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How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent

Jan Klabbers*

ABSTRACT

Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, states that have signed or ratified a treaty are supposed to refrain from acts which might defeat the object and purpose of the treaty pending its entry into force. After noting that international lawyers and academics have recognized various types of treaties, the Article begins by observing that traditionally the interim obligation operates well in contractual situations but not in normative situations. Furthermore, the Author argues that where treaties are normative, the traditional conception of the interim obligation is insufficient.

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. Several tests have been proposed, including evaluations of the subjective intent of the alleged infringing party and the legitimate expectations of the aggrieved party. The Author contends that none of the existing tests is adequate. Rather, he proposes the possibility of a "manifest intent" test. The manifest intent test has the advantage of being relatively objective, avoiding the pitfalls associated with more subjective tests. In addition, the manifest intent test is more appropriate in normative, non-contractual situations. The Author finds support for this test in the preparatory works for Article 18, as well as in both judicial practice and scholarly works.

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I. INTRODUCTION

Imagine this: State X is among the first to sign and ratify a convention against arbitrary detention. In the period of time between the ratification by State X and the entry into force of the convention, State X continues to detain a number of individuals arbitrarily. Does State X, in doing so, violate international law?

Or picture this: State Y signs a disarmament convention and plans to ratify it at the earliest possible date, but in the meantime State Y continues to procure the very armaments that the convention will ban when it enters into force. Is State Y violating international law?

Or consider this: State Z has ratified an extensive free trade agreement that, upon entry into force, will prohibit any new tariffs and similar charges and will be self-executing. A week or so before the agreement enters into force, State Z increases tariffs on products coming from one of its prospective partners, to the detriment of a producer operating from within that trading partner. Is State Z acting in violation of international law?

The three scenarios sketched above are more or less hypothetical, but not completely devoid of realism. The third scenario is, in fact, a simplified and stylized version of the facts that gave rise to the *Opel Austria* case, decided by the Court of First Instance of the European Community in early 1997.¹

The other examples also are not too far removed from real life occurrences. Angola endured a storm of criticism by continuing to use

1. Case T-115/94, *Opel Austria GmbH v. Council*, 1997 E.C.R. II-39, LEXIS, Legal (excluding U.S.) Library, ECJ File.

landmines after having signed the anti-landmine convention.² India met with fierce opposition when it announced its intention to block the entry into force of the Comprehensive Nuclear Test Ban Treaty after lengthy negotiations but before it signed the convention.³ Some commentators analyzed the 1994 agreement facilitating the entry into force of the United Nations Convention on the Law of the Sea in terms of whether it violated the Convention itself prior to its entry into force.⁴ In addition, the conclusion of the Chemical Weapons Convention in 1993 spurred the Committee on Arms Control and Disarmament Law of the International Law Association to investigate whether or not obligations may exist for signatories to arms control agreements prior to their entries into force.⁵

This recent discovery⁶ of the interim obligation is not merely coincidental. Note that all of the above examples—a human rights convention, an arms control treaty, and a complex free trade agreement—are not strictly contractual in nature; instead, they

2. Paul Brown, *Landmines Banned but Threats Stay*, THE GUARDIAN, Mar. 2, 1999, 1999 WL 12073096 (quoting an anti-landmine activist who accused Angola of continuing to use landmines after it had signed the convention by stating that such actions constituted “a flagrant violation of [Angola’s] international commitments”).

3. Under the Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, art. 14, 35 I.L.M. 1439 (1996), India is one of forty-four states whose consent to be bound is required before the convention can enter into force. India’s announcement in 1996 that it would not even sign the convention has spurred outcries of bad faith during and immediately after negotiations. This situation is slightly, but significantly, different from the Angolan situation in that India’s refusal to sign and ratify would have also prevented entry into force for the other negotiating states.

4. E.g., Jonathan I. Charney, *Entry into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT’L L. 381 (1995) (arguing against such a violation); *Law of the Sea: Momentous Change and Its Aftermath*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: CONFLICTS AND CONVERGENCE 296, 315 (Wybo P. Heere ed., 1996) (providing the somewhat more critical remarks of Tullio Treves and Dolliver Nelson during a panel discussion).

5. Thus, an ILA-backed symposium in 1997 gave rise to a paper by Jan Klabbers, *Strange Bedfellows: The “Interim Obligation” and the 1993 Chemical Weapons Convention*, in ISSUES OF ARMS CONTROL LAW AND THE CHEMICAL WEAPONS CONVENTION: OBLIGATIONS INTER SE AND SUPERVISORY MECHANISMS (Eric Myjer ed., forthcoming 2001). In addition, the Committee on Arms Control and Disarmament Law of the International Law Association discussed the topic with great passion at the ILA’s 1998 Taipei session. See INT’L LAW ASS’N, REPORT OF THE SIXTY-EIGHTH CONFERENCE 164 (Alfred Soons & Michael Byers eds., 1998).

6. The scarce nature of references to the interim obligation in textbooks written after the conclusion of the 1969 Vienna Convention on the Law of Treaties suggests that the present situation marks a discovery, or perhaps a rediscovery. Thus, there are mere neutral descriptions of the interim obligation, without analysis, in SUZANNE BASTID, *LES TRAITÉS DANS LA VIE INTERNATIONALE: CONCLUSION ET EFFETS* 50-51 (1985); T.O. ELIAS, *THE MODERN LAW OF TREATIES* 26 (1974); and PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 67 (José Mico & Peter Haggenschmacker trans., 1995). A brief textbook written on the eve of the Vienna Conference remains silent on the interim obligation. See generally INGRID DETTER, *ESSAYS ON THE LAW OF TREATIES* (1967).

aspire to create institutions and establish norms of general application. They are, to use the classic term, law-making treaties.

This suggests that there is something about law-making conventions which makes their effects desirable (if not their formal entry into force) without any delay. Indeed, it is awkward to argue that states have a right to lay landmines if they have signed, and perhaps have ratified, a treaty prohibiting such practices, simply because the calendar has not yet reached a certain date. Any suffering in the interim is suffering for formalities. Surely international law must have a rule preventing such situations, and many contend that this rule is the one embodied in Article 18 of the Vienna Convention on the Law of Treaties, widely known as the "interim obligation."⁷

According to its very terms the interim obligation provision of Article 18 of the Vienna Convention cannot be invoked without more. Its success depends on whether behavior would defeat the object and purpose of the treaty concerned, and it is here that a paradox sets in. Instead of defeating the object and purpose of a law-making convention, any behavior irreconcilable with it, prior to its entry into force, actually serves to emphasize the desirability of its entry into force. The behavior, rather, strengthens the very point of the treaty.

The paradox takes on additional importance because many states allow treaty provisions to be self-executing under certain conditions.⁸ Thus, they need not be transformed into domestic legislation but are capable of having an immediate effect in domestic legal orders. Where this is the case, the treaty concerned is no longer merely an undertaking among states. Hence, without the treaty attracting new formal partners, individuals or companies who stand to gain from a proposed treaty may require protection by the law prior to that treaty's entry into force.⁹

7. Useful general studies include Philippe Cahier, *L'Obligation de ne pas Priver un Traité de son Object et de son But avant son Entrée en Vigueur*, in 1 MÉLANGES FERNAND DEHOUSSE, LES PROGRÈS DU DROIT DES GENS 31 (M. Bos et al. eds., 1979); 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 (1992); Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT'L L. REV. 5 (1985); Werner Morvay, *The Obligation of a State Not to Frustrate the Object of a Treaty Prior to Its Entry into Force: Comments on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties*, 27 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 451 (1967); and Joseph Nisot, *L'Article 18 de la Convention de Vienne sur le Droit des Traités*, 1970 REVUE BELGE DE DROIT INTERNATIONAL 498.

8. For a general overview, see Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

9. Indeed, according to many, the traditional Vattellican concept of international law as regulating predominantly relations between sovereign entities is no longer fully tenable. Instead, the individual acquires an increasingly central place in international legal thinking. The most comprehensive analysis to date is THOMAS

The argument explored in this Article is multi-layered, but may be summarized as follows. In situations involving alleged infractions of law-making, normative treaties (as opposed to contractual undertakings) pending their entry into force, the interim obligation as laid down in Article 18 of the 1969 Vienna Convention on the Law of Treaties provides little relief, at least not in the way in which it is normally understood. That is far from surprising as the interim obligation has always been premised on contractual thinking, and its specific formulation in Article 18 of the Vienna Convention has been inspired by purely contractual notions. Thus, it requires a reconceptualization of the interim obligation in order to allow the interim obligation to adapt to situations involving normative instruments and in order to provide a useful function in international law and international relations. Such a reconceptualization is already present—albeit often somewhat below the surface—in both recent scholarly writings and recent judicial practice,¹⁰ although these are limited in numbers.¹¹ The reconceptualization concentrates on the test to determine whether the interim obligation is violated. For convenience, this specific reconceptualization of the test of the interim obligation shall be referred to as a “manifest intent test.”

The argument for the manifest intent test is multi-layered in that it rests on several other foundational points that must be recognized either as preliminary matters or in passing. The multi-layered nature of the argument may make the argument somewhat difficult to follow and at times give the appearance of repetitiveness. One such foundational point is that the law of treaties in general is based on thoroughly contractual notions. A second, related point is that the contractual underpinnings of the law of treaties are no longer very helpful in an age where a large number of treaties aspire (or claim to aspire) to protect the interests of the international community at large (no matter how amorphous this very notion itself is) or the interests of individual natural or legal persons within states. Moreover, the manifest intent test is inevitably rather abstract. There is, after all, not much existing state practice or case law on the topic to enliven the argument, and this Article aims to establish a point of general validity; abstraction, therefore, cannot be avoided. Still, in essence the claim is straightforward enough: the interim obligation as traditionally conceived is ill-suited to present-day demands, and so it must be reconstructed. Such reconstruction is

M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* (1999).

10. See *infra* Parts VI-VII.

11. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 94 (2000) (noting that there “is virtually no practice in the application of the provision”).

already under way, as the few judicial decisions and scholarly writings on the topic have witnessed.¹²

Article 18 of the 1969 Vienna Convention on the Law of Treaties carries the title "Obligation not to defeat the object and purpose of a treaty prior to its entry into force" and reads:

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.¹³

Thus under Article 18, states that have signed or ratified a treaty are supposed to refrain from acts which might defeat the object and purpose of the treaty prior to its entry into force. Yet can it really be said with respect to the examples mentioned above, that States X, Y, or Z are engaging in behavior that defeats the object and purpose of the treaty at issue and are acting in violation of international law? Upon a regular reading of Article 18 the answer must be in the negative, for reasons to be explained below. Only a different reading of Article 18's interim obligation may facilitate qualifying the behavior of States X, Y, and Z as not only morally untoward, but also in violation of international law.

This Article is structured as follows. Section II contains some preliminary remarks. Section III briefly sketches the place of the interim obligation in legal thinking. Section IV discusses why the traditional tests for determining whether the interim obligation has been violated are unsatisfactory. Section V contains a lengthy overview of the drafting history of Article 18 of the Vienna Convention, concentrating on the test to be used.¹⁴ Sections VI and VII discuss, respectively, recent—post-Vienna Convention—scholarship and judicial practice in which the interim obligation plays a role. Section VIII concludes the Article.

12. See *infra* Parts VI-VII.

13. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336, 8 I.L.M. 679, 686 (1969) [hereinafter Vienna Convention].

14. In other words, a few other elements of Article 18 will remain virtually undiscussed. The present interest is not with finding out whether Article 18 represents customary international law, whether a violation of the interim obligation could qualify as evidence of an intent not to become bound, or what time period would constitute undue delay of entry into force.

II. A FEW PRELIMINARY REMARKS

As the point of departure for this Article consists of an argument that the interim obligation as traditionally conceived works well in contractual situations but not in normative situations, a recognition of some idea of what that distinction represents is imperative.¹⁵ Since at least the 1930s, and probably earlier,¹⁶ international lawyers have recognized that there are various types of treaties. Lord McNair, probably the best known example, famously complained that in international law, treaties were the only and sadly overworked workhorse of the system, because they are used for contractual exchanges, law-making efforts, conveyance-like transactions, and even as charters of incorporation.¹⁷

Although arguably the invention of binding instruments emanating from international organizations could provide some relief,¹⁸ McNair's words are still accurate. Treaties are used to arrange various types of things. This gives rise to the question whether the fact that treaties perform different functions does not also mean that different types of treaties are subjected to different rules. To some extent, this is also explicitly recognized in the Vienna Convention on the Law of Treaties, which provides a separate status for treaties establishing international organizations¹⁹ and which occasionally makes legally relevant distinctions between bilateral and multilateral treaties.²⁰

15. It is well established that much of the law of treaties rests upon contractual notions. See generally, e.g., ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986); SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986* (1989).

16. In a string of advisory opinions on the powers of international organizations given in the course of the 1920s, the Permanent Court of International Justice gradually developed the awareness that treaties establishing international organizations are qualitatively different from contractual undertakings. This would culminate in the Court's finding that the powers of an organization are not based on interpretation alone, but may require special doctrines, such as the doctrine of speciality, which holds that organizations have such powers as are conferred upon them. Advisory Opinion No. 14, *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, 1927 P.C.I.J. (ser. B) No. 14, at 64 (Dec. 8).

17. *The Functions and Differing Legal Character of Treaties*, in A.D. MCNAIR, *THE LAW OF TREATIES* 739 (1961).

18. Then again, binding decisions of organizations that do not rest upon the immediate consent of all addressees are few and far between. See, for example, the discussion in HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 811-22 (3d rev. ed. 1995).

19. Vienna Convention, *supra* note 13, art. 5.

20. *Id.* art. 60 (material breach). The Vienna Convention also makes distinctions on points of detail. Thus, with reservations, a special place is reserved for reservations of constituent instruments of international organizations. *Id.* art. 20(3).

