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Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations

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NOTES

Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations

ABSTRACT

The 1969 Vienna Convention on the Law of Treaties attempted to give some order to the confusion that was treaty law after World War II. One treaty issue that was particularly in need of codification was the law governing reservations to treaties. With the growing number of participants in the international community making universal agreement more difficult, the frequency of reservations, as a vehicle for circumscribing disagreements in treaty negotiations, increased. However, most practices regarding reservations severely limited the ability of states to make reservations successfully. To remedy that problem, the Vienna Convention adopted a flexible approach to treaty reservations, applicable to treaties of all types, under which reservations are presumed permissible and acceptance of reservations is achieved easily. This Note analyzes the Vienna Convention's articles on reservations as they apply to different types of treaties, concluding that the drafters of the Convention went too far in the direction of facilitating reservations. The author argues that the Convention does not adequately protect the integrity of treaties or the right of non-reserving states to retain their bargained for rights and obligations. Moreover, the Convention allows treaties to disintegrate into a patchwork of small agreements rather than serve as one

useful multinational agreement. To remedy the problems of the Vienna Convention's approach to reservations, the author suggests reversing the presumption in favor of the permissibility of reservations and either developing a different framework for each type of treaty or requiring treaties to establish an authoritative decision-makers to resolve reservation issues.

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I. INTRODUCTION

Until the latter part of the twentieth century, international law governing treaties provoked substantial disagreement among legal scholars. Although some disagreement continues, the 1969 Vienna Convention on the Law of Treaties¹ (Vienna Convention or Convention) codified customary international law on the subject, and the international community accepts most of the Convention as the authoritative codification of contemporary international treaty law.² Only a limited number of states have become parties to the treaty, however.³

1. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The Convention is commonly referred to as the Treaty on Treaties. See Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

2. Herbert W. Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470, 471 (1979); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988). By 1971, the United States had recognized the Convention as the "authoritative guide to current treaty law and practice." *Id.* For cases in which the International Court of Justice (ICJ) cited various provisions of the Vienna Convention as the International law, see Aegean Sea Continental Shelf Case (Greece v. Turk.), 1978 I.C.J. 3, ¶ 96 (Dec. 19); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, ¶¶ 24, 36 (Feb. 2); Appeal Relating to Jurisdiction of ICAO Council (India v. Pak.), 1972 I.C.J. 47, ¶ 38 (Aug. 18); Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1970 I.C.J. 16, ¶ 94 (June 21).

3. As of December 31, 1992, 72 states had ratified and 46 states had signed the 1969 Vienna Convention. *Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December 1992*, U.N.Doc. ST/LEG/SER.E/11 at 789. The United States has signed, but not ratified, the Convention. *Id.* at 790. Even though it has no legal force for non-parties, most states regard the Vienna Convention as the authoritative declaration of international treaty law, considering its provisions to reflect the current status of the law and considering themselves bound by it. Briggs, *supra* note 2, at 471; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, cmt. f. *But see*, Frankowska, *supra* note 2 (arguing that only certain provisions of the Vienna Convention represent customary international law).

One of the most confusing areas of law addressed by the Convention is the set of rules governing reservations.⁴ The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in application to that State."⁵ Reservations must be distinguished from amendments.⁶ Reservations modify a treaty only in regard to specific provisions and only in the relations of the other states with the reserving state;⁷ reservations do not modify treaty relations between states that are parties to the treaty without reservations.⁸ Amendments, on the other hand, ordinarily modify treaty relations between all parties.⁹

The frequency of reservations to treaties increased dramatically during the twentieth century.¹⁰ The speculated

4. Kearney & Dalton, *supra* note 1, at 509. The problem of reservations was the first major issue taken up by the conference. *Id.*

5. VCLT, *supra* note 1, art. 2, ¶ 1, § d. Reservations may be labelled "declarative interpretations" or a host of other stylistic phrasings that in fact represent attempts to modify the legal effect of treaty provisions. *Id.*

6. The Vienna Convention contains separate provisions governing each, addressing reservations in Part II, Section 2, and amendments and modifications in Part IV. See VCLT, *supra* note 1.

7. William W. Bishop, Jr., *Reservations to Treaties*, 103 R.C.A.D.I. 253 (1961). Regardless of whether the other states accepted or objected to the reservation, treaty relations are modified between those parties. See VCLT, *supra* note 1, art. 20, ¶ 4; art. 21.

8. Bishop, *supra* note 7, at 253.

9. *Id.* States retain the right to refuse to accept an amendment unless the treaty specifies that a qualified majority of the parties may bind all of the parties. See VCLT, *supra* note 1, art. 40. A reservation sometimes evolves into an amendment if all parties decide to make the same reservation. This scenario actually occurred when the United Kingdom, the United States, Germany, and Italy all made reservations rejecting Article 10 of the 1899 Hague Convention. The other parties to the treaty then excluded Article 10 from their ratifications as well. Bishop, *supra* note 7, at 274.

