article offers a better understanding of object and purpose as those words are used in the Vienna Convention.

Part II of this Article surveys all eight invocations of object and purpose within the Vienna Convention to provide the reader with a broad overview. Each of the subsequent three parts focuses on a specific invocation of the term, offering a new understanding of object and purpose refined beyond what has been offered by other writers.

22. See, e.g., *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 21) ("The Court will therefore now consider the object and purpose of the Statute together with the context of Article 41."); *Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion*, 1951 I.C.J. 15 (May 28) (discussing the object and purpose of the Genocide Convention).

23. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006).

Article 36 . . . governs relations between a consulate and its nationals, particularly those who have been arrested by the host country. Its object is to assure consular communication and assistance to such nationals, who may not fully understand the host country's legal regime or even speak its language.

*Pushpanathan v. Canada (Ministry of Citizenship & Immigration)*, [1998] 1 S.C.R. 982, para. 57 ("This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place."); *Leung Kwok Hung v. H.K. Special Admin. Region*, [2005] 3 H.K.C.F.A.R. 164, 181 (C.F.A.) (noting the object and purpose of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

24. See, e.g., *Plattform "Ärzte für das Leben" v. Austria*, App. No. 10126/82, 13 Eur. H.R. Rep. 204, para. 32 (1988) ("Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.")

25. See, e.g., *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance art. 51(2)*, concluded Nov. 23, 2007, S. TREATY DOC. NO. 110-21 ("Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, . . . provided that such agreements are consistent with the objects and purpose of the Convention . . ."); *Agreement on Extradition Between the European Union and the United States of America art. 1*, U.S.-Eur. Union, June 25, 2003, S. TREATY DOC. NO. 109-14 (stating the Agreement's object and purpose is "to provide for enhancements to cooperation and mutual legal assistance."); *Inter-American Convention Against Terrorism art. 1*, June 3, 2002, S. TREATY DOC. NO. 107-18 ("The purposes of this Convention are to prevent, punish, and eliminate terrorism. To that end, the states parties agree to adopt the necessary measures and to strengthen cooperation among them, in accordance with the terms of this Convention."); *Agreement on Mutual Acceptance of Oenological Practices art. 6*, ST. DEPT. No. 03-10, Dec. 18, 2001, available at [http://www.trade.gov/td/ocg/eng\\_agreement.htm](http://www.trade.gov/td/ocg/eng_agreement.htm) ("Technical regulations and standards relating to labeling shall . . . not be used as a mechanism to frustrate the object and purpose of this Agreement."); CEDAW, *supra* note 3, art. 28(2) ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted.")

Part III examines Article 31 and the rule that treaties must be interpreted in light of their object and purpose. Article 31 calls for a dialectical interpretive process, oscillating between the specific provisions of a treaty and the general normative logic of the treaty taken as a whole.<sup>26</sup>

Part IV examines Article 19(c), which prohibits reservations that are incompatible with a treaty's object and purpose. In this context, the object and purpose test is a coherence-preserving device, meaning it exists to ensure that reservations do not add new distinctions to a treaty's rules unless those distinctions can be justified within the existing logic of the treaty.<sup>27</sup>

Finally, Part V examines Article 18, which forbids signatories from defeating a treaty's object and purpose prior to ratification.<sup>28</sup> Article 18 is best understood as a rule to facilitate domestic legislative review of new treaties during the time between signature and ratification. To achieve this end, Part V suggests a new "facilitation test" that aligns states' expectations and tempers gamesmanship among signatories.

Central to the structure of this Article is the belief that object and purpose is a necessarily abstract concept. Broadly, object and purpose refers to a treaty's goals, but any attempt to create a more specific definition risks truncating the full importance of the term. Necessarily abstract concepts are found in other contexts as well; in American constitutional law, for example, the terms "necessary and proper" and "equal protection" are vague yet clearly vital.<sup>29</sup> No single definition of these terms can be both broad enough to capture their full meaning and specific enough to guide practitioners in particular cases. To understand such terms, a more productive strategy—the strategy used in this Article—is to study how the term should be applied in particular contexts.

## II. EIGHT USES OF THE TERM OBJECT AND PURPOSE WITHIN THE VIENNA CONVENTION ON THE LAW OF TREATIES

The 1969 Vienna Convention "codified the law of treaties."<sup>30</sup> It was drafted by the International Law Commission in the late 1960s

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26. Vienna Convention, *supra* note 8, art. 31.

27. *Id.* art. 19(c).

28. *Id.* art. 18.

29. U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 1.

30. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 52 (2005); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, at 145 (1987) ("This Restatement accepts the Vienna Convention as, in general,



and entered into force January 27, 1980.<sup>31</sup> Over one hundred states have joined the Convention and are thereby bound by it.<sup>32</sup> Even states that have not joined are bound insofar as many of the Convention's articles reflect customary international law.<sup>33</sup> When the U.S. Department of State submitted the Vienna Convention to the President, the accompanying letter noted that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice."<sup>34</sup> Furthermore, "[t]he Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law[, and] United States courts have also treated particular provisions of the Vienna Convention as authoritative."<sup>35</sup>

The term object and purpose is used eight times in the Vienna Convention. All eight examples are considered below:

Article 18: When a state signs a treaty but before the treaty enters into force, the state is "obliged to refrain from acts which would defeat the object and purpose of a treaty."<sup>36</sup>

Scholars and practitioners deem this an "interim obligation" because it exists in the interim between signature (prior to which a state is not bound by any aspect of the treaty) and ratification (after which a state is completely bound to observe all terms of the treaty).<sup>37</sup> The extent of the interim obligation has never been conclusively

constituting a codification of the customary international law governing international agreements.").

31. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 579–80 (6th ed. 2003).

32. Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Vienna Convention on the Law of Treaties, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Mar. 30, 2010).

33. See BROWNLIE, *supra* note 31, at 580 n.6 (listing instances where the International Court of Justice has treated the Vienna Convention as adopting customary international law).

34. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, at 145 (quoting S. EXEC. DOC. L., 92d Cong., 1st Sess., at 1 (1971)).

35. *Id.*

36. Vienna Convention, *supra* note 8, art. 18.

37. For a more detailed discussion of the interim obligation, see *infra* Part V. See also Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 71, 114 (1991) ("It is the intent of this article to demonstrate the difficulty inherent in attempting to adequately define and develop the contours of interim obligation expressed in article 18."); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 283 (2001) ("While the interim obligation has been recognized in various international legal systems, it remains unclear how to determine whether the interim obligation is being violated.").

defined.<sup>38</sup> In Part V of this Article, current theories of the interim obligation are examined and rejected, and a new theory is proposed, arguing that Article 18 is a test to facilitate domestic treaty review and temper gamesmanship among states after signature.

Article 19(c): A state may make a reservation to a treaty unless the reservation is “incompatible” with the object and purpose of the treaty.<sup>39</sup>

Notably, both Articles 18 and 19(c) create an object and purpose obligation in negative terms. Article 18 says states must not “defeat” the object and purpose after signature.<sup>40</sup> Article 19(c) mandates that reservations not be “incompatible” with the object and purpose of the treaty.<sup>41</sup> Part IV of this Article considers Article 19(c) and what it means to deem a reservation incompatible with a treaty’s object and purpose.

Article 20(2): “When it appears from . . . the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent to be bound . . . , a reservation requires acceptance by all parties.”<sup>42</sup>

The law surrounding reservations is complex and burdened with a web of rules. Article 20(2) creates one of the highest hurdles: unanimous approval of all states party in order for a reservation to be effective.<sup>43</sup> This is a nearly insurmountable hurdle in multilateral negotiations. By its plain language, Article 20(2) looks solely to the treaty to determine if any reservation should require unanimous consent. In other words, unanimous consent may become necessary regardless of the content of the reservation.<sup>44</sup>

Article 31: “A treaty shall be interpreted . . . in light of its object and purpose.”<sup>45</sup>

This may be the vaguest invocation of the phrase object and purpose in the Vienna Convention, and scholars have commented on its puzzling circularity.<sup>46</sup> The text of a treaty must be interpreted in light of the treaty’s object and purpose, but the treaty’s object and

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38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 93–95 (1st ed. 2000).

39. Vienna Convention, *supra* note 8, art. 19(c).

40. *Id.* art. 18.

41. *Id.* art. 19(c).

42. *Id.* art. 20(2).

43. *Id.*

44. See AUST, *supra* note 30, at 71 (explaining that in the case of “plurilateral treaties,” art. 20(2) of the Vienna Convention mandates that “any reservation will require acceptance of all the parties”).

45. Vienna Convention, *supra* note 8, art. 31.

46. See Buffard & Zemanek, *supra* note 1, at 333 (describing the “vicious cycle” of how “[i]t is not possible to be guided in the interpretation of a treaty by its object and purpose when those have to be elucidated first by interpreting the treaty”).

purpose must be discovered through interpretation of the text itself. This circularity problem is discussed in detail in Part III.

Article 33: "When a treaty has been authenticated in two or more languages [and] when a comparison of the texts discloses a difference of meaning . . . the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."<sup>47</sup>

It is hard to imagine a scenario in which Article 33(4) would be helpful. Reconciling two translations of a treaty, to be done well, requires surgical precision and an appreciation for nuances of language, but the concept of object and purpose remains a blunt tool yet to be adequately honed. That said, the International Court of Justice (ICJ) applied Article 33(4) on one occasion, finding that a French-language version of a law (implying that the ICJ has the power to issue binding provisional orders) better reflected the object and purpose of the overall statute than an English-language version (implying otherwise).<sup>48</sup>

Article 41: "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if . . . [it] does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."<sup>49</sup>

Like Article 19(c), Article 41 prohibits changes "incompatible" with a treaty's object and purpose. Article 19(c) concerns reservations, whereby one state attempts to alter its treaty obligations between itself and *all* other states party.<sup>50</sup> Article 41, by contrast, involves the more limited function of altering treaty obligations between one state and *a fraction* of the other states parties.<sup>51</sup> Another significant difference is that reservations may be

47. Vienna Convention, *supra* note 8, art. 33(1)–(4).

48. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 501–03 (June 21).

49. Vienna Convention, *supra* note 8, art. 41.

50. *Id.* art. 19(c). Whether the reservation will indeed apply to all other parties depends on whether states accept or reject it. *Id.* arts. 19–20.

51. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 334 cmt. b (1987) (adopting a special meaning of the word "amendment" in the Vienna Convention so that it "permits fewer than all the parties to amend the agreement as between themselves, after affording all states parties the opportunity to participate in the negotiations"). Compare AUST, *supra* note 38, at 126 ("[R]eservation[s] may be formulated when signing, ratifying, accepting, approving or acceding to a treaty" and they may also be "made at another time if this is provided for in the treaty."), with *id.* at 222 (discussing agreements to modify a multinational treaty between certain persons only). Article 40 deals with modifications between *all* states parties and does not mention object and purpose. Vienna Convention, *supra* note 8, art. 40.

made only when a state becomes a party to a treaty,<sup>52</sup> while modifications may be crafted at a later date.<sup>53</sup>

Article 41 also differs from Article 19 because it contains the words “effective execution” and “as a whole,” which may be read as limiting and softening the prohibition.<sup>54</sup> In other words, a modification may permissibly infringe on the object and purpose *somewhat*, so long as the object and purpose is preserved *as a whole*.<sup>55</sup> Functionally, a less stringent standard may be justified on the grounds that a modification, which is concluded between only a fraction of states party, is presumably less disruptive than a reservation, which the reserving state makes vis-à-vis all other states party.<sup>56</sup>

Article 58(1): “Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty . . . if [such suspension] is not incompatible with the object and purpose of the treaty.”<sup>57</sup>

Articles 41 and 58 are parallel. Both articles allow parties to a multilateral agreement to carve out exceptions to the treaty so long as those exceptions are between themselves alone and do not affect other parties.<sup>58</sup> Article 41 allows for modifications generally, while Article 58 allows for the ultimate modification: suspension. Article 58, however, does not contain the softening language found in Article 41 regarding “effective execution” and the object and purpose “as a whole.”<sup>59</sup> Perhaps the softening language was excluded here because the drafters saw suspension of a treaty as more threatening to the treaty’s object and purpose than mere modification.<sup>60</sup>

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52. Vienna Convention, *supra* note 8, art. 19 (“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation . . .”).

53. The Vienna Convention’s rules for modification are silent regarding when a treaty may be modified. *See id.* arts. 39–41 (governing the amendment and modification of treaties); AUST, *supra* note 38, at 222 (discussing agreements to modify a multinational treaty between certain persons only).

54. Vienna Convention, *supra* note 8, arts. 19, 41.

55. The Restatement ignores the additional language and states only that modifications may not be incompatible with a treaty’s object and purpose. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 334.

56. The assumption that modifications will be less disruptive than reservations will not be true in all cases, of course.

57. Vienna Convention, *supra* note 8, art. 58(1).

58. *Id.* art. 41(1)(b)(i) (allowing modification if it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations”).

59. *Id.* arts. 41, 58.

60. We can, however, imagine situations in which modification is more damaging to the goals of a treaty than outright suspension.

Article 60: "A material breach of a treaty . . . consists in . . . the violation of a provision essential to the accomplishment of the object or purpose of a treaty."<sup>61</sup>

Article 60 raises complex questions about treaty obligations. This is the only instance within the Vienna Convention where the words object and purpose are combined using the disjunctive word "or" rather than the conjunctive word "and." At least one scholar has suggested this unique formulation—"object *or* purpose"—is used "so as not to restrain the notion of a material breach."<sup>62</sup> In short, the term "material breach" should be interpreted relatively broadly. On the other hand, Article 60 defines a material breach to include actions that violate provisions essential to the accomplishment of the object or purpose of the treaty. This could be read very narrowly: assuming a treaty's object and purpose is its *essential* content,<sup>63</sup> Article 60 is doubly narrow, proscribing violations of what is *essential to the essential* content of a treaty. However, such an interpretation is troubling because it would permit states wide latitude to violate a treaty's terms without coming within the proscribed realm of "material breach."

A better understanding of Article 60 reads the obligation more broadly, accounting for the disjunctive "or" and placing emphasis on the word "accomplishment." Pursuant to that understanding, a material breach includes either (i) the violation of a treaty's object or purpose, or (ii) the violation of any clause essential to the accomplishment of the object or purpose, even if that particular clause is not itself part of the object or purpose.<sup>64</sup> Another reason to interpret material breach in this manner is to distinguish it from a more egregious "fundamental breach." Fundamental breach is not mentioned within the Vienna Convention, but it has since been recognized as a "breach that goes to the root of a treaty" and "undermine[s its] fundamental basis."<sup>65</sup> In the case of a fundamental breach, states party have greater latitude to suspend the terms of a treaty than they would in the case of a material breach.<sup>66</sup> If material

61. Vienna Convention, *supra* note 8, art. 60.

62. Paul Reuter, *Solidarité et divisibilité des engagements conventionnels*, in INTERNATIONAL LAW IN A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 623, 628 n.9 (Yoram Dinstejn & Mala Tabory eds. 1989).

63. This assumption is considered in more detail in Parts II and IV, *infra*.

64. See AUST, *supra* note 38, at 238–39 (explaining the concept of material breach).

65. *Id.* at 296 (citing Kevin Chamberlain, *Collective Suspension of Air Services*, 32 INT'L & COMP. L.Q. 616, 630–31 (1983); Ghislaine Richard, *KAL 007: The Legal Fallout*, 9 ANNALS AIR & SPACE L. 146, 150 (1984)).

66. See *id.* at 295–96 (discussing the differences between material breach and fundamental breach).

breach is read too strictly, it eliminates the distinction between these two categories.

These eight uses of the term object and purpose touch upon treaty interpretation, reservations, modifications, material breaches, and obligations prior to ratification. The term's ambiguity adds confusion to each of these areas. The next three Parts focus on three particular uses of the term.

### III. ARTICLE 31: THE GENERAL RULE OF TREATY INTERPRETATION

#### A. *Defining Object and Purpose*

Article 31 is titled "General Rule of Interpretation." It begins:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.<sup>67</sup>

This general rule of treaty interpretation highlights three sources in which practitioners may seek the meaning of a treaty: the treaty's terms, the context of those terms, and the treaty's object and purpose.<sup>68</sup> The Vienna Convention defines context to include "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" as well as "any instrument . . . made by one or more parties . . . and accepted by the other parties."<sup>69</sup> Practitioners must also take into account, in addition to the context, relevant subsequent agreements between the parties, relevant subsequent practice of the parties, and any relevant rules of international law.<sup>70</sup>

These sources—text, context, and object and purpose—reflect three schools of treaty interpretation.<sup>71</sup> First, the objective (textualist) school "start[s] from the proposition that there must exist a presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text."<sup>72</sup> The subjective school, by contrast, "assert[s] that the primary, and indeed only, aim and goal of treaty interpretation is to ascertain the intention of the parties[,]" and, in so doing, it is

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67. Vienna Convention, *supra* note 8, art. 31.

68. BROWNIE, *supra* note 31, at 604–07.

69. Vienna Convention, *supra* note 8, art. 31(2).

70. *Id.* art. 31(3).

71. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 114–15 (2d ed. 1984).

72. *Id.*

permissible to go beyond the four corners of the text.<sup>73</sup> Lastly, the teleological school asserts that the practitioner “must first ascertain the object and purpose of a treaty and then interpret it so as to give effect to that object and purpose.”<sup>74</sup> The Vienna Convention’s general rule for treaty interpretation is a compromise combining all three approaches, though textualism is dominant.<sup>75</sup> According to the rule, treaty interpretation must rely primarily on the terms of a treaty while context and the treaty’s object and purpose must inform its meaning.<sup>76</sup>

The general rule of treaty interpretation is important for the purposes of this Article both because it uses the term object and purpose and because it provides a framework for interpreting the Vienna Convention itself. Thus, in accord with that framework, interpretation of the term object and purpose must begin with the words’ ordinary meaning. One dictionary defines “object” as “[t]he purpose, aim, or goal of a specific action or effort.”<sup>77</sup> The word “purpose” is defined as “[t]he object toward which one strives or for which something exists.”<sup>78</sup> Each word is thus defined by the other, and both are synonymous with the word “goal.” Accordingly, object and purpose appears to be a unitary concept referring to the goals that the drafters of the treaty hoped to achieve.<sup>79</sup> Although this, too, raises an important question: if object and purpose refers to a unitary concept, why did the Convention’s drafters use two words instead of one?

73. *Id.* at 114.

74. *Id.* at 115.

75. See *Report of the International Law Commission on the Work of the Second Part of Its Seventh Session*, [1966] 2 Y.B. Int’l L. Comm’n 169, 220, U.N. Doc. A/6309/Rev.1 (explaining that Article 27 “is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties” and thus, “the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties”).

76. Vienna Convention, *supra* note 8, art. 31(1). There is an important caveat to the Vienna Convention’s command that practitioners take context into account when interpreting a treaty: subsequent actions such as supplemental agreements and subsequent state practice count for more than prior drafting history. See Vienna Convention, *supra* note 8, art. 32 (allowing practitioners to rely on drafting history (*travaux préparatoires*) only when “interpretation according to Article 31 . . . leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable”).

77. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1211 (4th ed. 2000).

78. *Id.* at 1423.

79. This seems to be consistent with generally accepted tools of statutory interpretation. For further discussion on the general meaning of “object and purpose,” see ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES ch. 7, § 1 (2007) (Neth.).

The context of the term object and purpose provides little insight into its meaning: there are no supplemental agreements to the Vienna Convention that elaborate on the term, and subsequent state practice is opaque.<sup>80</sup> The teleology of the term object and purpose (that is to say, the object and purpose of the object and purpose) suggests that the term is a unitary concept—or at most a binary concept capturing two very closely related ideas. The command to interpret a treaty “in light of its object and purpose” suggests a holistic mode of interpretation that accounts for more than the goals of specific treaty provisions and encompasses the normative logic that presents itself when the entirety of the treaty’s provisions are considered together.<sup>81</sup>

Prior to the drafting of the Vienna Convention, the ICJ considered the term object and purpose, and it adopted a binary view. In its 1951 advisory opinion on the Genocide Convention, the ICJ equated “purpose” with “intention” and held that the intention behind the Genocide Convention is: “[T]o condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity.”<sup>82</sup> The ICJ further found that the Genocide Convention has two objects. One is “to safeguard the very existence of certain human groups”; the other is “to confirm and endorse the most elementary principles of morality.”<sup>83</sup> The ICJ failed to explain why it understood the words object and purpose as two separate ideas and in what ways the two ideas are different and distinct.<sup>84</sup> The Court also failed to explain

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80. See SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1970) (discussing various supplementary materials used to interpret the Vienna Convention but making no mention of the context surrounding the term object and purpose).

81. The term “normative logic” is an intentional echo of the Weberian concept of “value rationality.” Value rationality is a mode of rationality used to define one’s ultimate ends, as distinct from instrumental rationality, which is used to formulate a means of achieving one’s ends. MAX WEBER, *1 ECONOMY AND SOCIETY* 24–25 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968). The term is used here to refer to both the ends of a treaty and also the relative importance of those ends as compared to other perhaps competing ends. Such a hierarchy of values is rarely made explicit in the text of a treaty, but it may be discerned in the means a treaty deploys to achieve its ends. For instance, a convention to protect refugees may require states to provide refugees within their territory with a minimum standard of care but fail to provide an enforcement mechanism when the standard is not met, thus evidencing a concern for refugee protection but not at the cost of state sovereignty.

82. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (quoting G.A. Res. 96(1), U.N. Doc. A/64/Add.1 (Dec. 11, 1946)) (internal quotation marks omitted).

83. *Id.*

84. See *id.* (listing object and purpose as two separate ideas without elaboration).



how it discovered the one purpose and two objects of the Genocide Convention.<sup>85</sup> Scholars have dismissed it as a determination made “simply by intuition,”<sup>86</sup> and it is difficult to quarrel with that assertion.

Despite the ICJ’s treatment of object and purpose as a binary concept, the unitary view is more appropriate because it fits with the ordinary meaning of the two words “object” and “purpose.” Furthermore, the weight of scholarly writing supports a unitary view.<sup>87</sup> Indeed, “most scholars in the German, Austrian, and English tradition treat ‘object and purpose’ of a treaty as a joint notion.”<sup>88</sup> Only a strain of French scholarship approaches the two as separate concepts.<sup>89</sup> For example, J.P. Jacque argues that object refers to the rights and duties a treaty creates, and purpose refers to the goals that the treaty’s authors sought to achieve by creating those rights and duties.<sup>90</sup> However, even among French scholars, it has been suggested that the binary view is being imported from French administrative law and imposed on international law, where there is less basis for it.<sup>91</sup>

The unitary view is also preferable because the binary view complicates treaty interpretation without offering notable advantages. Indeed, the distinction between the two views may be only a “question of semantics,” to which “the best solution . . . is to consider the expression ‘object and purpose’ as a unitary one reflecting two closely interrelated aspects of a single idea.”<sup>92</sup> In sum, the term object and purpose refers broadly to a treaty’s goals and the character of the means employed to achieve them.

### B. *Applying Object and Purpose in Practice*

Having defined the term object and purpose, the next task is to apply it. In other words, what method should the practitioner use to discover a treaty’s object and purpose?<sup>93</sup> A textual approach asks

85. See *id.* (noting one purpose and two objects of the Genocide Convention without elaboration).

86. Buffard & Zemanek, *supra* note 1, at 319.

87. *Id.* at 325

88. *Id.*

89. *Id.*

90. *Id.* at 326 (quoting J.P. JACQUE, *ELEMENTS POUR UNE THEORIE DE L'ACTE JURIDIQUE EN DROIT INTERNATIONAL PUBLIC* 142 (1972) (Fr.)).

91. *Id.* at 327 (quoting Reuter, *supra* note 62, at 628 n.9).

92. *Id.* at 328 (quoting MAARTEN BOS, *A METHODOLOGY OF INTERNATIONAL LAW* 153 (1984)).

93. In some instances, the object and purpose is stated explicitly within the text of the treaty. For a list of examples, see *supra* note 25.

what intention is manifest in the text of the treaty.<sup>94</sup> A more subjective approach asks what intention was in the minds of the treaty's drafters.<sup>95</sup>

A subjective approach may be more appropriate for determining a treaty's object and purpose than it would be for determining the meaning of specific terms within the treaty. After all, object and purpose refers to the goals that motivated the drafting and ratification of a treaty. Therefore, it is natural to look to the motives of the people and institutions that held those goals.

But the problem with a subjective method is twofold. First, it lacks determinacy. Article 31 is a general rule of interpretation, and as such, it should guide practitioners to the correct understanding of treaty provisions, resolving disputes between competing interpretations.<sup>96</sup> However, if object and purpose is understood as the subjective intent of a treaty's drafters, Article 31 would invite conflict because of the difficulty in discerning each drafter's subjective intent and then reconciling those multiple intentions into a coherent whole.<sup>97</sup> Second, using object and purpose as a means of inquiring into the treaty makers' intentions would undermine Article 31's emphasis on text as the primary focus of treaty interpretation. Instead, object and purpose should be understood as an objective concept, referring to the goals of the treaty's drafters as those goals are reflected in the treaty's text. This is consistent with the assertion made by Sir Ian Sinclair that "there can be no common intentions of the parties aside or apart from the text they have agreed upon."<sup>98</sup>

Even when the task of divining the meaning of object and purpose is limited to the text of a treaty, it gives rise to another conceptual puzzle. A treaty's object and purpose is understood through the treaty's text, but the text is only properly understood when interpreted in light of the treaty's object and purpose.<sup>99</sup> Neither can be fully understood without the other, raising the obvious question of where to start.

This circularity issue is not as problematic as it first appears. Statutory interpretation is often a necessary dialectic between the

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94. See Buffard & Zemanek, *supra* note 1, at 323–24 (describing the textualist approach as "[t]ypical of the English tradition").

95. See *id.* at 323 (explaining that the German-Austrian approach defines object and purpose as the "general aim of the treaty").

96. See Vienna Convention, *supra* note 8, art. 31 (providing terms of the "[g]eneral rule of interpretation").

97. See LINDERFALK, *supra* note 79, at 204 (explaining the subjectivity of object and purpose). Ironically, although not owed with certainty, a subjective interpretation of the Vienna Convention itself may lead to less conflicting results.

98. Buffard & Zemanek, *supra* note 1, at 324 (quoting SINCLAIR, *supra* note 71, at 130).

99. *Id.* at 333 (calling this conceptual difficulty a "vicious circle").

general and the specific, and by comparing one against the other, we eventually hone in on the end result. To simplify, the search for a treaty's meaning can be understood as a series of steps. At Step One, we review the *specific* provisions of a treaty looking for common themes and ideas. (We do this tentatively and with caution, aware that at first reading, the full import and nuance of each article may not be apparent.) At Step Two, we examine the *general* themes and ideas that came forward in Step One. We try to reconcile these themes with one another, checking whether they fit together easily or whether they compete and conflict. Based on this comparison, we formulate a tentative statement of a treaty's object and purpose. At Step Three, we return to the specific articles of the treaty, reexamining them in the light of our tentative statement of the object and purpose, making notes of conflicts and anomalies. At Step Four, we return to the general themes, and, based on the conflicts and anomalies discovered in Step Three, we revise and refine our statement of the treaty's object and purpose. And so on.<sup>100</sup> This process of moving back and forth from the specific to the general may be repeated numerous times, but each time, the process moves us closer to a refined understanding of a treaty's object and purpose. The metaphor is not a circle spinning endlessly, but rather a spiral spinning gradually inward and coming, literally and figuratively, to a point.

The dialectical process outlined above pulls us out of the circle, but it does not guarantee a single, clear result. Different interpreters will come to different results depending on how the analysis is conducted. The point is not that indeterminacy may be avoided, but rather that the construct of an endless interpretative circle is overstating the problem.

#### IV. ARTICLE 19(C): OBJECT, PURPOSE, AND RESERVATIONS

A reservation is a unilateral statement made by a state upon ratifying a treaty that "modif[ies] the legal effect of certain provisions of the treaty in their application to that State."<sup>101</sup> The process for making reservations is governed by Articles 19 through 23 of the Vienna Convention, and within those articles, the term object and purpose is used twice but never defined.<sup>102</sup>

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100. *Id.* at 333–34 (proposing a two-step process similar to the one presented here for discovering a treaty's object and purpose). Buffard and Zemanek feel their test fails to provide determinacy as well. *Id.*

101. Vienna Convention, *supra* note 8, art. 2(d).

102. *Id.* arts. 19–23. In 1975, Judge José M. Ruda, then a judge on the International Court of Justice, claimed, "[t]he question of reservations to multilateral

Within this complex modern regime, the object and purpose test is best understood as protection against reservations that would result in incoherent treaty rules. Coherence is a technical term, developed by Professor Thomas Franck, referring to a rule's logical consistency.<sup>103</sup> A coherent rule treats like cases alike, and any distinction it makes between cases must be defensible in light of the rule's generalized logic—that is, “that distinctions in the treatment of ‘likes’ [must] be *justifiable in principled terms*.”<sup>104</sup> By contrast, an incoherent rule makes indefensible distinctions which rob a rule of legitimacy.<sup>105</sup> Every new reservation has at least the potential to add incoherence to a treaty. The object and purpose test stands as protection against such incoherence.

This analysis of the object and purpose test proceeds in two parts. First, to provide background, it considers the history of the term object and purpose as it has been used in the context of reservations. Second, it argues that the object and purpose test is best understood as a coherence-saving device based on the text of Article 19(c), its context, the opinion of the ICJ, and state practice.

### A. Background

Over the past half-century, the rules for creating reservations have become increasingly liberal, meaning it has become easier for a state to attach a reservation to a treaty. Prior to 1951, the generally accepted rule was that any reservation required the states party to give unanimous consent.<sup>106</sup> This was a strict test because any single state could veto any proposed reservation.

In 1951, this rule changed when the ICJ published its *Advisory Opinion Regarding Reservations to the Convention on the Prevention and Punishment of Genocide*, in which it introduced the words object and purpose into the reservations regime.<sup>107</sup> The ICJ held, “it is the

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treaties has been one of the most controversial subjects in contemporary international law.” José M. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95, 101 (1975) (Neth.). Since then, scholars have continued to bemoan the complexity of reservation law. See, e.g., AUST, *supra* note 38, at 100 (claiming the law of reservations is “baffling”); Richard W. Edwards, *Reservations to Treaties*, 10 MICH. J. INT’L L. 362, 362 (1989) (stating that the law of reservations is not “clear and stable”); Edward T. Swaine, *Reserving*, 31 YALE J. INT’L L. 307, 307 (2006) (explaining that the law of reservations is “complex and controversial”).

103. FRANCK, *supra* note 19, at 144.

104. *Id.*

105. *Id.* See *infra* Part IV.B for a more detailed discussion of coherence.

106. Edwards, *supra* note 102, at 388.

107. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (“[I]t is the compatibility of a reservation with the object and purpose of the Convention that must furnish the

compatibility of a reservation with the object and purpose” of a treaty that is the proper basis for formulating and objecting to a reservation.<sup>108</sup> Notably, the ICJ used the definite article “the” rather than the indefinite “a,” thereby signaling a treaty’s object and purpose is the *sole* basis for objecting to reservations. The ICJ decision loosened the rules for attaching reservations by constraining the basis upon which objections could be made; only objections premised on the idea that the reservation was incompatible with the treaty’s object and purpose would have legal force.<sup>109</sup> By limiting the available types of objections, the ICJ made it easier for states to attach reservations.