A perennial problem is that no matter how valid such distinctions between differing treaties may be, it always remains to be seen how such distinctions ought to be made. After all, treaties may contain various elements. Still, for present purposes, how exactly to distinguish between contractual and normative agreements is not all that relevant, as long as one accepts that such a distinction is meaningful.²¹

This Article argues that where treaties are normative, the traditional conception of the interim obligation is insufficient, as the interim obligation is structured to suit contractual exchanges but has, as traditionally conceived, a much harder time dealing with law-making instruments.²² That distinction is no coincidence: a perusal of the pertinent literature and other materials indicates that whenever an example is used to illustrate the working of the interim obligation—be it a real example or, as is more often the case, a hypothetical one—the example invariably concerns treaties which are structured as contractual exchanges.²³ Favorite examples include a cession of territory²⁴ and the sale of installations of State A within B's territory to B.²⁵ Tariff reduction²⁶ and arms reduction agreements or demilitarization agreements²⁷ are also often used as examples, and always in forms that suggest an underlying contractual structure.²⁸ Thus, the interim obligation has always been conceived as contractual in nature and has been drafted in its present form exclusively with contractual exchanges in mind. If there is a valid distinction between contractual and normative instruments, as many would accept without more and without precisely demarcating the line between

21. For an extensive argument to this effect, as well as an impressive catalogue of distinctions made in the law of treaties, see Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 221, 335-52 (1994).

22. A related, yet different, distinction is that between bipolar and multipolar treaties. For a brief exploration, see Albert Bleckmann, *Zur Wandlung der Strukturen der Völkerrechtsverträge*, 34 ARCHIV DES VÖLKERRECHTS 218 (1996).

23. See *infra* Part VI.

24. This was mentioned as an example in the Harvard Draft Convention on the Law of Treaties, prepared under the auspices of Harvard Law School and published as a supplement to 29 AM. J. INT'L L. 657, 781 (1935) [hereinafter Harvard Draft].

25. This was mentioned by the International Law Commission at its 788th meeting. *Summary Records of the 788th Meeting*, [1965] 1 Y.B. Int'l L. Comm'n 87, U.N. Doc. A/CN.4/SER.A/1965.

26. Harvard Draft, *supra* note 24, at 781.

27. *Id.*

28. The Harvard Draft adds other contractual examples: navigation rights, sale of goods, and restitution of property wrongfully taken. *Id.* at 781-82. The latter also arose within the ILC, at its 788th meeting. See *supra* note 25. It should be noted, perhaps, that an arms reduction agreement may be structured not only contractually, with each party undertaking to reduce a certain number or percentage of existing capacity, but also normatively, with all parties undertaking to eradicate their capacities completely.

them, then it should come as no surprise that a contract-inspired notion such as the interim obligation has trouble addressing non-contractual situations.

Those difficulties become acutely visible when the interim obligation is applied to a concrete set of facts. Here it becomes important to know what test to use when trying to determine whether behavior defeats the object and purpose of treaty. This Article contends that the best possible test is a manifest intent—or, in more pejorative terms, a manifest bad faith-test, and that such a test meets with some—albeit not unqualified—support in the preparatory works of the interim obligation's codification as Article 18 of the Vienna Convention,²⁹ and also finds support (although often unwittingly so) in the literature and in a few recent judicial decisions.³⁰

One preliminary point must be established. With contractual exchanges, the precise test employed to determine whether a treaty's object and purpose has been defeated is not all that relevant in making that determination, although it may assume relevance later on, such as when deciding compensation. Because the precise test used in contractual situations is largely irrelevant, one may presume that the drafters of the Vienna Convention intuitively realized that the precise modalities of the interim obligation were of less importance than the interim obligation itself, precisely because contractual notions were foremost in their minds.³¹

Perhaps an example will clarify things. Consider one of the most perplexing examples of this tension, the prototype of an interim obligation situation: a treaty for the cession of a piece of territory from State A to State B, to take effect some time after ratification.³² In principle, one can think of three types of tests to determine whether such a treaty's object and purpose are defeated as the result of behavior. One can employ an objective test—is the exchange still executable or has the treaty's object and purpose been defeated,³³ or two different sorts of subjective tests: one focusing on the subjective

29. See *infra* Part V.

30. See *infra* Parts VI and VII respectively.

31. As will be illustrated *infra* in Part V, relatively little of the preparatory work focused on the test to be employed. Much of the discussion was aimed at establishing the interim obligation as a legal rule, rather than as an emanation of morality, and at debating at which moment it starts to apply—only after signature or ratification, or already during negotiations?

32. It is this example that recurs not merely in the drafting of Article 18 but also in scholarly writings. *E.g.*, Morvay, *supra* note 7, at 453.

33. I will outline later why the objective test envisaged in Article 18 is impossible to execute standing on its own; it will always lapse into a test either of subjective intent or of legitimate expectations. See *infra* Part IV.

intent³⁴ of the offending party (be it akin to negligence or to mens rea),³⁵ the other focusing on the legitimate expectations of the aggrieved party.³⁶

Suppose that prior to handing over the territory to B, State A conducts a few nuclear experiments. Whatever test is employed to determine whether the treaty may survive, the result will be the same. State A acts with subjective intent; not only are its tests themselves not accidental, but A also can be accused of attempting to defeat the treaty's object and purpose. B's legitimate expectations also are frustrated, in that the value of the undertaking is diminished. Furthermore, the treaty clearly cannot be executed in the same manner as before, precisely because it is objectively evident that its object has somehow undergone a detrimental change.

Now consider that A does not engage in any untoward behavior, but that the territory in question falls victim to a natural disaster. As a result, the treaty is no longer executable as before, but this occurs without any subjective intent on the part of State A.³⁷ The natural disaster frustrates B's legitimate expectations, but it would be unfair to ask A to compensate B, or even to expect A to cover all losses that B incurs. After all, A's legitimate expectations are equally frustrated. Again, the test employed is irrelevant, for the result is the same whether one thinks in term of subjective intent (absent here, so no one is liable) or legitimate expectations (present here with both parties, so again no one can be held liable).³⁸ The objective test is not helpful either, as no behavior of either of the parties was involved.

The notion underlying this Article is that the relative³⁹ irrelevance of the test applies to all contractual situations: whether

34. Intention is perhaps best defined as "the linking of means and ends in a plan or proposal-for-action adopted by choice in preference to alternative proposals (including to do nothing)." John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229 (David G. Owen ed., 1995).

35. For an argument that negligence is an emanation of subjective intent rather than of inadvertence, see H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 136 (1968).

36. For a brief but very useful conceptualization, see P.P. Craig, *Legitimate Expectations: A Conceptual Analysis*, 108 L. Q. REV. 79 (1992).

37. Perhaps it is useful to note here that in most cases—those where an act actually occurs, as opposed to it being merely planned—intent includes an element of foresight. On this point in particular, see ALAN R. WHITE, *FOUNDATIONS OF LIABILITY: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 82-90 (1985).

38. To be sure, the objective test also provides this result; there will no longer be something to execute.

39. "Relative," of course, because it may matter when it comes to compensation. Those who focus on legitimate expectations may be more inclined to compensate than those for whom subjective intent is a strict requirement.

one looks at the subjective intent of A or the legitimate expectations of B, or even applies an objective test, the result will be the same.⁴⁰

Normative situations are strikingly different particularly when the actors involved are not only states, but also individuals relying on the potential self-executing provisions of treaties about to enter into force. In such circumstances, a test of legitimate expectations (broadly conceived) will occasionally show the same result as a test of bad faith, but without the intervening (and, in theory at least, controlling) variable of the defeat of the treaty's object and purpose. Put differently, one can plausibly argue that an act of torture prior to the entry into force of a convention prohibiting torture is an act of subjective intent, perhaps even to the point—however perverse—of being intended to nullify the future regime. If one accepts that the expectations of private citizens are among those protected under the interim obligation (which is far from self-evident, as will be discussed below),⁴¹ then one also can argue that the citizens of a state that has signed or ratified the anti-torture convention may legitimately expect to remain free from torture pending the convention's entry into force. One cannot seriously maintain, however, that a single act of torture defeats the object and purpose of the treaty concerned. In fact, if anything, such an act (or even a multitude thereof) serves only to underline the importance of the convention.

The most practical way around this particular problem—the circumstance that however horrendous behavior may be, it cannot seriously be maintained that a treaty's object and purpose are defeated—seemingly would be to argue that behavior need not so much defeat a treaty's object and purpose, but simply violate the prospective treaty's provisions. Indeed various writers have made such an argument, analyzing in particular the attempts to establish unilateral sea-bed mining regimes by signatories of the 1982 UN Convention on the Law of the Sea.⁴²

Still, such an approach is flawed, for at least two reasons. First, the text of Article 18 of the Vienna Convention clearly resists any attempt to break up the object and purpose of a treaty into the objects and purposes of smaller parts of the treaty.⁴³ Second, to hold that a

40. This finds some support by partial analogy in the neutral language of Article 61 of the Vienna Convention, which deals with supervening impossibility of performance after a treaty has entered into force. Vienna Convention, *supra* note 13, art. 61. A natural disaster may qualify as a ground for suspension or termination of a treaty, regardless of intent (naturally) or expectations.

41. See *infra* text accompanying note 177.

42. E.g., SAID MAHMOUDI, *THE LAW OF DEEP SEA-BED MINING* 251 (1987); McDade, *supra* note 7, at 31-40 (similarly analyzing behavior in terms of its compatibility with individual treaty provisions).

43. Recent methodologies of the notion of object and purpose in the law of treaties include Isabelle Buffard & Karl Zemanek, *The "Object and Purpose" of a*

violation of a provision of a treaty prior to its entry into force would defeat the treaty's object and purpose is tantamount to saying that the treaty actually assumes legal force upon signature rather than upon ratification.⁴⁴

III. A BRIEF SKETCH OF THE INTERIM OBLIGATION

The idea underlying Article 18 makes eminent sense—specifically, the value of an undertaking ought not to be diminished prior to the transaction being completed. If State A cedes a piece of territory to B, then obviously B is entitled to expect A to refrain from any activities which might lessen the value of the piece of territory before it is actually transferred. Thus, State A should refrain from such activities as nuclear testing, dumping toxic waste, destroying infrastructure, or arguably even exploiting the territory's natural resources. At the very least, A should not intensify its exploitative activities.

In this fashion, the idea of an interim obligation has been part and parcel of classical international legal thought in one form or another. Hugo Grotius, approaching the topic by approximation and under the general heading "On contracts," noted that "if ownership shall not pass immediately the seller will be under obligation to give possession according to contract."⁴⁵ Eméric de Vattel, when discussing agreements concluded between persons holding insufficient powers—so-called *sponsios*, opined with characteristic aplomb that although those implementing the agreement without waiting for ratification would be "guilty of imprudence" and committing "an egregious error," nonetheless "the other party is not justifiable in taking advantage of his folly and retaining possession of what he has so given."⁴⁶

Similarly, throughout the twentieth century until the conclusion of the Vienna Convention on the Law of Treaties in 1969,⁴⁷ the notion

Treaty: An Enigma?, 3 AUSTRIAN REV. INT'L & EUR. L. 311 (1998); Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT'L L. 138 (1997).

44. See also AUST, *supra* note 11, at 94. Of course, there are treaties, usually those of minor political import, that may enter into force upon signature. In such a case, there is no interim period between signature and entry into force, and accordingly, the problem of the interim obligation cannot logically arise.

45. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 352 (1925) (discussing transfer of ownership).

46. EMÉRIC DE VATTEL, *THE LAW OF NATIONS* 223 (Joseph Chitty trans., 1852) (discussing obligations arising from *sponsios*).

47. On the general subject of the moment of conclusion of a treaty, see E.W. Vierdag, *The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna*

of the interim obligation has met with general support in the pertinent literature. Samuel B. Crandall wrote in 1916 that pending entry into force, "neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed."⁴⁸ The Draft Convention on the Law of Treaties, prepared in 1935 under the auspices of Harvard Law School, contained a draft Article on the interim obligation, although it noted that it concerned a duty of good faith rather than of international law. Draft Article 9 reads:

Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.⁴⁹

In his brief but monumental study of full powers and ratification, J. Mervyn Jones, writing in 1949, formulated the interim obligation as follows:

Signature may, in conditions not yet defined by positive law, commit a State to the obligation not to exploit the signed text for its own purposes by abusing its discretion to ratify. Where a State has led other States to believe that its ratification will follow as a matter of course it ought not to do anything between signature and ratification which would frustrate the purpose of the treaty.⁵⁰

Finally, Lord McNair, possibly the greatest authority on the law of treaties of his time, stated with due caution that the version which he "believed to be correct" held that "one party to a treaty must not, pending ratification, do anything which will hamper any action that may be taken by the other party if and when the treaty enters into force . . ."⁵¹

Hence, there seems to have been general agreement among writers that, in one form or another, an obligation exists not to impair

Convention on the Law of Treaties and Related Provisions, 59 BRIT. Y.B. INT'L L. 75, 92 (1988).

48. SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 343-44 (2d ed. 1916) (discussing what he somewhat inaccurately termed the "provisionally binding" force of treaties).

49. Harvard Draft, *supra* note 24, art. 9, at 658 (containing the interim obligation).

50. J. MERVYN JONES, *FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE* 89 (1949) (positing the interim obligation).

51. MCNAIR, *supra* note 17, at 200 (formulating the interim obligation).

the value of an undertaking pending ratification or entry into force.⁵² The precise content and nature of the rule, however, are less clear.⁵³ As to the rule's nature, the Harvard Research team considered it a duty of good faith—morality, we may presume—rather than law. Lord McNair did not express himself one way or the other,⁵⁴ whereas the absence of anything on the topic with Crandall and Mervyn Jones may be read as suggesting that to their minds, the interim obligation was of a legal nature.⁵⁵

The views on the contents of the rule were even more divergent. For the Harvard Research scholars, the interim obligation was to be narrowly construed, as an exception to the sound proposition that the legal effect of treaties normally only commences upon entry into force.⁵⁶ For Crandall, what mattered was that states should not make their own positions untenable.⁵⁷ Mervyn Jones warned against defeating the treaty's purpose.⁵⁸ McNair's views were inspired not so much by concern for the treaty or the defaulting party but mainly by concern for the position of the aggrieved party.⁵⁹

Caselaw on the interim obligation has been relatively scarce, but the few classic cases that exist nonetheless illustrate the problems surrounding the interim obligation. The British-American tribunal deciding the *Iloilo Claims*, arising out of the Spanish-American war and addressing issues of liability caused by alleged delays on the part of the United States in taking control of the Philippine town of Iloilo after the signing of the peace agreement in 1898, held that no duty arose for the United States under the terms of the then still-unratified treaty: "*De Jure* there was no sovereignty over the islands

52. Some have argued that the obligation applies pending entry into force, as ratification expresses consent to be bound, but cannot apply after mere signature where signature does not express consent. After all, states are free to decide whether or not to ratify. With this in mind, it has been suggested that it is hardly a coincidence that the only case law available relating to an interim obligation after signature pertains to peace treaties, where obviously the defeated party is not free to decide whether or not to ratify. Cahier, *supra* note 7, at 34.

53. See Morvay, *supra* note 7, at 456 (writing in 1967 and noting that there is much disagreement on the exact conditions under which the obligation exists and on the exact extent of it).

54. While Lord McNair did note that there was some debate on whether the interim obligation was an obligation of good faith or strict law, he did not take sides. MCNAIR, *supra* note 17, at 200.

55. After all, these authors wrote legal treatises. It goes without saying that authors of such treatises will not remind the reader on every page that they are discussing a legal norm rather than any other type of norm.

56. See generally Harvard Draft, *supra* note 24.

57. See generally CRANDALL, *supra* note 48.

58. See generally JONES, *supra* note 50.

59. See generally MCNAIR, *supra* note 17.

until the treaty was ratified."⁶⁰ It held that whether the United States should have entered the town of Iloilo earlier so as to quell a Philippine uprising was a matter of discretion.⁶¹

The Turkish-Greek Mixed Arbitral Tribunal deciding *A.A. Megalidis v. Turkey*, however, took a slightly different tack and held that "from the time of the signature of the Treaty and before its entry into force the contracting parties were under the duty to do nothing which might impair the operation of its clauses."⁶² The differences between these two holdings may largely be explained by recognizing the type of behavior that was involved; in *Iloilo*, the British wished that the United States act positively prior to ratification, whereas in *Megalidis* the idea was rather that Turkey should have refrained from acting.⁶³ Both cases nevertheless illustrate the uncertainty with respect to the precise scope of the interim obligation and how to test whether the interim obligation is met.

Neither the Permanent Court of International Justice nor the International Court of Justice has ever had to pronounce itself on the interim obligation. In the *German Settlers* case, however, the interim obligation was invoked before the Permanent Court of International Justice.⁶⁴ Domestic courts have, however, occasionally addressed the issue. *McNair* refers, without providing many details, to *United States v. D'Auterive*, where a local U.S. court held that, in *McNair's*

60. *Iloilo Claims*, 3 Ann. Dig. 336 (British-American Trib. 1925). The words quoted are cited in *MCNAIR*, *supra* note 17, at 202.

61. *Iloilo Claims*, 3 Ann. Dig. at 336.

62. *A.A. Megalidis v. Turkey*, 4 Ann. Dig. 395 (Turkish-Greek Mixed Arb. Trib. 1928). The words quoted are those of the summary from the *Annual Digest of Public International Law Cases*. These words coincide with the French original which is reproduced in part in *MCNAIR*, *supra* note 17, at 202 ("[I]l est de principe que déjà avec la signature d'un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au Traité en diminuant la portée de ses clauses . . ."). A later case held that a directive issued shortly before the entry into force of a treaty, which would render such a directive illegal, amounted to an abuse of power and invalidated the directive. *Termination of Employment (Austria)*, 23 I.L.R. 470, 471 (Austrian Supreme Court 1956).

63. Jean-Pierre Cot has observed that the ILC's draft, and by extension Article 18 as adopted, confirms that no positive action is demanded from governments. It concerns instead a duty of abstention. Jean-Pierre Cot, *La Bonne Foi et la Conclusion des Traités*, *REVUE BELGE DE DROIT INTERNATIONAL* 140, 155 (1968, II).

64. Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6, at 6 (Sept. 10). In *The Mavrommatis Palestine Concessions*, the PCIJ also saw no need to "consider what the legal position would have been if the Treaty had not been ratified at the time of the Court's judgment." *The Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 33 (Aug. 30). As the treaty upon which Greece built its jurisdictional claim had not yet been ratified when Greece filed its claim, Judge Moore, dissenting, disagreed: "The doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past." *Id.* at 57.

words, "a State which had signed a treaty undertaking to cede territory to the other party would at least commit a breach of faith if, while the treaty was still awaiting ratification, it alienated a part of the territory in question to another State."⁶⁵

The idea of the value of an undertaking prior to performance or execution also appears, not surprisingly, to be generally recognized as a basic notion in the law of contract. P.S. Atiyah, for one, has no problem whatsoever in elucidating the binding nature of promises and contracts relating to future behavior.⁶⁶ In addition, treatises on contract law usually pay some attention to the idea of anticipatory breach,⁶⁷ defined by one authority as the situation that arises "when, before performance is due, a party either renounces the contract or disables himself from performing it."⁶⁸ In short, the idea that the seller may not impair the value of a transaction to the detriment of the buyer is well settled.

The notion has even entered European Community (EC) law in its own right. With respect to EC directives—which, by their very nature, grant the governments of the EC's Member States a certain period of time in order to arrange their implementation, the EC Court has held that Member States "must refrain from taking any measures liable seriously to compromise the result prescribed" during the period for transformation.⁶⁹

International law, then, is clearly not the only legal system recognizing an interim obligation. It remains unclear how to determine whether the interim obligation is being violated. What remains unclear is which test to employ, for as the opinions of

65. MCNAIR, *supra* note 17, at 203 (describing the court's decision). Also often mentioned is an obiter dictum of umpire Francis Lieber in the 1868 case *Ignacio Torres v. United States* who argued that if U.S. ratification of the peace treaty with Mexico had been certain, the U.S. attack on a Mexican town in the interim period "would certainly be considered . . . a fraudulent and invalid transaction." *Ignacio Torres v. U.S.*, No. 565 (Zacualtipan Claims, American-Mexican Joint Comm'n 1868), *reprinted in* 4 JOHN B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3798, 3801 (1898).

66. Atiyah acknowledges that it is difficult to ground this in a single reason. P.S. ATIYAH, PROMISES, MORALS, AND LAW 209-11 (1981) (discussing the basis of future obligation).

67. *E.g.*, 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 984 (1951) ("[I]f a promisor so conducts himself as to make the substantial performance of his promise impossible, this is a repudiation of his promise and has the same legal effect as would a repudiation in words."). *See also* J. BEATSON, ANSON'S LAW OF CONTRACT 544 (27th ed. 1998) (referring to anticipatory breach).

68. G.H. TREITEL, THE LAW OF CONTRACT 769 (9th ed. 1995) (emphasis deleted).

69. Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région Wallonne*, 1997 E.C.R. I-7411, I-7435, para. 45. The Court also pointed out, however, that Member States cannot be faulted for not having transposed directives before the transposition period has expired. *Id.* para. 43.

twentieth century pre-Vienna Convention scholars indicate, at least three tests are possible: (1) an objective test focusing upon the purpose of the treaty (the position maintained by Mervyn Jones);⁷⁰ (2) a test focusing on subjective intent (the position of Crandall);⁷¹ and (3) a test (advocated by McNair) concentrating on reliance or legitimate expectations on the part of the aggrieved party.⁷²

IV. BETWEEN INTENT AND EXPECTATIONS

At first, it might seem ideal to focus on legitimate expectations; indeed this is what a majority of authors, in particular those writing after the conclusion of the Vienna Convention, have proposed.⁷³ The benefits of a legitimate expectations test are rarely spelled out, but presumably amount to the following. The first benefit is that since it may be next to impossible to actually prove subjective bad faith, a legitimate expectations test would prove more workable.⁷⁴ Second, at least when focusing on the legitimate expectations of the aggrieved party, there is some concrete (or at least perceived) damage to be corrected. The interim obligation, in other words, has an object in reality, rather than in abstraction, which renders it measurable and workable.

Particularly with normative treaties, however, State A may engage in uncommendable behavior but without necessarily causing damage or frustrating anyone's expectations.⁷⁵ Thus, to accelerate the production of soon-to-be-prohibited weaponry is not, necessarily, commendable behavior, but unless the weapons are actually used it cannot be said to cause any damage. Similarly, to enact a law that would, upon application, violate a prospective human rights convention is not commendable, but unless and until the law is actually applied, no actual damage will result.⁷⁶

70. See *supra* note 50 and accompanying text.

71. See *supra* note 48 and accompanying text.

72. See *supra* note 17 and text accompanying note 51.

73. See *infra* Part VI.

74. E.g., McDade, *supra* note 7, at 21.

75. Except perhaps in the abstract manner in which we can say that policies are disappointing because we had hoped our governments to be more humane, or less calculating. Surely, though, this type of disappointment is not captured by any notion of legitimate expectations.

76. Indeed, there is a general consensus among international lawyers that to have a wrongful law on the books does not usually, as such, constitute an internationally wrongful act. Wrongfulness is incurred as soon as the law is actually applied. See generally, e.g., Wolfram Karl, *The Time Factor in the Law of State Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 95 (Marina Spinedi & Bruno Simma eds., 1987).

Thus, while a legitimate expectations test may serve to focus on concrete damage once it occurs, it nonetheless has drawbacks, particularly in situations that are not contractually structured. The first drawback is somewhat jurisprudential in nature: expectations, however legitimate, are not (not yet, perhaps) rights, and as Atiyah dryly observed, life is full of disappointed expectations.⁷⁷ Whereas full-fledged rights clearly deserve protection, it is less obvious why expectations deserve protection,⁷⁸ especially where expectations might be largely in the eye of the beholder. Hence, legitimate expectations have a hard time standing on their own.

To overcome this problem with legitimate expectations, one is forced to resort to the subjective intent of the offending party in arguing that the interim obligation has been violated. It is after all, wrong to frustrate someone else's expectations if it can be avoided, in particular if the offending state has created those expectations to begin with. Yet, resort to subjective intent is precisely the one thing that a focus on legitimate expectations was to remedy.

Another problem with a legitimate expectations test is that legitimate expectations, at least in some formulations, seem to presuppose a contractual bargain of sorts. Lauterpacht, who played an influential role in drafting the Vienna Convention as one of the ILC's special "Rapporteurs" on the topic, spoke in telling fashion of consideration, deploring the possibility that expectations for which consideration was given could be frustrated.⁷⁹ Yet, consideration, in the *quid pro quo* sense usually ascribed to it, while of obvious importance in contractual contexts, hardly has a place in normative discourse. With law-making or normative treaties, it is awkward to point to clearcut tangible consideration, for that suggests that states have something material to gain from, for instance, outlawing genocide or torture.⁸⁰ The connection between expectations and something else—here, consideration—suggests that expectations cannot stand on their own and has the additional drawback of suggesting that the expectations test is limited in applicability to contractual undertakings. In other words, where agreements are not

77. ATYIAH, *supra* note 66, at 210.

78. Perhaps for this reason, Bin Cheng speaks of imperfect rights rather than expectations. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 111 (1953).

79. See *infra* text accompanying note 112. Rather amazingly, the same passage is downplayed, and misleadingly so, by Charme as merely the opinion of a "delegate" and as "not especially authoritative." Charme, *supra* note 7, at 102 n.143.

80. If such concepts as gain and reciprocity play a role in such settings at all, it is in the diffuse version of reciprocity rather than the specific *quid pro quo* version. For a brief, and relatively rare, conceptual investigation of reciprocity along these lines, see Robert O. Keohane, *Reciprocity in International Relations*, in ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* 132 (1989).

based on consideration, there is little to gain in combining legitimate expectations with consideration.

There are other, more practical, drawbacks to the legitimate expectations test, particularly in normative situations. For instance, whose legitimate expectations deserve protection? Surely those of the treaty partner or treaty partners, but with normative instruments that can hardly be the whole answer. Rather the opposite is true: if anyone may legitimately expect State X not to defeat a human rights convention pending entry into force, it is the inhabitants of State X, perhaps even more so than the treaty partners.⁸¹ If the expectations of all inhabitants qualify then there is hardly any behavior left which is still excusable pending entry into force. Any form of behavior in violation of a prospective provision will inevitably frustrate someone's expectations. Accordingly, the treaty will, in effect, assume force upon signature, thus rendering the institution of ratification obsolete. That, in turn, is difficult to reconcile with the intentions of the drafters⁸² as well as with present-day ideas about democracy and foreign affairs, which hold that foreign affairs may be subjected to democratic control.⁸³ Additionally, if the expectations of entities within the aggrieved party are protected, should not those of entities within the offending party also find protection? After all, their expectations may be just as legitimate.⁸⁴ Once again, the end result is that nearly everything will be prohibited before the prohibition formally enters into force.

Yet another problematic aspect of a legitimate expectations test is that it may not be altogether clear at what point in time legitimate expectations may arise. Private persons are usually oblivious to the niceties of ratification, as ratification usually happens quietly through the appropriate diplomatic channels. If anything, the

81. Indeed, some go so far as to claim that the consent of right holders under human rights treaties is required in order to create exceptions, or by extension, amend or even terminate the treaties concerned. *E.g.*, MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 200 (1999).

82. The drafters may, after all, decide to have their agreement enter into force upon signature or to have it applied provisionally pending entry into force. Where they nonetheless insist on ratification, ratification must be taken seriously. *See* *Ambatielos (Greece v. U.K.)*, 1952 I.C.J. 28, 43 (July 1) (noting that ratification is "an indispensable condition for bringing [a treaty] into operation" when it is provided for and stating that ratification "is not, therefore, a mere formal act, but an act of vital importance.").

83. *Compare, e.g.*, MIROSLAV NINCIC, *DEMOCRACY AND FOREIGN POLICY: THE FALLACY OF POLITICAL REALISM* (1992) (vigorously arguing in favor of democratic control over foreign policy and, therewith, in favor of ratification), *with* LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) (making a similar argument in more moderate terms).

84. *See infra* Part VII for the circumstances surrounding the *Danisco Sugar* case before the EC Court.

moment of signing a treaty captivates a nation,⁸⁵ but surely to insist on the moment of signature as the decisive moment for the creation of legitimate expectations is once more to risk seeing the institution of ratification be reduced to naught. After all, having signed, states remain at liberty not to ratify.