The ICJ’s decision drew a quick response from the International Law Commission, which declared that “the object and purpose [test] . . . is not suitable for application to multilateral treaties in general.”<sup>110</sup> The Commission believed that the general rule should remain a unanimity rule, though an object and purpose test might be appropriate for some treaties.<sup>111</sup> Then, in 1953, the Commission suggested creating a special “chamber of summary procedure” that would determine when a reservation is incompatible with a treaty’s object and purpose.<sup>112</sup> With this suggestion, the Commission simultaneously demonstrated its new willingness to jettison the unanimity rule and its fear of the indeterminacy and conflict that could result from an object and purpose standard. A chamber of summary procedure was never formed, but the Commission affirmed in 1962 that the object and purpose test for reservations should be an “objective test.”<sup>113</sup>

The ICJ’s Genocide Opinion and the responses of the ILC suggest two standards of review for reservations. For bilateral treaties and some multilateral treaties, a state could propose any reservation, but unanimous acceptance was necessary for the reservation to enter into force.<sup>114</sup> For other multilateral treaties, a state could only propose, and other states could only object to, reservations based on their compatibility or incompatibility with a treaty’s object and purpose.<sup>115</sup>

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criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.”).

108. *Id.*

109. *Id.*

110. Edwards, *supra* note 102, at 389.

111. *Id.*

112. *Id.*

113. *Id.* at 390.

114. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 490–92 (1966); SINCLAIR, *supra* note 71, at 54–55.

115. See Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (“[I]t is the compatibility of a reservation with the object and purpose of the Convention that must furnish the

There was no test for distinguishing multilateral treaties that merited the first standard of review and those that merited the second.

In 1969, the rules for reservations changed again when the Vienna Convention was concluded, thereby establishing the test which exists today. Under the Vienna Convention, there are two steps for attaching a valid reservation.<sup>116</sup> In Step One, a state formulates its reservation. In Step Two, the other states respond. For Step One, the underlying treaty will sometimes explicitly permit or forbid a list of reservations,<sup>117</sup> but otherwise, the formulation stage is governed by Article 19(c), which states:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty.<sup>118</sup>

In Step Two, when each contracting state chooses whether to accept the reservation, there is a range of options.<sup>119</sup> A state may accept the reservation, thereby entering into the treaty with the reserving state.<sup>120</sup> It may reject the reservation, thereby refusing to join the treaty with the reserving state.<sup>121</sup> Or, it may reject the reservation and the section of the treaty to which it is addressed while still entering into the remainder of the treaty with the

criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.”); BROWNLIE, *supra* note 114, at 491 (noting that the ICJ’s more permissive standard for reservations was not unprecedented). “In the period of the League of Nations (1920–46) the practice in regard to multilateral conventions showed a lack of consistency.” *Id.* Sometimes, states applied a unanimity rule; other times, they applied more flexible rules. *Id.*; see J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 322–24 (Sir Humphrey Waldock ed., 6th ed. 1963) (explaining the International Court’s holding that “in the case before it a state making a reservation to which some but not all the parties objected would become a party if its reservation should be ‘compatible with the object and purpose of the convention,’ but not otherwise”).

116. Vienna Convention, *supra* note 8, arts. 19–23. In practice, contracting states challenge a reservation for being incompatible with a treaty’s object and purpose (step one) and object to a reservation for other reasons (step two) simultaneously. More important than the chronology, for our purposes, is the functional difference between the two steps.

117. *Id.* art. 19(a)–(b).

118. *Id.* art. 19(c).

119. Because it contains the object and purpose test, Article 19(c) is the focus of the present analysis, but before looking at that article in detail, it is helpful to have an understanding of the second step for making reservations.

120. Vienna Convention, *supra* note 8, art. 20(4)(a). Also, a state may remain silent with regard to a reservation, and “a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months.” *Id.* art. 20(5).

121. *Id.* art. 20(4)(b).

reserving state.<sup>122</sup> A state's objection need not be premised on the object and purpose standard—or any other standard for that matter. Indeed, an objecting state is not required to give any basis for its objection.

An important innovation of the Vienna Convention is that a "reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*" (literally "between themselves").<sup>123</sup> This means that State A may propose a reservation which is accepted by State B, but B's acceptance will not affect State C's right to accept or reject the reservation between itself and A. Nor will B's response alter the effects of the treaty between C and A, or even between C and B.<sup>124</sup>

These two factors—the *inter se* rule and the range of options for accepting or rejecting a treaty—combine to create a regime that is considerably more complex and more accommodative of reservations than the older, unanimous consent scheme. The old rule gave every state veto power over every proposed reservation, and this veto power would nullify the reservation's effect among all contracting states.<sup>125</sup> The new rule allows each pair of states within a multilateral treaty to determine how the reservation will affect them bilaterally without interfering with other states party.<sup>126</sup>

This new regime represents more than just a change in procedure. It is a paradigm shift. The unanimous consent rule conceptualized a multilateral treaty as a single, integral agreement. No exceptions or changes were permitted unless all contracting states agreed. The current regime, by contrast, casts a multilateral treaty as a bundle of parallel bilateral agreements, and each pair of states has the freedom, within limits, to craft the details of the agreement between themselves alone without affecting other states.

The limit on this freedom is found in the object and purpose test. A state may not attach a reservation that is incompatible with the treaty's object and purpose, and, by virtue of Article 19(c), other states have a legal basis for objecting to such a reservation—not just between themselves and the reserving state but among all states party. In this way, Article 19(c) is unique among the Vienna Convention's reservation rules because it is the narrow avenue by which states may make *inter se* objections.<sup>127</sup> Thus, if State A proposes an incompatible reservation, State B may object citing

122. *Id.* arts. 20(4)(b), 21(3).

123. *Id.* art. 21(2).

124. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(3) (1987).

125. Vienna Convention, *supra* note 8, art. 21.

126. It is yet to be seen how this shift will affect future treaties.

127. Vienna Convention, *supra* note 8, art. 19(c).

Article 19(c), and this objection, if successful, will void the reservation as between all states party.

This insight—that Article 19(c) provides a basis for making *inter se* objections—does not by itself explain what it means to say that a reservation is incompatible with a treaty’s object and purpose. Nonetheless, it provides an important clue. The next section uses this clue, in conjunction with the text and usage of Article 19(c), to provide a new, clearer understanding of the object and purpose test.

### B. *The Object and Purpose Test as a Safeguard Against Incoherence*

Article 19(c)’s object and purpose test is best understood as a test to preserve treaty rule coherence. The word coherence is used here in a technical sense; it is a jurisprudential concept elaborated by Professor Franck.<sup>128</sup> It means that “in applying a rule, conceptually alike cases will be treated alike”<sup>129</sup> and that any “distinctions in the treatment of ‘likes’ be *justifiable in principled terms*.”<sup>130</sup> By contrast, an incoherent rule is a rule that suffers from “bad distinctions.”

Bad distinctions—in the sense of distinctions incapable of being defended by reference to the generalized logic of the rule—illegitimate the rule to which they adhere. They make it incoherent. [For example, a] rule that property taxes will be levied only on houses with even-numbered addresses would be perceived as illegitimate by almost anyone.<sup>131</sup>

Reservations are potential threats to the coherence of a treaty’s rules because they introduce new distinctions into the treaty. If those distinctions are “incapable of being defended by . . . the generalized logic” of the underlying treaty’s rules, then the reservation weakens the treaty’s coherence.<sup>132</sup> As a coherence-preserving device, Article 19(c) blocks reservations with unjustifiable distinctions.

A coherence-based interpretation of Article 19(c) is supported by: (1) the article’s text; (2) the opinion of the ICJ; (3) the structure of the Vienna Convention’s reservation rules; and (4) state practice.

#### (1) The Text

According to the coherence-based interpretation, Article 19(c) forbids reservations that do not fit (are incompatible/incoherent) with the treaty’s generalized logic (its goals/object and purpose). The words incompatible and incoherent overlap in meaning. They both

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128. FRANCK, *supra* note 19, at 143–49.

129. *Id.* at 143.

130. *Id.* at 144.

131. *Id.* at 152.

132. *Id.*



derive from Latin roots, the former meaning “[i]ncapable of being held together”<sup>133</sup> and the latter meaning “consisting of parts which do not stick . . . together.”<sup>134</sup> In modern usage, incompatible means “incapable of existing together in the same subject; contrary or opposed in character; discordant, incongruous, inconsistent.”<sup>135</sup> Incoherent means “not connected or unified by any general principle or characteristic; inconsistent, uncoordinated.”<sup>136</sup> The two words’ meanings overlap when used to refer to ideas or concepts that, when combined, lack orderly continuity. The term object and purpose refers to the specific ends a treaty seeks and also the logic and the normative character of the rights and obligations the treaty creates to attain those ends.<sup>137</sup> This is akin to Professor Franck’s reference to the “generalized logic” of a treaty.<sup>138</sup> According to Franck, the generalized logic of a rule refers to the rational principles used to achieve an end, and a coherent rule must exhibit a “nexus” between its desired results and the means it uses to distinguish between like cases.<sup>139</sup> It is this nexus—the rational principles that connect a rule’s ends and means—that should be understood as part of the object and purpose of a treaty.<sup>140</sup> In this way, “incompatible” is understood to mean “incoherent,” and “object and purpose” is understood to refer to a treaty’s generalized logic, thus supporting a coherence-based test.

## (2) Opinion of the International Court of Justice

The coherence-based interpretation is also supported by the ICJ opinion wherein that court first proposed an object and purpose test. As discussed in the preceding section, the ICJ created an object and purpose test in its Genocide Opinion.<sup>141</sup> In that opinion, the ICJ explicitly rejected the unanimous consent rule and introduced the object and purpose test as an alternative limit on reservation making.<sup>142</sup> Some limit was necessary, the Court explained, because

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133. OXFORD ENGLISH DICTIONARY (2d. ed. 1989), available at <http://dictionary.oed.com/> (search for “incompatible” using the “Find Word” tool).

134. *Id.*

135. *Id.*

136. *Id.*

137. See *infra* Part III (“A treaty’s object and purpose is understood through the treaty’s text, but the text is only properly understood when interpreted in light of the treaty’s object and purpose.”).

138. FRANCK, *supra* note 19, at 152.

139. *Id.* at 146, 180–81.

140. See WEBER, *supra* note 81 (stating that the value rationality reflected in a treaty must fit coherently with its instrumental rationality).

141. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

142. *Id.*

to hold otherwise would “sacrifice the very object” and “frustrate the purpose[]” of a treaty.<sup>143</sup> With this language, the ICJ was invoking some value beyond any single state or reservation, implying that an incompatible reservation threatens not only the integrity of the treaty obligations for the reserving state alone but also the core of the treaty for all states party.