In addition, a problem exists because in some circumstances legitimate expectations may not be legitimate at all. It is no coincidence that in disarmament circles the maxim of "trust but verify" recurs time and again;⁸⁶ simply to trust a potentially deadly foe on his word (or signature) is unforgivably naive. The very concept of verification almost by definition undermines any possibility that legitimate expectations arise at all in the context of arms control and disarmament. Ironically, the relatively recent invention of human rights monitoring may end up doing much the same for human rights.

In other settings, potentially aggrieved actors may simply be unaware of the process—not all small enterprises, for instance, will be immediately aware of what goes on in the field of treaty-making, not even when it may affect their businesses, resulting in the literal absence of legitimate expectations.⁸⁷ If there are no legitimate expectations, then there is nothing to protect.⁸⁸ In such situations no legitimate expectations even arise, yet to conclude therefore that the interim obligation does not and can not apply to disarmament conventions or to possibly self-executing free trade arrangements is not persuasive. A legitimate expectations test raises quite a few conceptual questions and, more fundamentally still, inevitably must refer back to subjective intent.

To focus on subjective intent, however, is hardly a feasible alternative. The subjective intent test's greatest advantage is

85. Alternatively or additionally, the moment or moments when a proposed treaty is discussed in parliament may also do so. Yet where, as in the Netherlands, some seventy-five per cent of treaties are tacitly approved, this offers little help. Jan Klabbers, *The New Dutch Law on the Approval of Treaties*, 44 INT'L & COMP. L. Q. 629, 634 (1995).

86. See generally Kenneth W. Abbott, "Trust but Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993).

87. The 1974 Nuclear Tests cases are instructive by analogy, given the absence of reliance on the part of Australia and New Zealand that France would, as indicated in a handful of official statements, refrain from further nuclear tests. Where concrete reliance was absent, the Court wavered between intent and a kind of abstract reliance. *Nuclear Tests (Austr. v. Fr.)*, 1974 I.C.J. 253, 269, paras. 43-46 (Dec. 20). In a later case, it clarified that France in *Nuclear Tests* had had no other option but to commit itself unilaterally, and, therefore, may be deemed to have had an intent to do so. *Concerning the Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 574, para. 40 (Dec. 22).

88. Unless one wishes to resort to an objectified form of legitimate expectations, which is essentially what this paper advocates under the banner of manifest intent.

probably that it is in line with prevailing positivist thinking in international law, according to which the intentions of sovereign states play a pivotal role in all walks of life, from law-making to incurring responsibility.⁸⁹ Yet, the subjective intent test comes with drawbacks of its own. First, as a philosophical truism, it may be well-nigh impossible to identify someone else's subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man's head.⁹⁰

More importantly, a subjective intent test fails to do justice in cases where the offensive behavior is accidental rather than intentional but still results in some sort of damage.⁹¹ In such cases, one must resort to a legitimate expectations test in order to achieve some measure of justice, yet the main reason to focus on subjective intent is precisely as an alternative to a legitimate expectations test. Similar reasoning applies where a treaty regime appears not to be respected pending entry into force due to honest differences of interpretation.⁹²

Thus, the legitimate expectations test is ultimately bound to resort to subjective intent; the subjective intent test, on the other hand, ends up referring to legitimate expectations.⁹³ A structural tension between the two main tests developed in doctrine, and in light of the inevitable symbiosis of the tests (others would rather speak of oscillation), an objective test appears to be the ideal one—that is, where behavior objectively defeats a treaty's object and purpose, such behavior is to be viewed as an internationally wrongful act giving rise to responsibility.

Yet, the objective test prescribed by Article 18 of the Vienna Convention displays a tension between doctrine and empirical reality for the "defeat of object and purpose" test is far from objective and

89. The leading illustration of this conception is still the case of the *S.S. Lotus*. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7) (holding that international legal rules emanate from the free will of states).

90. Anne de Moor, *Intention in the Law of Contract: Elusive or Illusory?*, 106 L. Q. REV. 632, 648 (1990) ("[T]he intent of man cannot be tried, for the devil himself knows not the intent of man.").

91. Which is precisely why in international space law and international environmental law, issue areas where damage typically results from accidents rather than intent, regimes of strict liability have proved popular and useful. For an intricate analysis concerning international environmental law, see RENÉ LEFEBER, *TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY* (1996).

92. As Rosenne notes, it may not always be easy to distinguish a breach of treaty from a difference of interpretation. SHABTAI ROSENNE, *BREACH OF TREATY* 120 (1985).

93. For powerful arguments that international law in general oscillates between seeming opposites, see DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987) and especially MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

proves unworkable in practice. The unworkability results because the very notion of what constitutes a treaty's object and purpose is, to a large extent, in the eye of the beholder. People may reasonably differ on what constitutes the object and purpose of such landmark conventions as the United Nations Charter or the Treaty Establishing the European Union,⁹⁴ and where multilateral conventions can be reduced to sets of bilateral rights and obligations, the multilateral convention may lack a unifying object and purpose.⁹⁵ Even where a consensus exists on a given treaty's object and purpose, disagreement on the type of behavior which would defeat this object and purpose may remain.

Thus, even if objectivity were attainable, and even if third party settlement were institutionalized to a high degree so as to present authoritative interpretations of what constitutes a given treaty's object and purpose, one cannot tell whether on its own the seemingly objective test of Article 18 lends itself for application without more. In other words, it is questionable whether one can look at behavior involving the "violation" of a prospective treaty at all without looking either at the offending party's intent or the aggrieved party's expectations. If that is true, any objective test is bound to lapse into the same deadlock already represented by the two subjective tests; that of endless oscillation between subjective intent and legitimate expectations. To think of defeat of object and purpose in terms other than those of intent or expectations is an impossibility. If no bad faith was present, and no expectations were frustrated, then it is impossible to hold that the treaty's object and purpose were nevertheless defeated, unless as the result of some sort of force majeure.⁹⁶ The interim obligation, however, does not cover situations such as force majeure.

Thus, a double bind results. The only way to overcome the tension between the two main doctrinal—subjective—tests is to leave those behind, and replace it by another tension—that between the objective test and the reality of its impossibility. To overcome the latter problem, one can only replace it by the former. Where strict objectivism is impossible, and where the two major tests to find out whether a treaty's object and purpose have been defeated pending

94. For the context of material breach of treaty, which is defined as breach of a provision essential to the accomplishment of the treaty's object and purpose, see D. W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 345 (1994). See Buffard & Zemanek, *supra* note 43; Klabbers, *supra* note 43.

95. ROSENNE, *supra* note 15, at 80-84.

96. In terms borrowed from criminal law, the *actus reus* cannot be seen in isolation from either *mens rea* or some sense of injury or damage. For a general discussion, see R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (1990).

entry into force are of limited use, one may wonder whether no way is left to apply the interim obligation.

The remainder of this Article is devoted to an exploration of the possibility of substituting a "manifest intent" test for the unworkable tests described earlier. A manifest intent test has two clear advantages. First, it has the distinct advantage of being relatively objective—what matters is the intent of an act's author as it manifests itself to the outside world—thus avoiding many of the pitfalls associated with relying on either form of subjective test. Second, it can do justice to reality far better than the objective test of Article 18 in non-contractual situations. While to think in terms of a defeat of a treaty's object and purpose makes no sense whatsoever with non-contractual treaties, to think of behavior in terms of right and wrong makes eminent sense, particularly in the context of normative instruments.

Nothing is particularly novel about a manifest intent test. One could argue that in many cases when trying to determine whether a violation of international law has taken place, "intent is 'constructed' or implied from the nature of the acts themselves."⁹⁷ Much the same applies to reconstructing the terms of an agreement.⁹⁸ In the context of determining whether there is an intent to be bound by a treaty, a manifest intent test also is involved.⁹⁹ The novelty of this Article is in proposing such a way of thinking in connection with the interim obligation. While the manifest intent test may not establish the absolute truth, the preparatory works of Article 18 of the Vienna Convention offer some support for its use, and as a manifest intent test is being used in both judicial practice and recent scholarly contributions, at least it may result in what Neil MacCormick has once so felicitously described as the "relative truth."¹⁰⁰

V. DRAFTING ARTICLE 18 AND ITS TEST

The Vienna Convention on the Law of Treaties was drafted over a period of two decades by the International Law Commission (ILC),

97. Martti Koskenniemi, *Evil Intentions or Vicious Acts? What is Prima Facie Evidence of Genocide?*, in *LIBER AMICORUM BENGT BROMS* 180, 196 (Matti Tupamaki ed., 1999).

98. See FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* 235 (1989) ("[T]he 'will' or the intention of the party is simply a 'construct' of the interpreter which might or might not have much to do with the actual motives and intentions . . .").

99. See generally JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* (1996).

100. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 271 (rev. ed. 1994).

which appointed four consecutive special rapporteurs (all based in the United Kingdom) to prepare reports for discussion and draft articles.¹⁰¹ The rapporteurs to a great extent all worked on the premise of the contractual situation—that the value of an undertaking for which consideration has been given must be protected.

In such a contractarian discourse, there is little need to resort to a middle ground between subjective intent and subjective expectations, either one will do.¹⁰² The non-contractarian situation is precisely where the limits of both subjective approaches become most easily visible.

For the first of these rapporteurs, Oxford's Chichele professor J.L. Brierly, the interim obligation was a good faith duty rather than an obligation in strict law.¹⁰³ Reproducing verbatim Article 9 of the 1935 Harvard Draft,¹⁰⁴ Brierly tersely added that it was included merely for purposes of discussion as it stated a moral rather than a legal obligation.¹⁰⁵ Indeed, in discussing the draft article within the ILC, Brierly supported a proposal to delete it altogether.¹⁰⁶ A substantial discussion ensued, which occasionally touched on the test to be employed.¹⁰⁷ Thus, one delegate observed that the "intent to cause harm [had] to be proved"¹⁰⁸ while another added in a similar vein that "between the time of signature and the time of ratification, none of the States should do anything at all calculated to make the ratification of the treaty impossible."¹⁰⁹ In the end, Brierly's article was deleted by the narrowest of margins, a five-to-four vote.¹¹⁰

Having resigned from the ILC, Brierly was succeeded as special rapporteur by Sir Hersch Lauterpacht, whose enthusiasm for the interim obligation stood in marked contrast to Brierly's lackluster approach.¹¹¹ Lauterpacht proposed to include a provision holding that signature of a treaty creates an obligation to "refrain, prior to ratification, from any act intended substantially to impair the value

101. See generally Vienna Convention, *supra* note 13.

102. See *supra* text accompanying notes 31-40.

103. See *infra* notes 105-06, 111 and accompanying text.

104. See *supra* note 24.

105. J.L. Brierly, *Second Report: Revised Articles of the Draft Convention*, [1951] 2 Y.B. Int'l L. Comm'n 70, 73, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

106. *Summary Records of the 86th Meeting*, [1951] 1 Y.B. Int'l L. Comm'n 27, 34, U.N. Doc. A/CN.4/SER.A/1951 [hereinafter *86th Meeting*].

107. *Id.*

108. *86th Meeting*, *supra* note 106, at 34 (Mr. Georges Scelle).

109. *Summary Records of the 87th meeting*, [1951] 1 Y.B. Int'l L. Comm'n 36, 42, U.N. Doc. A/CN.4/SER.A/1951 (Mr. Jesús María Yepes).

110. *Id.* at 42.

111. See *infra* notes 112-15.

of the undertaking as signed.”¹¹² Lauterpacht viewed the interim obligation as part of the obligations corollary to the rights that signatory states have, for example, in the context of reservations or accessions,¹¹³ and found that the interim obligation “refers only to such acts as are intended, and not merely calculated, to impair the value of the obligation as signed.”¹¹⁴ The purpose of the interim obligation, Lauterpacht continued, “is to prohibit action in bad faith deliberately aiming at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration.”¹¹⁵

At first blush, Lauterpacht here tries to have his cake and eat it too. He manages to combine both the subjective intent of the offending state and the legitimate expectations of the aggrieved state in one sentence.¹¹⁶ The example by which he continued, however, indicates that what he had in mind (however unwittingly perhaps)¹¹⁷ ran more along lines of manifest bad faith, rather than subjective bad faith. A state:

would be acting in bad faith and in violation of a legal duty if . . . after having undertaken to cede to another a portion of its territory it were to proceed to alienate, in the interval between signature and ratification, all the public property of the State which would otherwise pass to the other contracting party under the rules of State succession.¹¹⁸

What matters, in Lauterpacht’s example, is not whether the ceding state subjectively acts in bad faith. Rather, what matters is that its action can be only plausibly regarded as a manifestation of bad faith.

A few things are noteworthy about Lauterpacht’s observation. First, both the example he provided and his chosen words, repeatedly speaking of the “value” of an undertaking, the “benefits” of a treaty, and “consideration,” seem to suggest that foremost on his mind was the contractual situation.¹¹⁹ If that is correct, it follows that there is

112. Hersch Lauterpacht, *First Report on the Law of Treaties*, [1953] 2 Y.B. Int’l L. Comm’n 90, 108, U.N. Doc. A/CN.4/SER.A/1953/Add.1 (quoting the draft of pt. II, art. 5(2)(b)) [hereinafter Lauterpacht, *First Report*].

113. *Id.* at 110. The same view would later be echoed in E.W. Vierdag, *The International Court of Justice and the Law of Treaties*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 145 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

114. Lauterpacht, *First Report*, *supra* note 112, at 110.

115. *Id.*

116. Some have interpreted Lauterpacht as favoring a subjective intent test. *E.g.*, KAYE HOLLOWAY, *MODERN TRENDS IN TREATY LAW* 57 (1967).

117. In the sentence immediately subsequent to the block quote, *infra*, in the text accompanying note 118 he loosely referred to “deliberate action intended to deprive the other party of some of the benefits of the treaty,” and used the same formula to summarize his proposal. Lauterpacht, *First Report*, *supra* note 112, at 110.

118. *Id.*

119. *See id.*

little point in searching for further hints of manifest intent ideas in Lauterpacht's thought, for the simple reason that in contractual situations, any bad-faith act will deprive the treaty of its objective.¹²⁰ One must note, though, that on balance Lauterpacht supported an intent-based test rather than a reliance test.