The ICJ would not have created the object and purpose test if it had been focused only on reserving states. A single state’s treaty membership may be conceptualized as a spectrum with 100% adoption of the treaty’s obligations on one end and 0% adoption on the other, and states that join with reservations fall somewhere between these two poles. Seen this way, it would be logical to assume that a treaty’s goals would be better served by a state’s partial adoption of a treaty—that is, adoption with a reservation—rather than no adoption at all. Yet, the ICJ did not embrace this conceptualization. Instead, it held that, for states insisting on incompatible reservations, exclusion is necessary.<sup>144</sup> The ICJ never clearly articulated what damage it envisioned in the wake of an incompatible reservation, but it saw this damage reaching beyond the obligations of the reserving state.<sup>145</sup>

The coherence-based interpretation of the object and purpose test provides a compelling description of that far-reaching threat. Incoherent reservations erode a treaty’s legitimacy and its compliance pull. They reach beyond the reserving state and strike at the core of a treaty, undermining the treaty for all states party. This is how, to use the ICJ’s language, a reservation may “sacrifice the very object” of a treaty.<sup>146</sup>

### (3) Context: The Structure of the Vienna Convention’s Reservation Regime

The coherence-based interpretation of Article 19(c) is supported by that article’s place within the Vienna Convention’s regime governing reservations. Article 19(c) is unique because it provides a legal basis for making *inter se* objections, and as a safeguard for treaty coherence, it is appropriate that states be able to make

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143. *Id.* at 24.

144. *Id.* at 29. Article 19(c) forces states to choose: they must commit to the negotiated terms of the treaty beyond some threshold level on the scale of zero to one hundred or remain outside of the treaty entirely. Vienna Convention, *supra* note 8, art. 19(c).

145. *See generally* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 12–22 (May 28) (noting the abstract issue of collateral effects of reservations but not addressing it with specificity).

146. *Id.* at 24.

objections *inter se*.<sup>147</sup> Incoherence affects more than simply the bilateral give-and-take between two states within a multilateral treaty. It affects the legitimacy of the entire treaty, so *intra se* objections are not enough. To cure incoherence, objecting states need the power to reach into the proverbial bundle of bilateral connections and root out the incoherent reservation entirely.<sup>148</sup>

It is also appropriate that *inter se* objections have a *legal* basis. Even without Article 19(c), states could make political objections *inter se*, but a legal objection, unlike a political one, invokes the authority of the international legal regime. It says, "This reservation must be withdrawn not only because we, the objecting state, want it withdrawn but also because it violates international law." Grounding coherence-based objections in legal norms is appropriate because the coherence and legitimacy of international law are values that exist beyond the discrete political interests of any state or states. They are values shared by all states with an interest in seeing international law obeyed. To that end, Article 19(c) empowers states to do more than apply political pressure against an offending reservation. Through Article 19(c), states can summon the existing authority of the established legal regime to protect the future authority of budding legal rules.

#### (4) State Practice: Convention on the Elimination of All Forms of Discrimination Against Women

A real world illustration of the use of Article 19(c) to protect treaty coherence involves CEDAW.<sup>149</sup> Immensely popular, CEDAW boasts 186 states party<sup>150</sup> that, by joining the treaty, agreed "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>151</sup> However, a handful of states attached troubling reservations premised on religious or social grounds that interposed significant exceptions to this obligation.<sup>152</sup> The Maldives' proposed reservation read:

The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may

147. *Supra* Part IV.A.

148. FRANCK, *supra* note 19, at 72–75.

149. CEDAW, *supra* note 3.

150. Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Convention on the Elimination of All Forms of Discrimination Against Women, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) [hereinafter CEDAW Status] (last visited Mar. 30, 2010).

151. CEDAW, *supra* note 3, art. 2(f).

152. Schabas, *supra* note 4, at 84–86.

consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is [sic] founded.<sup>153</sup>

In response, a number of states objected, arguing that these reservations were incompatible with CEDAW's object and purpose.<sup>154</sup> They argued that the Maldives' reservation violated Article 19(c) because it allowed Sharia law to trump the protections of CEDAW.<sup>155</sup> States party to CEDAW pledged themselves to eliminate national laws that "discriminat[ed] against women,"<sup>156</sup> and the Maldives' reservation would have created an exception to this pledge, whereby gender discriminatory laws would remain in force in the Maldives if doing otherwise would be contrary to Sharia law.<sup>157</sup> Sharia law, though not uniform across the world,<sup>158</sup> is invoked in some countries to justify female genital mutilation, honor killings of women, the denial of education to women, and gender apartheid.<sup>159</sup>

The objecting states were not satisfied with rejecting the reservation only vis-à-vis themselves and the Maldives—an option available to each objecting state through the Vienna Convention's Article 20.<sup>160</sup> Instead, they sought to nullify the reservation as between any and all parties to the treaty.<sup>161</sup> Faced with ongoing criticism from objecting states, the Maldives eventually dropped its offending reservation and replaced it with a more acceptable, less far-reaching one.<sup>162</sup>

153. *Id.* at 85; cf. CEDAW Status, *supra* note 150 (indicating similar objections from several other states).

154. Multilateral Treaties Deposited with the Secretary-General, *supra* note 150 (quoting several of these objections). The object and purpose test was applicable both through the Vienna Convention's Article 19(c) and through one of CEDAW's provisions that created an identical restriction on reservations. CEDAW, *supra* note 3, art. 28(2). The objecting states included Austria, Canada, Finland, Germany, the Netherlands, Portugal, and Sweden. Schabas, *supra* note 4, at 89.

155. CEDAW Status, *supra* note 150 (quoting several of these objections).

156. CEDAW, *supra* note 3, art. 2.

157. See CEDAW Status, *supra* note 150 (providing several objections to the reservation of the Maldives).

158. Marie-Aimée Hélie-Luca, *What is Your Tribe?: Women's Struggles and the Construction of Muslimness*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 21, 23 (Courtney W. Howland ed., 1999).

159. See Mahnaz Afkhami, *Gender Apartheid and the Discourse of Relativity of Rights in Muslim Societies*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 67, 69 ("Gender apartheid is clearly defined in all laws and regulations pertaining to the role of women within the private and public spheres.").

160. Vienna Convention, *supra* note 8, art. 20(2).

161. See, e.g., CEDAW Status, *supra* note 150 (containing Austria's objection, which reads, "The reservation made by the Maldives is incompatible with the object and purpose of the Convention . . . Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto." (emphasis added)).

162. The revised reservation reads as follows:

The CEDAW example illustrates how Article 19(c) is used to protect treaty coherence. The Maldives' reservation was objectionable because it added a new distinction to CEDAW's rules and that distinction was not defensible in light of the generalized logic of the Convention. CEDAW rests on the premise that many states have gender discriminatory "laws, regulations, customs and practices" that should be eliminated.<sup>163</sup> In other words, gender discrimination is not legitimate simply because it has become entrenched in a society's laws and customs. This principle is incompatible with a reservation that permits gender discrimination simply because such discrimination is part of a society's laws and traditions. From the perspective of the objecting states, allowing the reservation would have affected some element of the treaty that reached beyond the obligations the Maldives was crafting for itself.<sup>164</sup> The objecting states were concerned that the Maldives' reservation and others like it would erode the perceived legitimacy of CEDAW, and this erosion would result more generally in states taking their CEDAW obligations less seriously.<sup>165</sup> The following objection from Norway's delegation illustrates this point:

[A] reservation by which a State party limits its responsibilities under the Convention by invoking general principles of internal law may create doubts about the commitments of the reserving State to the object and purpose of the Convention *and, moreover, contribute to undermine the basis of international treaty law. It is in the common interest of States that treaties to which they have chosen to become parties also are respected, as to their object and purpose, by all parties.*<sup>166</sup>

The protection of women's rights certainly motivated the objecting states, but when analyzing how the object and purpose test works, it is important to note that the test itself did not directly

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The Government of the Republic of Maldives expresses its reservation to article 7(a) of the Convention, to the extent that the provision contained in the said paragraph conflicts with the provision of article 34 of the Constitution of the Republic of Maldives. . . . The Government of the Republic of Maldives reserves its right to apply article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of percent Muslim population of the Maldives.

*Id.*

163. CEDAW, *supra* note 3, art. 2(f).

164. For example, Finland's representative stated "the unlimited and undefined character of the said reservations cast serious doubts about the commitments of the reserving State to fulfil [sic] its obligations under the Convention. CEDAW Status, *supra* note 150.

165. *Id.* (providing several objections stating such).

166. *Id.* (emphasis added).

protect Maldivian women. When invoking Article 19(c), the objecting states did not claim the authority to regulate the rights of women within the Maldives, nor did they claim that the Maldives' reservation would directly affect the rights of their (the objecting states') citizens.<sup>167</sup> Indeed, the fact that the objections ultimately resulted in greater protection for Maldivian women was entirely contingent on the response of the Maldivian government. Faced with Article 19(c) objections, the government may just as well have terminated its membership in CEDAW, in which case Maldivian women would have received none of the Convention's protections.<sup>168</sup> Article 19(c) would not have prevented this outcome and could have even provoked it. But what Article 19(c) did prevent—what it was crafted to prevent—were reservations that did not fit with the logic of the underlying treaty.

Objecting states did not use the words “rule coherence” when they invoked Article 19(c), but it was coherence they were trying to protect. States were worried not merely about the rights of women in one individual country—though presumably this was a concern—but also about the larger threat to CEDAW's legitimacy. States would have felt less obligation to comply with CEDAW as its legitimacy waned, and the protections it affords women would have become less meaningful.

In sum, coherence-based interpretation of Article 19(c) is supported by the text of the article, the opinion of the ICJ, state practice, and the function of the article within the context of the Vienna Convention's reservation regime. According to this interpretation, when a state invokes Article 19(c), it is arguing that a particular reservation would add incoherent distinctions to a treaty's rules.

To be sure, even if states explicitly adopt the coherence-based interpretation, they will continue to debate which reservations violate the test, but this would be an improvement over the under-theorized, undefined alternative. Rather than rake the surface of two undefined terms—“incompatible” and “object and purpose”—states should root their arguments in the theoretical foundation of coherence and legitimacy. This would allow a more focused and sophisticated discussion of whether the test is satisfied.

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167. See, e.g., *id.* (“The Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto.”).

168. Vienna Convention, *supra* note 8, arts. 54–64 (providing termination rules).

## V. ARTICLE 18: THE INTERIM OBLIGATION

Article 18 forbids signatory states from undertaking any action that would “defeat” the object and purpose of a treaty. Yet, neither the text of the Vienna Convention nor subsequent practice has adequately defined these terms, leaving ambiguous the scope of the prohibition. The remainder of this Article takes a critical look at four tests used to understand Article 18 and suggests that, in their place, a new test should be adopted. This new test is premised on the idea that Article 18 exists to facilitate domestic review of pending treaties by preserving the status quo at the time of signature.

### A. Background

Article 18 of the Vienna Convention reads as follows:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>169</sup>

The first sentence of Article 18 creates the obligation—not to defeat a treaty’s object and purpose—and subsections (a) and (b) describe when the obligation applies. Article 18 is known as the “interim obligation” because it governs state conduct in the period between a state signaling its intention to join a treaty (i.e., signature) and the moment the state either becomes bound to the treaty (i.e., ratification) or makes clear its intention not to become a party to the treaty.<sup>170</sup>

The time between signature and ratification allows governments to review a treaty before the state becomes fully bound.<sup>171</sup> In the past, signature alone was sufficient to bind a state to a treaty, which

169. *Id.* art. 18.

170. *Id.* Precisely how a state makes clear its intention not to be bound by a treaty has been the subject of much debate. In the vernacular, the concept of “unsigned” treaties has come into vogue, although there is no such action recognized in treaty law. See Jonas, *supra* note 6, at 1042–44 (“[T]here is no term in the formal international law lexicon for ‘unsigned’ a treaty, although that term has crept into common usage both inside and out of the legal community.”).

171. SINCLAIR, *supra* note 71, at 29, 39–41.

was logical in a system of primarily monarchical states.<sup>172</sup> International law assumed that each state's representative had authority to make a binding commitment on behalf of the state, so treaties entered into force upon signature, and any subsequent ratification by the head of state "merely confirmed the agent's act of signature."<sup>173</sup> As monarchy was replaced in many states by more complex systems of government, however, this assumption became less realistic,<sup>174</sup> and many governments now require that some treaties be approved by their legislative branch before an executive can bind the state.<sup>175</sup> With the interim obligation, international law accommodates this practice.

As ratification became the ultimate binding act, the drafters of the Vienna Convention were left to decide what significance remained for signature. Signature could not retain its traditional status as the ultimate binding act because that would undo the shift towards meaningful ratification and frustrate states in their attempts to review treaties according to domestic procedures. The Vienna Convention adopts a middle position whereby signature is more than ceremonial but does not fully bind a state<sup>176</sup> unless a state clearly intends its signature to have binding effect.<sup>177</sup>

This middle ground between no obligation and full commitment to a treaty reflects two competing goals. Domestically, the interim obligation protects political accountability by accommodating domestic review of pending treaties.<sup>178</sup> Domestic laws that require multi-branch review of a treaty exist to subject new international commitments to a wider swath of political actors.<sup>179</sup> For instance, in the United States, the President is required to obtain the advice and consent of two-thirds of the Senate before ratifying a treaty,<sup>180</sup> and

172. *Id.*

173. Charme, *supra* note 37, at 85–86.

174. SINCLAIR, *supra* note 71, at 30; Charme, *supra* note 37, at 86.

175. See, e.g., U.S. CONST. art. II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."); DUNCAN B. HOLLIS ET AL., NATIONAL TREATY LAW AND PRACTICE 161, 258–60, 323–24, 419–21, 544–47, 733–34 (2005) (documenting similar legal provisions for China, France, Germany, Japan, Russia, and the United Kingdom).

176. Charme, *supra* note 37, at 88–89.

177. Vienna Convention, *supra* note 8, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

178. Charme, *supra* note 37, at 89 ("Treaty making in this fashion is deemed necessary to allow signatory states time to contemplate the treaty and its potential domestic and international ramifications before the signatory state is bound.").

179. HOLLIS ET AL., *supra* note 175, at 23–24 ("Whether as a matter of national law or practice, states authorize various actors outside of the executive (e.g., the legislature, the courts, sub-national units, or even the populace at large) to restrict when or how the executive may exercise its treaty authorities.").

180. U.S. CONST. art. II, § 2. For examples of other countries requiring some sort of domestic review, see *supra* note 175.



the interim obligation facilitates this process because it allows the President to conclude negotiations by signing a treaty without fully binding the United States to the treaty prior to senatorial review.

Internationally, the interim obligation furthers a different goal, facilitating cooperation between signatory states.<sup>181</sup> When a state signs a treaty, it makes a legal commitment not to defeat the treaty's object and purpose.<sup>182</sup> Other states may rely on that commitment as they deliberate over the merits of a pending treaty, secure in the knowledge that all signatories are committed, at least temporarily, to a threshold level of cooperation.

The interim obligation thus attempts to reconcile two competing concerns. One concern is that states are not fully bound by the provisions of a treaty without the opportunity to review it under domestic procedures, and the second concern is that states may rely on one another to some degree to act in accordance with the recently negotiated obligations. The second concern is a product of the first, allowing domestic political institutions to review a pending treaty without substantial risk of other states suddenly acting in opposition to the treaty, thereby reducing uncertainty and raising states' ability to accurately weigh the costs and benefits of ratification.

### B. *The Essential Elements Test*

Multiple theories have been suggested to explain how, in reconciling these goals, the interim obligation should be applied. Under one theory, the term object and purpose is understood to mean the "essential goals" of a treaty,<sup>183</sup> and Article 18 forbids states from violating those goals. According to this interpretation, a signatory state need not comply with every part of a treaty, but it must comply with the most important parts.<sup>184</sup> This essential elements test is appealing because it is an intuitive reading of the language of Article 18. Object and purpose is understood to mean "essential elements," and "defeat" is understood as "violate"; by transporting these words into Article 18, the test is born.

The test is also appealing because it reinforces the idea that signature is a significant act. Signature is a legal promise between states, often made after intensive negotiations, and it represents a

181. BRIERLY, *supra* note 115, at 319–21.

182. *Cf.* Vienna Convention, *supra* note 8, art. 31.1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

183. Buffard & Zemaneck, *supra* note 1, at 331–32.

184. *Id.* at 332 ("[T]he treaty provisions actually agreed upon might become more or less irrelevant as long as the conduct of the parties achieved the aim of the treaty.").

political and policy commitment by the executive on behalf of a state. It seems appropriate that this promise should protect, at least, the most important aspects of the newly negotiated agreement.

However, the essential elements test suffers from two significant problems. First, the test offers little protection for domestic political factions. The essential elements test accommodates domestic review only for the less significant, nonessential parts of a treaty. The more significant, essential parts of the treaty are binding immediately upon signature, depriving domestic political factions of the same full opportunity to review those obligations before the state is bound by them. Where protection is needed most, protection is least given, and vice versa.

The second problem with the essential elements test is that it offers no objective method for determining which parts of a treaty are the "essential" parts.<sup>185</sup> A treaty's object and purpose cannot be reduced to specific articles because object and purpose is an inherently abstract concept.<sup>186</sup> Without an authoritative judge to resolve the question, states can only dispute inconclusively whether a particular provision of a treaty is indeed part of its object and purpose.

In other contexts, this abstractness is less problematic. For example, Article 31 requires that a treaty be interpreted in light of its object and purpose.<sup>187</sup> In that context, object and purpose is merely a lens through which practitioners must read the treaty. The actual point of focus is on the treaty's articles, so the object and purpose need not be articulated except at a high level of generalization. By contrast, the essential elements test looks directly at the object and purpose and attempts to reduce it to specific rules. Rather than looking *through* the metaphorical lens to see something beyond it, the practitioner must look *at* the lens and describe its precise contours. However, any attempt to move from high-level abstraction to specific features will fail for lack of a clear standard. In practically all cases, there is no objective method for determining which articles of a treaty are the essential ones or what actions defeat them.

The essential elements test is a straightforward reading of Article 18, but it fails to protect domestic political factions and is unworkably subjective. Within academic literature, it has been eclipsed by another, more objective standard: the impossible performance test.

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185. See Vienna Convention, *supra* note 8, art. 18 (listing no objective criteria for defining "object" or "purpose").

186. *Supra* Part III.

187. Vienna Convention, *supra* note 8, art. 31.

### C. *The Impossible Performance Test*

The drafters of the Vienna Convention provided eight examples of actions that would defeat the object and purpose of a treaty,<sup>188</sup> and, at first glance, these examples appear to support the proposition that Article 18 embodies an “impossible performance” standard, wherein a treaty’s object and purpose is defeated if subsequent performance of the treaty becomes impossible or “meaningless.”

Of the eight examples, the first six come from the authors of an early draft of the Vienna Convention known as the 1935 Harvard Draft. These examples are:

(1) A treaty contains an undertaking on the part of a signatory that [the signatory] will not fortify a particular place on its frontier or that it will demilitarize a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armaments within the zone referred to.

(2) A treaty binds one signatory to cede a portion of its public domain to another; during the interval between signature and ratification the former cedes a part of the territory promised to another State.

(3) A treaty binds one signatory to make restitution of certain property to the other signatory from which it has been wrongfully taken, but, while ratification is still pending, it destroys or otherwise disposes of the property, so that in case the treaty is ratified restitution would be impossible.

(4) A treaty concedes the right of the nationals of one signatory to navigate a river within the territory of the other, but the latter, soon after the signature of the treaty, takes some action which would render navigation of the river difficult or impossible.

(5) By the terms of a treaty both or all signatories agree to lower their existing tariff rates, but while ratification of the treaty is pending one of them proceeds to raise its tariff duties.

(6) A treaty provides that one of the signatories shall undertake to deliver to the other a certain quantity of the products of a forest or a mine, but while ratification is pending, the signatory undertaking the engagement destroys the forest or the mine, or takes some action which results in such diminution of their output that performance of the obligation is no longer possible.<sup>189</sup>

The International Law Commission considered two more examples in 1965:

(7) A treaty provides for the return of art work taken from the territory of another state. Prior to ratification, the signatory either destroys or allows the destruction of the art work.

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188. *Summary Records of the 788th Meeting*, [1965] Y.B. Int’l L. Comm’n 87, 92, U.N. Doc. A/CN.4/SER.A/1965.

189. Charme, *supra* note 37, at 98–99 (citing James W. Garner, *Draft Convention on the Law of Treaties*, 29 AM. J. INT’L L. SUPP. 653, 781–82 (1935)).

(8) A treaty provides for the cession of certain installations by a signatory in another State. The ceding State destroys the installations or allows for their destruction.<sup>190</sup>

Based on these examples, the standard for defeating a treaty's object and purpose is stringent. Examples (3) and (7) involve the restitution of property, and to violate Article 18, a state would need to destroy the property prior to transfer. Thus, some scholars have said that a treaty's object and purpose is defeated when subsequent performance of the treaty would be "impossible."<sup>191</sup> Other scholars use the word "meaningless."<sup>192</sup> Either way, the standard is high, signaling that only conduct that renders performance of the treaty impossible, meaningless, or considerably more difficult than the parties had anticipated during negotiations violates Article 18.