Lauterpacht's first report remained undiscussed, due to the ILC's hectic schedule, and upon his election to the International Court of Justice, Lauterpacht was succeeded as special rapporteur by Sir Gerald Fitzmaurice.¹²¹ Fitzmaurice's approach differed markedly from that of his predecessors in various respects—for instance his well-known reluctance to go beyond an expository code of the law of treaties, and his conceptual approach to the topic to begin with. Like Lauterpacht, however, he stressed the legal nature of the interim obligation as well as an intent-based test.¹²²

Accordingly, Fitzmaurice's first report contained a draft Article 30, which held that signature of a treaty "[m]ay involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty."¹²³ Indeed, the commentary simply referred to Lauterpacht's views on the matter, to which Fitzmaurice merely added that he desired "to state the proposition in question in somewhat cautious and qualified terms."¹²⁴

As the ILC was busy working on the law of the sea, Fitzmaurice's first report was discussed in a general way only at the 368th, 369th, and 370th meetings of the Commission;¹²⁵ his second and third reports were left undiscussed, as the ILC had shifted its focus to codifying diplomatic relations and arbitral procedure.¹²⁶ These reports, however, contained nothing of immediate relevance for present purposes and neither did Fitzmaurice's fourth report (which

120. See *supra* text accompanying notes 31-40.

121. Lauterpacht's brief second report contains nothing of relevance for present purposes. See Hersch Lauterpacht, *Second Report on the Law of Treaties*, [1954] 2 Y.B. Int'l L. Comm'n 123, U.N. Doc. A/CN.4/SER.A/1954/Add.1.

122. See *infra* notes 123-24 and accompanying text.

123. Sir Gerald Fitzmaurice, *Law of Treaties*, [1956] 2 Y.B. Int'l L. Comm'n 104, 113, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

124. *Id.* at 122.

125. *Summary Records of the 368th Meeting*, [1956] 1 Y.B. Int'l L. Comm'n 211, 216, U.N. Doc. A/CN.4/SER.A/1956; *Summary Records of the 369th Meeting*, [1956] 1 Y.B. Int'l L. Comm'n 219, 219-26, U.N. Doc. A/CN.4/SER.A/1956; *Summary Records of the 370th Meeting*, [1956] 1 Y.B. Int'l L. Comm'n 226, 226-28, U.N. Doc. A/CN.4/SER.A/1956.

126. See *generally* [1957] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1957; [1958] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1958.

was intensively discussed during the ILC's 1959 session) nor did his fifth and final report.¹²⁷

With Fitzmaurice's election to the International Court of Justice, the ILC appointed Sir Humphrey Waldock as its fourth special rapporteur, and he explicitly followed the line set out earlier by Lauterpacht and Fitzmaurice.¹²⁸ Waldock's draft Article 9, as proposed in his first report, held that the signatory state "shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance."¹²⁹

A lively debate ensued in the ILC, but not on the test to be employed. All speakers addressing the issue and even formulating amendments retained the same basic formula: what mattered was that a state refrain from acts calculated to frustrate the objects of the treaty.¹³⁰ One delegate, Mr. Tabibi, even seemed to formulate what may come close to a manifest intent test when stating that "signature should be regarded as having been done in good faith until the terms of the treaty were violated, which was the only way of determining whether the state had acted in good faith or not."¹³¹ While it is possible to disagree with the statement that a violation of the treaty pending ratification or entry into force is the only way of determining good faith, Mr. Tabibi realized the difficulties inherent in any subjective test.

Having heard the comments of interested governments, Waldock returned to the matter of the interim obligation in his fourth report.¹³² Most of the governmental comments revolved around his proposal to extend the interim obligation even to the negotiating stage. Many thought this reflected a departure from customary law

127. Sir Gerald Fitzmaurice, *Fifth Report on the Law of Treaties*, [1960] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/130.

128. Sir Humphrey Waldock, *First Report on the Law of Treaties*, [1962] 2 Y.B. Int'l L. Comm'n 27, 46, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

129. *Id.* at 46 (quoting the draft of art.9(2)(c)). Draft Article 5(3), moreover, specified that during negotiations states shall refrain "from any action that might frustrate or prejudice the purposes of the proposed treaty . . ." *Id.* at 39. Article 9(3) specifies much the same with respect to states that had already expressed consent to be bound, but prior to entry into force of the treaty. *Id.* at 46.

130. *E.g.*, *Summary Records of the 644th Meeting*, [1962] 1 Y. B. Int'l L. Comm'n 88, 89, U.N. Doc. A/CN.4/SER.A/1962 (Mr. Castrén's reformulation); *Summary Records of the 644th Meeting*, [1962] 1 Y. B. Int'l L. Comm'n 88, 91, U.N. Doc. A/CN.4/SER.A/1962 (Mr. Elias' reformulation); *Summary Records of the 644th Meeting*, [1962] 1 Y. B. Int'l L. Comm'n 88, 94, U.N. Doc. A/CN.4/SER.A/1962 (rendition of Mr. Briggs); *Summary Records of the 644th Meeting*, [1962] 1 Y. B. Int'l L. Comm'n 88, 95, U.N. Doc. A/CN.4/SER.A/1962 (rendition of Mr. El-Erian).

131. *Summary Records of the 644th Meeting*, [1962] 1 Y. B. Int'l L. Comm'n 88, 90, U.N. Doc. A/CN.4/SER.A/1962 (Mr. Tabibi).

132. Sir Humphrey Waldock, *Fourth Report on the Law of Treaties*, [1965] 2 Y.B. Int'l L. Comm'n 3, 43-45, U.N. Doc. A/CN.4/SER.A/1965/Add.1.

and quite a few thought it went too far. The Japanese government made the only comment on testing the interim obligation, mentioning that "the criterion for refraining from acts calculated to frustrate the objects of the treaty is too subjective and difficult of application. It would prefer to leave the matter entirely to the good faith of the parties and to omit the whole article."¹³³ Waldock, however, retained in his revised draft article the subjective intent test: states were "to refrain from acts calculated to frustrate"¹³⁴ a treaty's objects.

The lengthy discussions within the ILC during its 788th and 789th meetings do not shed much light on the matter of the criterion to be used, with one exception. Mr. Reuter, believing that the special rapporteur's focus on acts calculated to frustrate a treaty's objects constituted an objective test, proposed that it be replaced by the following subjective test: "when a State definitively expressed its will to be bound, it created a certain expectation in its partners, and . . . it was the non-fulfillment of that expectation that was incompatible with good faith."¹³⁵ Later, Mr. Reuter acknowledged that he may have been thinking of a different situation than his colleagues in the ILC. He had been thinking about frustrating the partners, whereas his colleagues had mainly been thinking about frustrating a treaty.¹³⁶ Mr. Reuter's suggestions were not included.

A pair of other relevant remarks both seemed to favor a more or less objective test. Mr. Jiménez de Aréchaga observed that good faith would require a state during negotiations to "abstain from acts that would nullify the essential purpose of the treaty,"¹³⁷ while Mr. Lachs, invoking the example of an arms reduction agreement, felt that states "were under an obligation to maintain the *status quo*, so as not to invalidate the basic presumption of the agreement . . ."¹³⁸

These were, in the end, isolated positions. The collective intent of the ILC seemed to point in the direction of a relatively objective test—by focusing on the objects of the treaty—but tilting somewhat toward subjective intent. Both Mr. Reuter¹³⁹ and Mr. Ago¹⁴⁰ observed a small distinction between the English and French versions—"frustrate" versus "réduire a néant"—with the French expressing the collective intent more accurately. The operative

133. *Id.* at 44.

134. *Id.* at 45 (revised draft Article 17).

135. *Summary Records of the 788th Meeting*, [1965] 1 Y.B. Int'l L. Comm'n 87, 91, U.N. Doc. A/CN.4/SER.A/1965 [hereinafter *788th Meeting*].

136. *Summary Records of the 789th meeting*, [1965] 1 Y.B. Int'l L. Comm'n 94, 95, U.N. Doc. A/CN.4/SER.A/1965 [hereinafter *789th Meeting*].

137. *Id.* at 97.

138. *Id.*

139. *788th Meeting*, *supra* note 135, at 91.

140. *Id.* at 92.

verb—"calculate" in English—remained unaffected until later, when the ILC met again in 1966.¹⁴¹

More important is that at the 788th meeting, some ILC members expressed an awareness of the pivotal distinction (in this context) between contractual and normative instruments and its links to the propriety of a given test. Unfortunately, these members expressed their awareness in lapidary and somewhat unfortunate terms (due, perhaps, to their being spoken in a meeting rather than written down upon reflection).

Mr. Ago in particular pointed out that with multilateral treaties, "it was difficult to accept the idea that . . . a single State could commit acts which frustrated its objects," and he observed that the examples usually referred to tended to be of such a nature that a breach of the obligation of good faith could be easily discerned.¹⁴² While speaking in terms of bilateral treaties, what Mr. Ago clearly had in mind was not the bilateral form, but the underlying contractual exchange.¹⁴³

Mr. Tunkin also discussed the distinction between bilateral and multilateral treaties, but like Mr. Ago, he seemed to have in mind the underlying structure of the agreement—contractual versus normative—rather than its outward manifestation. For example, he observed that states being members of international organizations sometimes were taking part in the conclusion of a treaty within those organizations while disapproving of the very object of such a treaty.¹⁴⁴ Since contractual engagements prepared under auspices of international organizations are relatively rare, it seems plausible that Mr. Tunkin too referred to normative undertakings.

The distinction between contractual and normative agreements fell flat as none of the members arrived at the full realization that the form of treaties was not at issue but rather their underlying structure. Special Rapporteur Waldock effectively terminated the discussion when he remarked "that such matters as tariff reductions, which had been mentioned as one of the examples, could just as well form the subject of a multilateral as of a bilateral treaty."¹⁴⁵

In light of this extensive drafting history, the text as finally proposed by the ILC contained few surprises, with one exception.

141. See *infra* text accompanying note 146.

142. 788th Meeting, *supra* note 135, at 92.

143. For an interpretation of the records as focusing on form and not substance, see Charme, *supra* note 7, at 98-103.

144. 788th Meeting, *supra* note 135, at 93.

145. 789th Meeting, *supra* note 136, at 96. Incidentally, the tariff reduction example was mentioned by neither Mr. Ago nor Mr. Tunkin. To complicate matters though, it may be observed that tariff reduction may be contractual but normative as well. Surely, a general provision not to introduce new tariffs between a handful of states cannot, without more, be deemed contractual. Yet, a numerical reduction of existing tariffs between the same states may well be contractual in nature.

Draft Article 15, as it had now become, spoke no longer of acts "calculated" to frustrate the object of a proposed treaty, but used the ostensibly less subjective "tending to" description. States were obliged to refrain from acts tending to frustrate the object of a proposed treaty pending ratification and entry into force and even during negotiations.¹⁴⁶

Despite having earlier rejected the idea to extend the interim obligation to bare negotiations, the ILC's final draft nonetheless included an obligation not to do anything which might tend to frustrate a treaty's object pending negotiation.¹⁴⁷ Not surprisingly, it was this provision that attracted much of the attention at the first session of the Vienna Conference on the Law of Treaties,¹⁴⁸ with the representatives of many states advocating a deletion of the proposal because it would unduly limit the freedom of states during negotiations.¹⁴⁹

Although many representatives underlined the connection between the idea of good faith and the interim obligation, few pronounced themselves explicitly on the test to be used in determining whether certain acts tend to frustrate or, as it was changed by the Drafting Committee, whether those acts "defeat" a treaty's object and purpose.¹⁵⁰ The few who did broach the matter of the test to be employed all seemed to think in the direction of subjective intent. Thus, the Hungarian representative, with a keen eye for stating the obvious, opined that good faith "was a fundamental principle of positive international law, which was

146. *Reports of the Commission to the General Assembly, Part II: Report of the International Law Commission on the Work of its Eighteenth Session*, [1966] 2 Y.B. Int'l L. Comm'n 172, 202, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The change had been made so as to bring the French and English texts in line, at the ILC's 892nd meeting. The French changed from "actes de nature à" to "actes tendant à," with the English changing from "acts calculated" to, on Sir Humphrey's proposal, "acts tending to." *Summary Records of the 892nd Meeting*, [1966] 1 Y.B. Int'l L. Comm'n 321, 326, U.N. Doc. A/CN.4/SER.A/1966.

147. Occasionally, pleas to that effect have been voiced in the post-Vienna Convention literature. *E.g.*, Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443 (1981).

148. The provision has also been addressed in the contemporary literature. See generally Morvay, *supra* note 7 (advocating deletion of the interim obligation at the negotiating stage).

149. As the representative of India put it, such an obligation during negotiations "might result in hindering rather than promoting successful negotiations." *Summary Records of Meetings of the Committee of the Whole, U.N. Conference on the Law of Treaties*, 1st Sess., 19th mtg. at 97, 98, U.N. Doc.A/CONF.39/11 (1968).

150. The change was "a purely drafting change, made in the interests of clarity," according to the chairman of the Drafting Committee. *Summary Records of Meetings of the Committee of the Whole, U.N. Conference on the Law of Treaties*, 1st Sess., 61st mtg. at 353, 361, U.N. Doc.A/CONF.39/11 (1968).

violated by a State acting in bad faith.”¹⁵¹ He added, in reference to the proposed interim obligation during negotiations, that a state has “no right fraudulently to undermine the success of negotiations.”¹⁵² By the same token, the representative of Iraq observed that the interim obligation was somehow related to “the problem of abuses,”¹⁵³ and Sir Humphrey Waldock, present at the Conference as expert consultant, clarified (referring to negotiations) that what the ILC probably had had in mind was that a state “remained free to break off negotiations; only acts of bad faith were excluded.”¹⁵⁴

VI. SCHOLARSHIP ON THE TEST

If one main idea resulted from the discussions and debates in the ILC, spanning many years, many reports and rapporteurs, and involving many ILC members, as well as from the discussions at the Vienna Conference, it is the almost unanimous endorsement of a test based on intent. With the exception of some comments made by Mr. Reuter,¹⁵⁵ which were later more or less withdrawn in the realization that he may not have been talking about the same thing as his colleagues, fairly little support exists for a legitimate expectations test.¹⁵⁶ Instead, on balance it seems that the ILC in general wavered between an objective test and a subjective intent test.¹⁵⁷ Much of the preparatory work seems to favor subjective intent, speaking consistently of acts calculated to defeat a treaty's object. Towards the

151. *Summary Records of Meetings of the Committee of the Whole, U.N. Conference on the Law of Treaties*, 1st Sess., 19th mtg. at 97, 102, U.N. Doc.A/CONF.39/11 (1968).

152. *Id.*

153. *Summary Records of Meetings of the Committee of the Whole, U.N. Conference on the Law of Treaties*, 1st Sess., 20th mtg. at 102, 103, U.N. Doc.A/CONF.39/11 (1968).

154. *Id.* at 104.

155. *See supra* text accompanying notes 135-36.

156. It may be countered that blank references to good faith may be read as involving legitimate expectations, but then it can also be said that good faith might refer to the subjective intent of the offending state.

157. Before the actual conclusion of the Vienna Convention, Morvay's reading of the ILC's final draft summarized the ILC's ambivalence:

According to the draft as interpreted by the Commission, the obligation is violated only by acts which are intended to frustrate the object of a treaty and not also by acts which frustrate it unintentionally. Although the wording of the draft is not quite conclusive on this point, this clearly appears from the genesis of the provision.

Morvay, *supra* note 7, at 458. Nonetheless, he later seems to move toward a legitimate expectations test when discussing the interim obligation at the negotiations stage: “[I]n such circumstances there would not be any legitimate expectations . . .” *Id.* at 459.

end though, and without explanation, the focus seemed to shift to an objective test, first speaking in the final draft of acts "tending to" frustrate a treaty's object and resulting, eventually, in the wording of Article 18, speaking of acts "which would defeat" a treaty's object and purpose.¹⁵⁸

Given this background (but not in light of other considerations), it is surprising¹⁵⁹ that many post-Vienna Convention writers advocate a legitimate expectations test.¹⁶⁰ Perhaps the most sophisticated analysis along these lines is Paul McDade's work.¹⁶¹ In an article devoted to analyzing the legality of unilateral attempts to explore the deep sea-bed by signatories of the 1982 UN Convention on the Law of the Sea, he observes:

The emphasis should be on conduct a state can expect as a result of the obligation of good faith rather than defining which actions constitute bad faith. Examining the legitimate expectations which each state is entitled to expect regarding the treaty which has been signed and the conduct of other states in relation thereto is likely to be more fruitful than focussing [sic] on bad faith or attempting to prove subjective intent to abuse a set of rights.¹⁶²

McDade derives his legitimate expectations test from what is, in his view, the rationale of the interim obligation—that is, "to ensure that a state does not negotiate and conclude a treaty with another or

158. Zoller, indeed, is insistent on the objective nature of the test: "Aucun élément intentionnel, aucune qualité psychologique n'interviennent en l'espèce." ELIZABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* 74 (1977).

159. So much so that elsewhere, perhaps unduly influenced by those writings, I may have also somewhat over-emphasized the role of legitimate expectations in the preparatory works. See Jan Klabbbers, *Re-inventing the Law of Treaties: The Contribution of the EC Courts*, 30 NETH. Y.B. INT'L L. 45 (1999).

160. Not all writers, however, do so. Some manage to describe the interim obligation in completely neutral terms. See *supra* note 6. See also SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 42-44 (2d ed. 1984). Charme maintains perhaps somewhat indecisively that in focusing on acts calculated to defeat a treaty's object and explicitly rejecting a legitimate expectations test, the ILC opted for "the more objective language providing for resort to the object of a treaty." Charme, *supra* note 7, at 96.

161. Perhaps aware of the surprise he might otherwise create, McDade tentatively suggests that:

[I]t is probably more in keeping with the intention of the parties to the Vienna Conference to interpret the words in order to give effect to them, i.e., in the 'objective' sense. This would avoid the analysis of intention to commit bad faith and could lead to an assessment of the legitimate expectations of states.

McDade, *supra* note 7, at 23. This latter step remains unexplained though, unless McDade wishes to suggest that an objective test is bound to lapse into a subjective test at any rate, in which case a legitimate expectations test is, in his view, to be preferred.

162. *Id.* at 21.

others, gain rights under the treaty[,] and then act in such a way as to reduce the benefits agreed upon.”¹⁶³

While McDade is perhaps the most explicit advocate of a legitimate expectations test, he is by no means the only one. Mark Villiger, in the first edition of his *Customary International Law and Treaties*, devotes a brief case study to the drafting of Article 18 and reaches the surprising conclusion that “[c]learly, Art. 18 gives concrete meaning to the principle of good faith by protecting legitimate expectations.”¹⁶⁴

Robert Turner, studying arms control agreements, eventually advocates something of a legitimate expectations test when noting that “the underlying principle behind article 18 is not that signed treaties are binding; it is instead that fundamental fairness requires a State to refrain from undermining an agreement on which another State is relying”¹⁶⁵ In addition, Yoram Dinstein, addressing the situation involving the Chemical Weapons Convention, determines that the interim obligation operates through legitimate expectations, arguing that signature creates legitimate expectations to the extent that the signatory state is bound to refrain from acts defeating the object and purpose of a treaty, and in the case of the Chemical Weapons Convention this means that a signatory state (or ratifying state) is not allowed to accelerate the production and stockpiling of chemical weapons, although it would not yet be under an obligation to stop producing and stockpiling altogether.¹⁶⁶

A rare exception¹⁶⁷ is Jonathan Charney, who considered whether the entry into force of the UN Convention on the Law of the Sea (LOS Convention) by means of a modifying collateral agreement between many signatories and ratifiers of the LOS Convention amounted to a violation of the interim obligation.¹⁶⁸ He answered in the negative, writing that by concluding their modifying agreement,

163. *Id.* at 20. Note though how he moves away here from a legitimate expectations test, and almost, but not quite, finds himself in the opposite camp by looking at things from the position of the offending state.

164. MARK EUGEN VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 321 (1985). The case studies have disappeared in the second edition, which was published in 1997.

165. Robert F. Turner, Note, *Legal Implications of Deferring Ratification of SALT II*, 21 VA. J. INT'L L. 747, 777 (1981).

166. Yoram Dinstein, *Ratification and Universality, in THE CONVENTION ON THE PROHIBITION AND ELIMINATION OF CHEMICAL WEAPONS: A BREAKTHROUGH IN MULTILATERAL DISARMAMENT* 151, 154-55 (1995).

167. For a study on good faith where the interim obligation is mentioned in passing in terms of subjective intent—borrowed, so it seems, from the Lauterpacht version—see J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 108 (1991) (“[A]n obligation in good faith rests upon the signatory State to refrain from acts calculated to frustrate the object of a treaty which is signed subject to ratification, acceptance[,] or approval.”).

168. Charney, *supra* note 4, at 398-99.

“signatories to the LOS Convention are unquestionably promoting, not undermining, the object and purposes of the Convention”¹⁶⁹

Charney’s conclusion was based on neither a legitimate expectations test nor, strictly speaking, a subjective intent test. Instead, it would seem that Charney, without being explicit, simply asked himself whether the modifying agreement was good or bad for the law of the sea at large. Surely, upon such a construction, any modifying agreement that has the effect of triggering the entry into force, and thereby the application of a comprehensive legal regime among a multitude of participants,¹⁷⁰ must be a good thing.

Charney’s test looks like an objective test, but it really is not, at least not in the sense which seems to be pre-ordained by Article 18—that is, defeat of a treaty’s object and purpose. Instead, what Charney does is objective in a different sense (and which is perhaps not strictly objective to begin with); he employs a test of manifest intent, or manifest bad faith. The drafters of the modifying agreement were clearly inspired by a sincere desire to help the LOS Convention finally get off the ground. Their motives were reasonably pure (although never free from self-interest),¹⁷¹ and few if any legitimate expectations were frustrated (as witnessed by the large-scale support for the modifying agreement in the UN General Assembly, where it was endorsed by 121 states, with seven states abstaining and none voting against).¹⁷² In those circumstances, if no one thinks the interim obligation is being violated, no one seriously can maintain that the modifying agreement did indeed breach the interim obligation. Instead, the opposite conclusion is warranted, and that is precisely the conclusion Charney reaches.

Clearly, academic opinion tilts in favor of a legitimate expectations test. Equally clearly, the preparatory works of Article 18 of the Vienna Convention do not support a legitimate expectations test. If anything, they cautiously support a subjective intent thesis. Why, then, does academic opinion seem to favor so overwhelmingly a legitimate expectations test?

The answer in part is that the Vienna Convention’s drafters thought primarily of contractual exchanges where the precise test to be used is of little relevance. By contrast, with normative

169. *Id.* at 399.

170. Charney formulates the object and purpose of the Convention on the Law of the Sea as “to provide a comprehensive legal regime for the oceans accepted by widespread participation.” *Id.* at 399. One may quarrel with such a rendition, since virtually every ambitious multilateral treaty aspires to provide a comprehensive legal regime on the topic accepted by widespread participation. For present purposes, however, such a quarrel is beside the point.

171. Thus, Charney emphasizes U.S. national security interests in adhering to the Convention. *Id.* at 385.

172. *Id.* at 382.

conventions, the precise test to be used is of pivotal importance. Most authors have somehow addressed such a normative convention, be it the Chemical Weapons Convention (Dinstein),¹⁷³ arms control agreements (Turner),¹⁷⁴ or the UN Convention on the Law of the Sea (McDade,¹⁷⁵ Charney¹⁷⁶).

With such normative conventions, the subjective intent test proves too much and too little at the same time. To stockpile or produce chemical weapons despite having signed a convention not to do so is only attributable to subjective intent; such behavior cannot be accidental. Yet it does not automatically signify an intent to defeat a treaty's object and purpose, for it may also be explained on other grounds—such as, a lack of trust in the treaty partners or an awareness of a potential free rider problem. The same applies to all behavior which contravenes normative acts. It will always be the result of the subject's intentions, yet rarely (if at all) will it conclusively demonstrate the subjective intent to defeat a treaty's object and purpose. Hence, to argue subjective intent in such circumstances is to argue the obvious and the impossible all at once. The explanatory force of the test is nil, which radically impairs its utility as a test for the legality of behavior.

As a result, one is almost automatically forced to take on the other position, that of legitimate expectations. At least this position offers a glimmer of hope of being able to distinguish between serious cases, possibly resulting in a finding of liability, and less serious cases which one can simply ignore.

The main problem is, however, that precisely in such circumstances it is not plausible for states to expect others to behave in accordance with a set of norms prior to the entry into force of that set of norms. In much the same way, a responsible government will not expect its citizenry to pay higher taxes prior to a tax increase entering into force. While one might occasionally hope, desire, wish, or pray that a signatory will not engage in behavior which collides with its future obligations, surely few would actually expect as much. In other words, the reality of legitimate expectations may well be doubted.

Moreover, it is precisely with normative conventions that a variety of acts within the state may enter the picture. When States A, B, and C conclude an anti-torture convention, A and B will hardly expect C to fully meet future obligations prior to entry into force. Arguably such expectations, however, may start to grow amongst citizens of C. After all, why else would their government enter into

173. See *supra* text accompanying note 166.

174. See *supra* text accompanying note 165.

175. See *supra* text accompanying notes 161-63.

176. See *supra* text accompanying notes 168-72.

an anti-torture commitment unless it would fully intend to abide by its terms? In such a case, the citizens' expectations may be frustrated, yet it is doubtful that the expectations of the citizens (instead of the treaty partners) find protection under the interim obligation.¹⁷⁷

In short, there seems to be no way out. The legitimate expectations test, with normative treaties, is either hopelessly unrealistic (when it comes to treaty partners) or hopelessly inadequate (when it comes to citizens or companies). The subjective intent test, on the other hand, is far too inclusive to be of any use and cannot be conclusively demonstrated. Furthermore, from a broader perspective, the paradox remains that whichever of those two tests one uses, behavior which is reprehensible in itself does not defeat the object and purpose of a treaty intended to stop such behavior; rather it underscores the need for the treaty.¹⁷⁸

Indeed, the authors mentioned above as seemingly utilizing a legitimate expectations test, upon closer scrutiny do not really utilize such a test. None of them engages in an analysis of whose expectations are frustrated, in what ways exactly, and through which behavior. No evidence of expectations exists to begin with. Instead, there is an equation of undesirable behavior and behavior violating the interim obligation. Charney's analysis is perhaps the most instructive example thereof, precisely because he does not find the interim obligation violated in the situation he analyzes.¹⁷⁹ He notes that behavior generally deemed desirable is unlikely to violate the interim obligation.¹⁸⁰ Still, Charney's analysis is by no means the only example.

It could hardly have been otherwise. Where saying that behavior actually defeats a treaty's object and purpose does not make sense, and where a subjective intent test is necessarily too much and too little, all that is left is an appeal to legitimate expectations. Intuitively, the above-mentioned authors have realized as much, which explains why they phrase their arguments in terms of legitimate expectations. Effectively, however, with no investigation into legitimate expectations, they focus on the moral quality of the behavior they observe, that of the offending party. Courts use the same manifest intent test in the few cases where the interim obligation has recently been invoked.

177. The preparatory works provide not a shred of support for this proposition.

178. Unless in extremely outrageous hypothetical scenarios. Think of all-out chemical warfare, resulting in the annihilation of humankind. Such would defeat the object and purpose of the Chemical Weapons Convention, but by then the interim obligation is of little practical value anymore.

179. Charney, *supra* note 4, at 399.

180. *Id.*

VII. JUDICIAL PRACTICE

The interim obligation rarely has made an appearance before a court or tribunal. There are the classic cases discussed above, *Iloilo*¹⁸¹ and *Megalidis*¹⁸² in particular, but after those were decided, the courts had little occasion to pronounce on the interim obligation and had not been confronted with Article 18 claims since the conclusion of the Vienna Convention.¹⁸³

This changed in the 1990s however, and three relatively recent decisions are instructive.¹⁸⁴ In order to illustrate the difficulties involved in applying the interim obligation and the various questions it raised, these cases will be discussed at some length. Those questions themselves are a consequence of the circumstance that treaties are no longer always to be considered as compacts addressing only states; instead, many of the difficulties in applying the interim obligation (in all three cases) stem from the circumstance that a private or legal person invoked the interim obligation.