However, examples (1) and (5) conflict with the impossible performance standard. Example (1) involves the building of forts and the amassing of armaments along a national border. Such a buildup would be illegal after the treaty enters into force, but it does not follow that the treaty's subsequent performance would be impossible if the same buildup occurred prior to ratification. The state could, after all, disarm and dismantle bases new and old along the border.

This is an instance where some scholars have argued that the difference between the words "impossible" and "meaningless" is material.<sup>193</sup> If the treaty called for both bordering states to reduce their arsenals by a factor of one half, but immediately prior to ratification one state doubled its existing arsenal, it would not be "impossible" for the state to reduce its now-expanded arsenal by one half, but the complete transaction would be "meaningless" in the sense that the arsenal would be, in the end, the same size as it had been before the treaty negotiations.

This distinction between impossible and meaningless is facile, and it glosses over the importance of shared expectations between treaty partners. The example given by the drafters of the Vienna Convention makes no mention of ratios or proportional reductions in arsenals.<sup>194</sup> Even if it did, it would not be impossible or meaningless to destroy the newly built forts or reduce the recently expanded arsenals to the level ostensibly contemplated during negotiations so that a state could meaningfully perform its treaty obligation.

Example (5) is also incompatible with the impossible performance test. It involves the lowering of tariffs between states.

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190. *Id.* at 99.

191. *Id.* at 101–02.

192. *Id.* (quoting MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 322 (1985)).

193. VILLIGER, *supra* note 192, at 322.

194. *Cf.* Charme, *supra* note 37, at 98–99 (failing to mention nuclear arsenals).

If one state suddenly raised its tariffs prior to ratification, this would not render it impossible or meaningless for the state, upon ratification, to lower its tariffs to the levels manifestly intended during negotiations.

Thus, examples (1) and (5) both raise the possibility that some actions defeat a treaty's object and purpose even when subsequent performance has not been rendered impossible.

A second difficulty with the impossible performance test is applying it to multilateral treaties. Some of the examples above contemplate only two parties, referring as they do to "one signatory" and "the other,"<sup>195</sup> and some drafters of the Vienna Convention even suggested that Article 18 should not apply to multilateral treaties.<sup>196</sup> A delegate to the International Law Commission averred that "the [drafting] Commission had been thinking mainly of bilateral treaties."<sup>197</sup> In the context of a multilateral treaty, he stated, "it would be difficult to accept the idea that between the time when the treaty was adopted, or even negotiated, and the time when it was ratified, a single State could commit acts which 'frustrate' its objects."<sup>198</sup> To understand what the delegate meant, consider, for example, a treaty to end torture. If one signatory state engages in torture prior to ratification, this act does not defeat the goals of preventing torture and shaming those who practice it. Rather, the fresh violation makes the treaty's goals even more compelling.<sup>199</sup>

Again, however, example (5) stands out. It explicitly contemplates more than two signatory states. Furthermore, the treaties mentioned in the other seven examples could be negotiated multilaterally, and, presumably, it is not the number of parties to a treaty that determines its object and purpose. Rather, the object and purpose is a function of a treaty's subject matter.

Crucially, the language of Article 18 makes no distinction between bilateral and multilateral treaties. The drafters decided not to incorporate this distinction into the final text, and it is contrary to accepted principles of treaty construction to read the distinction into the text.<sup>200</sup> That the drafters explicitly considered limiting Article 18

195. This is the case with examples (3) and (4). *Supra* text accompanying note 189.

196. *Summary Records of the 788th Meeting*, *supra* note 188, at 92 ("The objections of governments related mainly to multilateral treaties.").

197. *Id.*

198. *Id.*

199. *Cf.* Klabbers, *supra* note 37, at 286 ("[I]t is awkward to argue that states have a right to lay landmines if they have signed . . . a treaty prohibiting such practices, simply because the calendar has not yet reached a certain date.").

200. Vienna Convention, *supra* note 8, art. 31.1 (mandating that treaty text must be interpreted according to its "ordinary meaning"); LORD MCNAIR, *THE LAW OF TREATIES* 365 (1961) (explaining treaty interpretation is "the duty of giving effect

to bilateral treaties but chose not to do so is strong evidence that the article applies to all treaties without regard to the number of negotiating states.

Because the distinction between bilateral and multilateral treaties is troubling in the context of the impossible performance test, the practitioner's challenge becomes either applying the test to multilateral treaties in a meaningful way—an option which has so far proven unsuccessful—or finding a better test.

#### D. *The Bad Faith and Manifest Intent Tests*

Professor Jan Klabbbers argues that the relevant distinction is not between bilateral and multilateral treaties but instead between contract-based treaties and law-creating (or norm-creating) treaties.<sup>201</sup> A contract-based treaty memorializes a contract-like arrangement between two (or more) states engaged in a reciprocal exchange of considerations.<sup>202</sup> In a law-creating treaty, on the other hand, a collection of states (possibly two but usually more) agree to abide by particular rules of conduct.<sup>203</sup> This could include rules to prevent and punish acts of genocide, a rule not to test nuclear weapons, rules to maintain a free trade zone, and so on. By labeling one type of treaty "law-creating," Klabbbers does not mean that contract-based treaties are not themselves binding international law; they are.<sup>204</sup> The labels merely denote the different character of the two types of treaties—not a difference in their legal validity or vitality.

Klabbbers argues that the impossible performance standard is inadequate when applied to law-creating treaties.<sup>205</sup> It is impractical to render impossible the subsequent performance of a law-creating treaty.<sup>206</sup> The more egregiously a state violates the proposed law, the more urgently relevant the law becomes.<sup>207</sup>

As an alternative to the impossible performance test, Klabbbers suggests a "manifest intent" test, which he defines in the following manner:

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to . . . [the parties'] intention *as expressed in the words used by them*"); SINCLAIR, *supra* note 71, at 115.

201. Klabbbers, *supra* note 37, at 289–91.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 291.

206. *Id.* at 293 (arguing that public expectations may render treaties effective even when violated).

207. *Id.*

[I]f behavior seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of whether anyone's legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.<sup>208</sup>

Klabbers believes this test is superior to the impossible performance test because it provides Article 18 force and relevance in the context of law-creating treaties.<sup>209</sup>

With the manifest intent test, Klabbers seeks to combine the scope of a bad faith test with the objectivity of the impossible performance test.<sup>210</sup> The impossible performance test is objective because it is focused on the observable world, concerned with a variety of questions. *Can these cultural artifacts be returned to their state of origin? Can this river be navigated by foreign vessels? Can these military fortifications be deconstructed?*<sup>211</sup> A bad faith test, by contrast, covers a wider range of actions—actions which intuitively Article 18 should cover—but the test is difficult to apply because it is focused on the inner “mind” of a state rather than on the outer observable world.<sup>212</sup> The manifest intent test is similar to the bad faith test because it is concerned with the motivations of the acting state, but, like the impossible performance test, it is focused on observable, objective evidence.<sup>213</sup>

However, the difference between the bad faith and the manifest intent tests is not, as Klabbers suggests, one of subjectivity versus objectivity.<sup>214</sup> Although the bad faith test is phrased as a subjective test, practitioners cannot delve into the subjectivity of a state or its leaders. Instead, they must rely on objective evidence; they must rely on the state's external manifestations of bad faith. The difference between the bad faith and manifest intent tests is actually only a lower standard of proof. Under a bad faith test, a state violates Article 18 if its actions are unwarranted or condemnable,<sup>215</sup> while under the manifest intent test, the actions need only “*seem unwarranted and condemnable . . . regardless of actual proof of bad faith.*”<sup>216</sup>

208. . *Id.* at 330.

209. *Id.* at 331.

210. *Id.* at 304–05.

211. *Id.* at 299–302 (referring to the impossible performance standard as the legitimate expectations test and noting that concrete, observable damages can be measured).

212. *Id.* at 303.

213. *Id.* at 305 (“A manifest intent test has two clear advantages. First, it has the distinct advantage of being relatively objective. . . . Second, it can do justice to reality far better than the objective test of Article 18 in non-contractual situations.”).

214. To be fair, these remain nominal elements of the comparison.

215. *Id.* at 330.

216. *Id.* (emphasis added).

Any such test raises the problem of defining which actions actually demonstrate bad faith or the manifestation thereof. It is often a qualitative problem rather than a quantitative one, and lowering the standard of proof does not solve the problem. For example, when the President of the United States signs a free trade treaty to reduce tariffs on imported agricultural products, is it bad faith if Congress, to win bipartisan domestic support for the treaty, passes a bill granting increased subsidies to American corn growers? The subsidy will diminish and perhaps eliminate the advantage that foreign corn growers expected to gain from the treaty. On the other hand, without the subsidy, two-thirds of the Senate may not approve the treaty, in which case growers of other foreign crops besides corn would also fail to receive any of the treaty's benefits. Is the corn subsidy an example of bad faith, or is it a good faith attempt to build the domestic support necessary for ratification? Neither the bad faith nor the manifest intent test can answer that question—at least not objectively—so states are left with inconclusive debates over whether the interim obligation has been violated.

#### *E. The Status Quo/Facilitation Test*

A workable test for the interim obligation must facilitate treaty review procedures within states, and it must do so with a clear and objective standard. None of the tests considered thus far fulfill these criteria. The essential elements test prohibits states from transgressing a treaty's most essential provisions, but the test offers no method for determining which provisions are the essential ones. The impossible performance test prohibits states from taking any action that would render a treaty's subsequent performance impossible, but the test provides little restraint on states in the context of multilateral and norm-creating treaties. The bad faith and manifest intent tests attempt to proscribe the condemnable conduct that the impossible performance fails to cover, but both tests are highly subjective and fail to provide a workable standard for defining bad faith or the manifestation thereof.

The remainder of this Article describes a new test that seeks to assist domestic treaty review by preserving the status quo at the time of signature. This new "facilitation test" has two parts. First, has a signatory state transgressed one or more articles of the pending treaty? A state "transgresses" a pending treaty when acting contrary to the obligations the treaty would impose had the treaty already entered into force. The word "transgressed" is used here instead of "breached" because the treaty is not yet binding law and thus cannot be breached in a legal sense. Second, was the transgressing action new, or was it part of a pattern existing prior to signature? If the transgressing action is not new, there has been no violation.



As an illustration, if two states with mutually imposed tariffs of 20% sign a treaty agreeing to lower their tariffs to 10%, it would not be a violation of Article 18 if one or both states maintained the existing 20% tariff until ratification. Although the 20% tariff would transgress the treaty's text, Article 18 would not prohibit this transgression because it began prior to signature. By contrast, if a state raised its tariffs above 20%, it would violate Article 18 because the transgression would be new; it would alter the status quo in a manner contrary to the treaty.<sup>217</sup>

Importantly, the facilitation test preserves the status quo in only one direction. Signatory states may not move *away* from eventual compliance, but they are permitted to move *toward* it. Thus, in the example above, a signatory state would be permitted prior to ratification to lower its tariff below 20%.