A. *S.E.B. v. State Secretary for Justice*

The first (and arguably the least complicated) case is a decision by the Judicial Division of the Dutch Council of State (the highest administrative court in the Netherlands), in the case of *S.E.B. v. State Secretary for Justice*.¹⁸⁵ In this case, the Court refused to honor an appeal on the interim obligation when a Moroccan teenager whose father lived in the Netherlands claimed a right to be reunited on grounds of the Rights of the Child Convention.¹⁸⁶ At the material time, the Convention had been signed by the Netherlands but not yet ratified, and accordingly had not yet entered into force for the Netherlands.¹⁸⁷

The Court dealt with the argument in a few brief sentences. Taking its cue from the explanation of Article 18 provided by the Dutch government when it submitted the Vienna Convention for parliamentary approval, the Court argued that:

181. *Iloilo Claims*, 3 Ann. Dig. 336 (British-American Trib. 1925).

182. *A.A. Megalidis v. Turkey*, 4 Ann. Dig. 395 (Turkish-Greek Mixed Arb. Trib. 1928).

183. As Charme stated in 1991: "Since 1969, neither a court nor a tribunal has decided a case directly on point." Charme, *supra* note 7, at 83.

184. The three cases discussed *supra* in notes 60-62 seem to exhaust the matter. I am not aware of any other decisions in which the interim obligation was discussed.

185. For a brief case report, see *S.E.B. v. State Secretary for Justice, Council of State, Judicial Division, 9 July 1992, Institute's Collection No. 3696*, 25 NETH. Y.B. INT'L L. 528 (1994) [hereinafter *S.E.B. v. State Secretary for Justice*].

186. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (1989).

187. *S.E.B. v. State Secretary for Justice*, *supra* note 185, at 529.

[T]his obligation means in the majority of cases that a State should refrain from acts which would make the future application of the treaty in question impossible once it has entered into force. Contrary to what the appellant evidently believes, it cannot be maintained that the refusal constitutes an act that makes the future application of the Child Rights Convention impossible . . .¹⁸⁸

The case neatly illustrates the difficulties embodied in the various tests. While the Dutch administrative decision that gave rise to the proceedings was based on the subjective intent of the Dutch authorities (it could hardly have been otherwise), it was obviously not rendered with the intent to undermine the Convention or to defeat its object and purpose. Hence, it is difficult to argue that the Dutch authorities acted in bad faith. To argue, on the other hand, that the appellant's legitimate expectations were frustrated would have required the following: first, that the appellant's expectations (as opposed to those of treaty partners) are the expectations that the interim obligation aspires to protect; and second, that such legitimate expectations did indeed exist (or that a reasonable person could have legitimately expected a family reunion based on a non-ratified Convention) and were frustrated by the contested decision. Establishing this principle was a tall order, particularly in light of the abundantly clear fact that the Convention at issue had yet to enter into force for the Netherlands.

The Court thus was almost forced to apply a more or less objective test, and could only reach the obvious conclusion. There was no way in which a single incident could possibly be construed as defeating the object and purpose of the Rights of the Child Convention.

One is hard put to find fault with the decision as a matter of law, and in light of the facts of the case—the child being almost mature, and having close family in Morocco as well—it is even difficult to disagree with the outcome, yet it does not set a terribly satisfying precedent. Suppose that the child were much younger, and that the only relatives in Morocco were distant uncles. In those circumstances, surely, the outcome adopted by the Court would have been much harder to accept. In those circumstances, the objective test applied by the Court, however correct in principle, would have led to disastrous results—the sacrifice of a young child to no more than a formality. Instead, in those circumstances one would hope that the tribunal would have found in the child's favor, despite the absence of intent or expectations and despite the circumstance that the Dutch authorities came nowhere near a defeat of the Convention's object and purpose. In short, had circumstances been different, one hopes that the tribunal would have done the "right

188. *Id.* at 530.

thing,” and the only possible rationalization of doing the right thing here is a manifest intent test.

B. Opel Austria

The manifest intent test was eventually chosen by the EC's Court of First Instance in what is already becoming something of a landmark case, the *Opel Austria* case, decided in 1997.¹⁸⁹ The complexity of the case (and the reason for the lengthy analysis here) is in large measure not the result of a difficult set of facts, but rather a result of the uncertainties involving the interim obligation and the somewhat wavering approaches thereto on the part of the applicant, the intervening state, and the Court itself.

At issue was whether the EC Council had violated the interim obligation in imposing tariffs against gearboxes made by Opel Austria, ostensibly as a retaliatory measure to countenance government subsidies, shortly before the Agreement establishing the European Economic Area (EEA) entered into force between Austria and the EC (as well as some other states, effectively extending the reach of parts of EU law).¹⁹⁰ A complicating factor here was that the relevant prohibition contained in the EEA agreement would undoubtedly be self-executing in the legal orders of the territories covered by Community law from the moment of entry into force onwards.¹⁹¹ Yet another complicating factor was that the Council deliberately backdated its publication of the contested regulation.¹⁹²

The Court eventually annulled the contested regulation, reasoning that the regulation had “infringed the applicant's legitimate expectations.”¹⁹³ Curiously, though, it is not quite obvious that the Court employed a legitimate expectations test. Even more accurately perhaps, to the extent that it did employ such a test, it did not do so very felicitously and consistently. What the Court ended up referring to as the applicant's legitimate expectations was, upon closer scrutiny, simply the result of a manifest intent test.

A complicated and large agreement such as the EEA—one that creates not only an elaborate free trade regime but also institutions

189. Opel Austria, *supra* note 1. For comments, see Jan Klabbers, *Protection of Legitimate Expectations in EC Law Deriving from an International Agreement Prior to its Entry into Force: The Opel Austria Decision of the Court of First Instance*, 95 LAKIMES 732 (1997). See also P.J. Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties* 1969, 25 LEGAL ISSUES OF EUR. INTEGRATION 1 (1998).

190. Opel Austria, *supra* note 1, paras. 39-44.

191. *Id.* para. 102. The text of the EEA Agreement can be found in 1994 O.J. (L 1) 3.

192. Opel Austria, *supra* note 1, para. 46.

193. *Id.* para. 123.

designed to supervise the workings of the regime¹⁹⁴—is not very likely to see its object and purpose defeated by a single act which would run counter to its terms committed some time before its entry into force.¹⁹⁵ Hence, any attempt to apply the objective test, as formulated in Article 18 of the Vienna Convention,¹⁹⁶ immediately encounters the obstacle that as formulated, Article 18 is of little use when it comes to such complex agreements that involves institutions and that may contain norms of general application.

The arguments invoked by both parties as well as by the government of Austria, intervening on behalf of the company, illustrate the problematic nature of the test to be employed in determining whether or not the interim obligation has been violated. The applicant, Opel Austria, presented at least three different renditions of the interim obligation and the test to be used.¹⁹⁷ First, it interpreted the prohibition of Article 18 to mean a prohibition of “circumvention by any State or international organization of the binding nature of international agreements by means of acts which are incompatible with the basic principles of the agreement taken immediately prior to its entry into force.”¹⁹⁸ Read like this, the objective test no longer demands that object and purpose are defeated, but merely that acts are incompatible with the basic principles of the agreement. If anything, that lowers the hurdle considerably.

Second, its rendition was reworked when it observed that the interim obligation constitutes “an expression of the general principle of protection of legitimate expectations in public international law, according to which a subject of international law may, under certain conditions, be bound by the expectations created by its acts in other subjects of international law.”¹⁹⁹ Here the applicant seemed to opt for a legitimate expectations test (regardless of whether acts are

194. The Court itself emphasized this complicated nature. *Id.* para. 107 (“[T]he EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement.”).

195. Compare on this point the case note by Peter Fischer in 35 COMMON MARKET L. REV. 765, 779-80 (1998).

196. To be sure, the Community as such is not a party to the 1969 Vienna Convention or to its 1986 counterpart on the law of treaties concluded with or between international organizations (the latter has yet to enter into force). Nonetheless, the ECJ has observed on various occasions that the EC is bound by customary international law. A first hint to that effect is contained in the decision in Case C-286/90, *Public Prosecutor v. Poulsen & Diva Navigation*, 1992 E.C.R. I-6048. See also generally DOMINIC MCGOLDRICK, *INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION* 36 (1997).

197. At least, in the versions as formulated by the Court.

198. Opel Austria, *supra* note 1, para. 76 (providing the Court’s rendition of the applicant’s argument).

199. *Id.* para. 78.

compatible with a treaty's "basic principles"), but in terms too broad for the case. Clearly, the "other subjects of international law" that the Court speaks of, whose expectations are to be protected, used to be simply the treaty partners. Given the debatable status of companies as subjects of international law generally,²⁰⁰ it is not at all clear whether the applicant here refers to treaty partners or also to legal persons registered in states that happen to be treaty partners, or possibly makes an even broader *erga omnes* argument to the effect that the international community at large (including its component elements) has an interest in seeing to it that the Council does not undermine a prospective treaty provision.²⁰¹

Third, in the next paragraph of the opinion, the test to be employed changes yet again, with the applicant arguing that Article 18 "contains an unambiguous, unconditional prohibition of acts that are incompatible with the aims and objects of international agreements."²⁰² Here it is not defeat of object and purpose that matters, nor conflict with a treaty's "basic principles" (let alone legitimate expectations), but rather incompatibility with object and purpose. Again, in comparison to Article 18's words, that amounts to a lowering of the hurdle because many things may be incompatible with a treaty's object and purpose without actually defeating it. Thus, in making its case, Opel Austria presented three substantially different versions of the interim obligation, thereby underlining how complicated matters really are.

The government of Austria emphasized the importance of legitimate expectations. It stated that the EU's Member States share a general principle of law according to which "a party to a binding agreement must act in good faith to safeguard the interests of other parties to or beneficiaries of the agreement . . ."²⁰³ Note that in formulating the interim obligation in this way and by stressing the interests of beneficiaries, the Austrian government presupposed that the interim obligation also extends to private and legal persons within a state.²⁰⁴

The Council's response to the allegations that it had breached the interim obligation was rather terse. It claimed that its behavior

200. *E.g.*, PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 100 (7th rev. ed. 1997) (stating that the topic is "extremely controversial").

201. On the place of *erga omnes* arguments in international legal discourse, see Simma, *supra* note 21, at 293-300.

202. Opel Austria, *supra* note 1, para. 79.

203. *Id.* para. 83.

204. There is also a hint to private and legal persons being covered by the interim obligation; in passing the contested regulation, the Council had infringed the rights of Austria and its citizens, so the Austrian government claimed. *Id.* para. 82.

was fully compatible with the EEA Agreement and “therefore”²⁰⁵ did not defeat the EEA Agreement’s object and purpose.²⁰⁶ The precise test underlying the Council’s suggestion remains somewhat vague. One could perhaps put it in terms of the Council hiding the absence of any deeper thoughts by insisting on the quasi-objectivism of “no violation, no defeat.”²⁰⁷ Still, what the Council referred to was the absence of a violation of the EEA Agreement. Whether this necessarily entails the absence of a violation of the interim obligation is a different matter. The opposite, at any rate, is implausible: a violation of a treaty provision prior to entry into force by definition will not defeat that treaty’s object and purpose.

The Court’s construction of the interim obligation was rather complicated, which is not surprising in light of the diversity of versions presented by the parties. It analyzed the interim obligation as an obligation of good faith, and the Court held that in international law this principle of good faith is the “corollary”²⁰⁸ of the principle of legitimate expectations. This would seem to suggest that the Court’s main test was a legitimate expectations test, and indeed the Court seemed to reconstruct the interim obligation in terms of the principle of protection of legitimate expectations, which itself has found recognition in EC law.²⁰⁹ It found that because the contested regulation would violate the EEA Agreement after its entry into force, it “follows” that by adopting the measure pending entry into force, the Council “infringed the applicant’s legitimate expectations.”²¹⁰

Yet, to conclude that the Court applied a legitimate expectations test would be hasty for several reasons. It may be the case that Opel Austria had started to nurse certain expectations upon hearing of the conclusion of the EEA Agreement, or that it could reasonably have done so.²¹¹ There is, however, fairly little in the Court’s opinion

205. *Id.* para. 85.

206. Logical as the Council’s position may seem on this point, the International Court of Justice has nonetheless on one occasion held that behavior violated a treaty’s object and purpose, independent of the question of whether it also violated the actual terms of the treaty. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 135-42 (June 27).

207. Opel Austria, *supra* note 1, para. 85.

208. Opel Austria, *supra* note 1, para. 93.

209. If I understand Mengozzi correctly, the protection of legitimate expectations in Community law covers par excellence private and legal persons operating within the Member States. See Paolo Mengozzi, *Évolution de la méthode suivie par la jurisprudence communautaire en matière de protection de la confiance légitime*, 4 REVUE DU MARCHÉ UNIQUE EUROPÉEN 13, 18 (1997).

210. Opel Austria, *supra* note 1, para. 123.

211. See TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 152 (3d ed. 1994) (presenting a “reasonable man” test in which “an expectation is not legitimate unless it is reasonable: the question here is whether a prudent man would have had the expectation”). See also P.P. Craig, *Substantive Legitimate*

which bears out this assumption. At no point did the Court actually investigate whether expectations had been created or had started to form.²¹²

The Court also refrained from investigating whether the expectations of private companies are among those that are protected by Article 18. Presumably, an argument could be made in favor of such a conception, but despite a few fleeting references in the argument of the Austrian government to this effect,²¹³ the Court failed to pick it up.