The facilitation test, unlike the essential elements test, does not try to reduce the inherently abstract concept of object and purpose into a few specific provisions. The test leaves object and purpose at a high level of generalization and focuses instead on the word "defeat." The goals of a treaty are "defeated" when a signatory state acts contrary to *both* the text of a new treaty *and* the state's established pattern of practice.

Conceptually, the facilitation test accommodates domestic treaty review by balancing two variables. The first variable measures the weight of the obligation imposed on a state at the time of signing a treaty. Ideally, this variable would be as low as possible. That way, a state would not accrue any significant obligations until the state's government approves those obligations through whatever legitimizing process is required by its domestic laws. This variable is important because it reinforces the principle of consent, and in many states, the executive alone does not have the power to give consent without legislative approval.<sup>218</sup>

The second variable measures the degree to which signature aligns expectations between states. Ideally, this variable will be high because each signatory state will be capable of a more accurate accounting of the costs and benefits of a new treaty when it can rely on other signatories to act in a predictable way and not contrary to the goals of the treaty. Intuitively, this makes sense; it is harder to make a decision when faced with greater amounts of uncertainty. This intuition can be refined through a game theoretical framework. In game theory, each potential "move" by a "player" creates another

217. This outcome is consistent with hypothetical (5) posed by the creators of the Harvard Draft. *Supra* text accompanying note 189.

218. See HOLLIS ET AL., *supra* note 175, at 29–37 (explaining the legislative role in treaty making).

fork in a decision tree.<sup>219</sup> When certain moves are forbidden, it eliminates those forks, making the decision tree—and decision making itself—less complicated.<sup>220</sup>

The difficulty with balancing these two variables is that they are closely linked but cut in opposite directions. If signature imposes a minimal obligation on states, it will further the goals of the first variable but frustrate the goals of the second. By contrast, if signature imposes a significant obligation, it furthers the goals of the second variable but frustrates the goals of the first.

The facilitation test resolves some of this tension. It maximizes predictable behavior among signatories by requiring all signatories to maintain the status quo existing at the time of signature, and it minimizes encroachments on domestic treaty review by tailoring its burden to fit each state's past behavior. No state is required to take any action that it has not already been taking. Nor is any state required to refrain from any action it has not already been refraining from. Granted, signature still creates a new obligation; a state's presumptively voluntary pattern of conduct becomes obligatory. The facilitation test thus seeks to minimize this burden by shaping the new obligation to fit each state's particular conduct.

In some instances, to balance and resolve these variables, the facilitation test creates a double standard whereby one state is permitted to do what another state is forbidden from doing. Such a double standard raises questions of fairness and reciprocity. For example, suppose Italy and the United States sign a treaty to end capital punishment. Under the facilitation test, the United States could continue using capital punishment even after signature because the United States has an established pattern of using the death penalty.<sup>221</sup> Italy, however, has not used capital punishment since the middle of the twentieth century,<sup>222</sup> and if it suddenly executed one of its citizens, the execution would violate the test because it would be contrary to both the treaty's text and Italy's past practice.

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219. For a non-technical introduction to game theory in the context of group decision making, see HOWARD RAIFFA, *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 6 (2002) (explaining that "[t]he essence of this perspective is that although the individual decision entities make their choices separately of each other, the payoffs they receive are a function of all the players' choices").

220. Vienna Convention, *supra* note 8, art. 18. More accurately, when Article 18 forbids certain actions, it does not eliminate the possibility that states will undertake those actions. States could, after all, choose to violate Article 18. *Id.* But to the extent that Article 18, as a binding norm of international law, alters state behavior, the probability that a state will act to defeat a treaty's object and purpose is lessened. *Id.*

221. ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 62–74 (3d ed. 2001).

222. *Id.* at 23 (explaining that in Italy, capital punishment "was abolished in 1947 for all but military offences during wartime" and has not been reinstated since).

In this example, the United States would be permitted to do what Italy is legally prohibited from doing. Is this fair? The answer depends on one's understanding of the interim obligation. If the interim obligation were understood as an agreement between states, then the baseline point of focus would be between those states. Questions of reciprocity would control, making the double standard inequitable. However, when the interim obligation is understood instead as a procedural rule that accommodates domestic treaty review, the focus is no longer between states as treaty partners. No partnership yet exists; there is no binding treaty. Instead, the focus is on treaty-making procedures and each state's actions over time. From this perspective, the facilitation test imposes the same burden on each state as measured in relation to that state's past practice.

A procedural view of the interim obligation accords with the original purpose of Article 18 and of the Vienna Convention as a whole. Article 18 does not exist to further the underlying goals of any particular treaty or to encourage ratification. Indeed, for the purpose of Article 18, it is immaterial whether a state ever ratifies the treaty. What matters instead is whether each state has an opportunity, prior to becoming a party to a treaty, to review that treaty in accordance with established domestic procedures. In addition, the procedural view better fits the purpose of the Vienna Convention as a whole because it is an inherently procedural document.<sup>223</sup> Other treaties create substantive rules—rules that promote free trade, prohibit genocide, and make peace. The Vienna Convention, by contrast, creates the procedural ground rules by which those other treaties are made, and the provisions of the Vienna Convention, including Article 18, should be read in that light.

The facilitation test is extremely flexible. A state may alter the contours of the interim obligation simply by changing its behavior before signature, thereby altering the status quo. Such flexibility further reconciles the two variables which underlie the interim obligation. First, the flexibility allows each state to control the details and extent of the burden imposed upon it; second, the pre-signature change in behavior puts other signatories on notice so that they know what to expect and can factor the change into their decisions to sign or ratify.

Indeed, a state need not actually change its behavior so long as the state announces that a specific aspect of its behavior *might* change. A clear announcement is as good as an actual change—

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223. "[The Vienna Convention] is not so concerned with the substance of a treaty (the rights and obligations created by it)." AUST, *supra* note 38, at 6. Rather, the Convention contains "the body of rules which determines whether an instrument is a treaty, how it is made, brought into force, amended, terminated, and operates generally." *Id.*

perhaps even better. The interim obligation is satisfied so long as states communicate their intentions clearly enough and early enough to minimize any disruption to the process.

One potential concern raised by the facilitation test is that it creates perverse incentives for states to act contrary to their proposed treaty obligations. Returning to the hypothetical treaty between Italy and United States, Italy may want to maximize the range of what it is permitted to do between signature and ratification. To that end, Italy could use the death penalty prior to signature in order to alter the status quo and keep open a category of action that otherwise would have been prohibited post-signature.

If the facilitation test actually induced states to act contrary to the goals of the proposed treaty, this would be a serious concern. However, there are good reasons to doubt whether such a threat exists. First, only in special circumstances will a state have the desire or incentive to act in a manner that is contrary to both its established pattern of practice and the goals of a treaty it has signed and is seeking to ratify. Second, even if the desire existed, the state would risk alienating other negotiating states and scuttling the chances of ratification. Lastly, the facilitation test would enable a state like Italy to shape its post-signature obligations simply by announcing that it reserves the right to engage in specific conduct prior to ratification; Italy need not actually execute anyone. Thus, what the facilitation test actually encourages is clearer communication between signatories.

Another concern the facilitation tests raises is that it could deprive states of gamesmanship opportunities. In a world without the facilitation test, if two states sign a treaty to lower tariffs on each other's imports, one state could try to induce the other's speedy ratification by raising tariffs; in a world with the facilitation test, however, this move would be prohibited post-signature. Such gamesmanship is a good thing insofar as it encourages the development of international law.

Nevertheless, the facilitation test does provide ample room for gamesmanship, and to the extent gamesmanship is restricted, it is for the sake of democratic legitimacy. Prior to signature, the facilitation test imposes no direct restriction on gamesmanship.<sup>224</sup> In the tariff hypothetical, a state would be permitted to raise tariffs one day and sign the treaty the next, and the raised tariffs could remain in place until ratification. States may also expand the opportunity for post-signature gamesmanship by announcing their intentions in advance

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224. However, the facilitation test does impose an indirect restriction on pre-signature behavior insofar as pre-signature behavior is one of the two bases for calculating the scope of a state's post-signature obligations under the test.

of signature—such as, for example, announcing the right to raise tariffs if other negotiating states do not ratify within a given time period. The effect of the facilitation test is simply to create a default rule that states will forgo a degree of gamesmanship after signature to aid the legitimizing processes of domestic treaty review.

Furthermore, when applied to the tariff example, the facilitation test is consistent with the original understanding of the Vienna Convention's drafters.<sup>225</sup> The tariff example is example (5) from the list created by the International Law Commission.<sup>226</sup> The ILC believed that the interim obligation should prohibit the raising of tariffs. Other tests, such as the impossible performance test, reach the opposite conclusion and are thus inconsistent with the drafters' original understanding.

In sum, Article 18 is a procedural rule that exists to facilitate domestic treaty review. The facilitation test furthers this goal by preserving the status quo at the time of signature. At the same time, the test minimizes the potential burden on signatory states by shaping the interim obligation to fit each state's existing pattern of behavior. Under the facilitation test, a signatory state defeats a treaty's object and purpose when the state acts contrary to both the text of the treaty and its own past practice. By accommodating domestic treaty review, the facilitation test reinforces the principle of consent in international law and recognizes that, for many states, full consent is only possible after multiple branches of those states' governments review the treaty.

## VI. CONCLUSION

The term "object and purpose" is an inherently abstract concept that refers broadly to a treaty's goals. Any attempt to formulate a single, more specific definition is bound to fall short because no single definition could be adequately specific to guide practitioners through the multiple contexts in which the term is used. A more fruitful approach is to understand how the term is used in practice.

This Article analyzed the term object and purpose by focusing on how it is used in three contexts. First, Vienna Convention Article 31 states that a treaty should be interpreted in light of its object and purpose. In this context, object and purpose is used to reinforce the interpretive principle that a treaty's text should be interpreted to reflect the goals embodied in the document as a whole. Second,

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225. See *supra* discussion Part V.D (discussing the parameters of the facilitation test).

226. Charme, *supra* note 37, at 99.

Article 19(c) prohibits reservations that are incompatible with a treaty's object and purpose. This test is best understood as a coherence-saving mechanism, preventing incoherent distinctions from being incorporated into a treaty's rules and undermining the treaty's legitimacy. Finally, Article 18 creates an interim obligation that prohibits conduct that would defeat a treaty's object and purpose. This prohibition is best understood as a test to preserve the status quo and thereby facilitate domestic treaty review procedures. Lawyers who face the term object and purpose in any of these three contexts may benefit from the analysis presented herein.

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