In addition, the question remains from what date forward legitimate expectations may start to grow and be nurtured. The Court seemed to think that the moment of ratification—or approval—was decisive, which was December 13, 1993.²¹⁴ If so, with the EEA Agreement destined to enter into force on January 1, 1994, the applicant would have exactly eighteen days to form and nurture legitimate expectations, which by any standard, is not a long period of time.²¹⁵

Moreover, given the negotiating history of the EEA Agreement (with a first agreed version being declared unacceptable by the EC Court),²¹⁶ one could argue that companies such as Opel Austria would already start to entertain expectations from the moment of negotiations onwards, culminating in the moment of signature.²¹⁷ There is nothing truly eccentric about such an argument, but it does come with a serious drawback. As a signature does not yet signify consent to be bound, states remain at liberty not to ratify and

Expectations in Domestic and Community Law, 55 CAMBRIDGE L.J. 289, 306-07 (1996) (arguing that a claim based on legitimate expectations may succeed when based on a promise or course of conduct but may fail when expectations are not reasonable).

212. Bettina Kahil, *EuG: Rückdatierung des Amtsblattes*, 8 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 664, 671, 672 (1997) ("Die Voraussetzungen einer Berufung auf den Vertrauensschutzgrundsatz . . . prüfte das EuG nicht näher.").

213. See *supra* notes 203-04 and accompanying text.

214. Opel Austria, *supra* note 1, paras. 92, 94 (holding that legitimate expectations apparently may be nursed in a situation "where the Communities have deposited their instruments of approval").

215. The period is even shorter if one holds that those expectations must have come to fruition on the date the contested measure was taken, which was December 20, 1993, leaving the company a week to form its expectations. On the other hand, the contested measure was only published in mid-January 1994, after the EEA Agreement had already entered into force. If the actual moment of publication is decisive, then Opel Austria's expectation had some three weeks to come to fruition.

216. Opinion 1/91, 1991 E.C.R. I-6079.

217. See Craig, *supra* note 36, at 92 (arguing that legitimate expectations often are inherent in some form of representation being made). In the present context, that means that the element of publicity is not without importance, which once again would tend to emphasize the moment of signature rather than ratification. See *id.*

therefore no legitimate expectations can possibly be built on signature alone.²¹⁸

Yet, natural or legal persons are unlikely to be well-informed about ratification or approval, as those acts usually take place in silence, through diplomatic channels. Thus, on the theory (which appears necessary) that publicity is a prerequisite for natural and legal persons (other than treaty partners themselves of course) to start to form legitimate expectations, usually only the moment of signature meets the publicity requirement; yet to expect things on the basis of signature alone is, in a very real sense, naive.

In the absence of any investigation into expectations and the legitimacy thereof, and in the absence of an examination of the preliminary question as to whether the expectations of Opel Austria are to be protected at all (and if so, from what date forward), the suspicion grows that the Court did not apply a legitimate expectations test at all, but rather applied something else. Paying lip service to a legitimate expectations test (presumably precisely because such a test is well accepted in Community law itself),²¹⁹ it actually applied a test of manifest bad faith.

This suspicion finds confirmation in particular in the innuendo with which the Court reminds us that what the Council had done was improper. The Court noted that from December 13, 1993 forward, the Communities were aware of the date of entry into force of the EEA Agreement,²²⁰ and thus, the Council should not have adopted its regulation.

Indeed, the Court went on to make exactly this point, although it made it, somewhat curiously, under the heading of legal certainty. EC law is subject to a principle of legal certainty, yet by adopting its regulation "when it knew with certainty that the EEA Agreement would enter into force" shortly, "the Council knowingly created a situation in which, with effect from January 1994, two contradictory rules of law would co-exist . . ."²²¹ Moreover, by deliberately backdating publication of the contested regulation, the Council yet again violated the principle of legal certainty.²²² On this point, the Court scathingly concluded that "the conduct of the Council's administration must therefore be regarded as particularly serious."²²³

218. See generally Cahier, *supra* note 7 (arguing this point less explicitly).

219. E.g., HARTLEY, *supra* note 211, at 152-55. See also Mengozzi, *supra* note 209.

220. Opel Austria, *supra* note 1, para. 92. See also Kuijper, *supra* note 189, at 16 (suggesting that the Court may have been especially strict as the Council's breach of good faith had been "particularly egregious").

221. Opel Austria, *supra* note 1, para. 125.

222. *Id.* paras. 131-32.

223. *Id.* para. 133.

While the backdating may be regarded as difficult to reconcile with legal certainty, the Court's first point had little to do with legal certainty.²²⁴ The Council did not create two contradictory rules of law, one relating to trade in general—the EEA Agreement, prohibiting tariffs—and one relating only to certain products produced by the applicant—the increased tariff on Opel Austria's gearboxes. If that were the case, then every application of any legal rule itself would constitute a legal rule, potentially conflicting with the notion of legal certainty.²²⁵ The point is not so much that the Council violated the notion of legal certainty (although it unquestionably did this when it backdated the publication of the contested regulation), but rather that the imposition of the tariff was unwarranted altogether.

Defending the imposition of a tariff a mere few weeks prior to the scheduled prohibition of such tariffs is difficult. In this light, clearly the Council's behavior was less than commendable. Yet to say that it acted against the principle of legal certainty is far from convincing. It is even less convincing to argue that the Council's behavior frustrated the legitimate expectations of a single legal person operating on the territory of a prospective treaty partner and thereby somehow defeated the object and purpose of the entire EEA Agreement in all its richness.

It is reasonably obvious to any observer that the Council's behavior was less than desirable. To capture this sentiment in an appropriate rule of law proved difficult,²²⁶ however, and the Court could eventually only do so by applying the interim obligation in unsuspected ways and without conducting much of an investigation into the expectations, legitimate or otherwise, of the company concerned, or whether those expectations were protected to begin with, and if so, from what date onwards. In conclusion, the Court did not so much apply a legitimate expectations test, but simply proceeded to do the right thing—annul the contested regulation. The reasoning may have been feeble, but the result was unequivocally equitable.

224. That is not to say that there is no connection between legitimate expectations and legal certainty, for there certainly is. *See generally* Craig, *supra* note 36.

225. Kahil, *supra* note 212, at 672 (observing the same implausibility but suggesting that if there truly were two contradictory norms, then some principle of hierarchy ought to have been applied so as to give preference to one of them).

226. Indeed, it has also proved difficult to apply traditional law of treaties notions in other circumstances involving the multilayered EC. For an overview, see Klabbers, *supra* note 159.

C. *Danisco Sugar*

Ironically, perhaps the clearest illustration of the pragmatic re-invention of the interim obligation into a test of manifest intent can be found in a judgment that refrained from dealing with the issue, the 1997 *Danisco Sugar* decision of the European Court of Justice.²²⁷

A week and a half before January 1, 1995, when Sweden's membership of the European Union would take effect, Sweden's parliament adopted a new Sugar Law on December 20, 1994, which would take effect a day before Sweden's accession to the Union.²²⁸ Under the Sugar Law, anyone holding large amounts of sugar in stock at midnight, December 31, 1994, was to be subjected to a heavy tax.²²⁹ The purpose was to prevent speculation with sugar, because the regular EU sugar price (which would become applicable upon accession) differed markedly from the then current Swedish market price.²³⁰ As a result of the new law, Danisco Sugar AB was liable to pay, according to a determination of the Swedish agricultural board, close to half a billion Swedish crowns by way of sugar tax.²³¹ Danisco brought proceedings for annulment of the Sugar Law, claiming among other things that the enactment of the Sugar Law just prior to entry into force of Sweden's membership of the EU amounted to a violation of the interim obligation.²³² The local court referred the matter to the EC Court for a preliminary ruling under Article 177 EC.²³³

Although the EC Court did not address the point about the interim obligation, holding it to be "unnecessary,"²³⁴ the case is nevertheless interesting for various reasons. One reason is the way Danisco Sugar raised the argument. Surely it must have felt that its legitimate expectations were jeopardized when it was confronted, out of the blue, with a heavy tax liability. Then again, the question remains whether it makes sense to argue, with the interim obligation, that a private company's expectations are at all protected. Here the situation was even more tricky, in that if legitimate expectations

227. Case C-27/96, *Danisco Sugar AB v. Allmänna Ombudet*, 1997 E.C.R. I-6653 (Judgment of the Court), LEXIS, Legal (excluding U.S.) Library, ECJ File.

228. *Id.* para. 2.

229. *Id.* para. 9.

230. *Id.* para. 10.

231. *Id.* para. 13.

232. *Id.* para. 14.

233. Since the renumbering of the treaties at Amsterdam, this is now Article 234 EC. A consolidated version of the Treaty on European Union and the Treaty Establishing the European Community as amended can be found in 37 I.L.M. 56 (1998).

234. *Danisco Sugar*, *supra* note 227, para. 31.

were frustrated, the frustration of the Swedish company's²³⁵ expectations was the result of the activities of the Swedish government. If the issue of whether the interim obligation covers the expectations of private companies within the aggrieved party is debatable, it seems even more debatable whether it covers the less certain expectations of those within the offending party.

Put differently, between the contracting parties themselves—here, the EC and Sweden—no expectations were frustrated. In fact, there is some ground to suspect that the two treaty partners acted in collusion.²³⁶ Hence, on this “intergovernmental” level, no problem relating to the interim obligation occurred or could possibly occur; no expectations of the treaty partners were frustrated, none was accused of acting in bad faith, and neither of the parties considered that the enactment of the contested Sugar Law defeated the object and purpose of Sweden's accession to the Union.

Although the Court did not address the interim obligation, Advocate-General La Pergola did devote some attention to it, after having noted that the Court would not have jurisdiction, as it concerned the behavior of the Swedish government prior to accession.²³⁷ The Advocate-General seemed to be of two minds. At one point he suggested that Danisco Sugar's observation that Sweden violated the interim obligation may have been “not without foundation,”²³⁸ yet later he acknowledged, without further explication, his “agree[ment] with the approach taken by the Swedish Government and the Commission.”²³⁹

Advocate-General La Pergola's apparent contradiction neatly captured the tension between the two tests addressed throughout this Article. The remark that Danisco Sugar's observation was not without foundation may well have been inspired by sympathy for the company's unexpected plight. Still, had anyone actually done something wrong? Quite the opposite, the Advocate-General held that the Sugar Law had been enacted as a tax on profits made as a result of the transition from a domestic market organization to a communitarian market organization, and there was nothing wrong

235. The company's nationality is left undiscussed in the published documents, although both the name, Danisco, and the intervention of the Danish government on the company's behalf suggest Danish nationality. At any rate, this seems of little relevance here, as what mattered was that the company operated in Sweden and found itself to have fallen victim to a Swedish act rather than an act of Sweden's treaty partner.

236. Case C-27/96, *Danisco Sugar AB v. Allmänna Ombudet*, 1997 E.C.R. I-6653, para. 23 (Opinion of Advocate-General La Pergola), LEXIS, Legal (excluding U.S.) Library, ECJ File.

237. *Id.* para. 23.

238. *Id.* para. 19.

239. *Id.* para. 23.

with doing that.²⁴⁰ In support, the Advocate-General relied above all on the text of the Sugar Law and its supposed effects,²⁴¹ but additionally also invoked the preparatory works of the Sugar Law in order to determine manifest intent.²⁴²

In much the same way as in the decision of the Dutch administrative tribunal in *S.E.B. v. State Secretary for Justice*, the argument as made and discussed focused on manifest intent—that is, the intent of the Swedish government, as it manifested itself to the outside world. That intention was proper, so the Advocate-General suggested, and as a result, the mere circumstance that a company's expectations—a company operating in Sweden, moreover—may have been frustrated by Swedish behavior on the eve of Sweden's accession was not something the Court should address.

VIII. CONCLUDING REMARKS

The argument of this Article is that particularly with non-contractual, normative, multilateral arrangements, the interim obligation as laid down in Article 18 of the Vienna Convention does not provide much relief. The objective test it seemingly prescribes makes no sense in a normative context (as one can hardly defeat the object and purpose of generally desirable behavior), and inevitably lapses into a test of either subjective intent or legitimate expectations (or hypothetically, both), and those turn out to be of little use as soon as they need to be applied. Consequently, both judicial practice and post-Vienna Convention scholarship turn away from the letter of Article 18 and apply, while often ostensibly referring to legitimate expectations, really a simple but effective manifest intent test, which is the following: if 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.

Only such a conception can explain why the EC Court of First Instance could find the imposition of a tariff shortly before the entry into force of an agreement prohibiting them to constitute a violation of the interim obligation. Only such a conception can explain why authors can condemn the purchase or production of arms on the eve of a disarmament agreement or why states can be accused of violating international law by laying mines after having signed a convention

240. *Id.* The judgment itself is built on similar foundations. *Id.*

241. *Id.* para. 40 (holding that the Sugar law could not have had any impact at all on the sugar market).

242. *Id.* para. 29.

not to do so. Conversely, only such a conception can explain why a Dutch tribunal could reject a plea for a family reunion despite the Dutch having already signed a convention which would probably support the plea or why the EC Court could ignore a plea that an effort to manage the modalities of accession to the EC would violate international law. In addition, only such a conception can explain why authors can persuasively conclude that to drastically change the terms of a large convention on the law of the sea before its entry into force is nonetheless not in violation of the interim obligation.

As traditionally conceived, the interim obligation as laid down in Article 18 of the Vienna Convention on the Law of Treaties was, in effect, meant to serve in limited circumstances only and can only provide a meaningful service in the limited confines of contractual situations. Where, by contrast, international agreements are concluded to further the community interest, Article 18 as drafted and conceived can only disappoint.

Instead of simply discarding the idea of the interim obligation as unworkable, or positing that some treaties are qualitatively different so as to warrant that they effectively enter into force upon signature even if the text itself prescribes ratification, the more sensible approach is to help the interim obligation adapt to circumstances that were never considered during the drafting stage. Such relatively painless adaptation pays homage to the vitality and flexibility of international law, and the law of treaties in particular. On the relatively few occasions where Article 18 arguments have been made in recent decades (be it by courts or by authors), they have invariably involved a test different from anything contemplated by the ILC or self-evident under the terms of Article 18 itself. Such applications of the interim obligation are best explained with the help of a "manifest intent test," which is useful shorthand for saying that where behavior pending entry into force of an agreement is generally held to be morally obnoxious in light of what the agreement itself represents, then it violates the interim obligation. Such an approach has the dual benefit of allowing the law to remain flexible while remaining faithful to some of our dearest moral convictions, which is exactly what these situations require.

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