10. See John K. Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372, 376-78 (1980). The twentieth century also has witnessed more treaties prohibiting reservations. FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES 113 (1988). International Labor Conventions prohibit reservations as a general rule. The 1952 Universal Copyright Convention and the 1964 Convention for the Unification of Certain Rules Relating to the International Carriage by Air both expressly prohibit reservations. Other treaties, such as the 1951 Convention Relating to the Status of Refugees and the 1958 Geneva Convention on the Continental Shelf, prohibit reservations only to certain provisions. *Id.* The change in frameworks governing reservations might have precipitated the increase in reservation prohibitions. Establishing default frameworks allowing for

reasons for this change include the increase in the number of states participating in the international community, the increase in popular control over domestic approval of treaties, and the use of majority voting in approving the specific provisions of treaties.¹¹

The Vienna Convention attempted to devise a fixed, all-encompassing set of rules to govern the permissibility and legal effects of reservations to all types of treaties.¹² Unlike other parts of the Convention, the articles on reservations were not a codification of customary international law. Rather, the articles were an attempt at progressive development of the law.¹³ The drafters agreed to, and the negotiating states subsequently adopted, an experimental hybrid system to govern reservations.¹⁴ In practice, the articles have not accomplished the drafters' goals of equitably balancing the rights of both reserving and non-reserving states and of simultaneously encouraging universal acceptance of treaties and protecting their integrity.¹⁵

This Note analyzes the Convention's framework governing reservations in light of different types of treaties. First, Part II analyzes and critiques the reservation provisions of the Vienna Convention. Part III applies the Convention's framework to various types of international agreements, noting the problems that arise in each context. Part IV then offers three modifications to the Convention designed to create alternative frameworks better tailored to the specific needs of different types of international agreements. The Note concludes that the drafters should reserve the presumption favoring reservations and either adopt default rules tailored to the type of treaty or establish an authoritative decisionmaker on reservations issues. Thus, the flexible construct enunciated in the Vienna Convention should serve as a beginning—not an end—in the quest for a workable approach to treaty reservations.

reservations requires the drafters of a treaty that does not allow for reservations to include an express provision to that effect rather than relying on the unanimity rule.

11. Bishop, *supra* note 7, at 245, 264.

12. See VCLT, *supra* note 1, arts. 19-23.

13. *Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session and Eighteenth Session*, U.N. GAOR 21st Sess., Supp. No. 9, ¶ 35, U.N. Doc. A/6309/Rev.1 (1966) [hereinafter *ILC Report*]. The members of the ILC did not attempt to delineate which provisions represented codification of customary international law and which were progressive developments. Most scholars agree, however, that the provisions relating to reservations constituted progressive development. *Id.*

14. This system applies absent provisions governing reservations in a treaty itself. See *infra* note 97 and accompanying text.

15. *ILC Report*, *supra* note 13, at ¶ 13.

II. THE VIENNA CONVENTION ON THE LAW OF TREATIES

A. Background

The uncertainty of treaty law after the Second World War led the United Nations General Assembly to request that the International Law Commission examine and propose changes for the law of treaties.¹⁶ The Commission prioritized this problem at their first session in 1949 by placing the law of treaties on their list of topics suitable for codification.¹⁷ The Commission then spent the next seventeen years writing the draft articles to the Vienna Convention on the Law of Treaties.

In 1951, when the General Assembly requested an advisory opinion from the International Court of Justice (ICJ) on the permissibility of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁸ the General Assembly simultaneously requested that the International Law Commission prepare a report on the issue of reservations to multilateral conventions.¹⁹ The Commission, after examining practice to that time, recommended the adoption of the unanimity rule²⁰ with certain minor modifications.²¹

The Commission's view changed substantially by the time it submitted the final draft articles to the General Assembly in

16. G.A. Res. 478, U.N. GAOR, 5th Sess., 16 Nov. 1950 [*hereinafter* Resolution 478(V)]. The General Assembly also held lengthy debates specifically on the question of reservations in 1951, 1958, and 1959. Kearney & Dalton, *supra* note 1, at 510.

17. *ILC Report*, *supra* note 13, at 255.

18. Dec. 9, 1948, 78 U.N.T.S. 277 (1951).

19. Resolution 478(V), *supra* note 16.

20. The unanimity principle requires that all parties to a treaty consent to a reservation before a reserving state may become a party to that treaty. If a treaty is not yet in force, different systems may be used. Either all signatories to the treaty must consent or only those signatories that have already ratified the treaty must consent. One objection bars the reserving state from becoming a party. HORN, *supra* note 10, at 15-16. An objection does not bar a reserving state from ever becoming a party to the treaty. A state may always withdraw its reservation and accept the treaty as a whole, thereby becoming a party. See Bishop, *supra* note 7, at 275.

21. *ILC Report*, *supra* note 13, at 320. The ILC found the ICJ's compatibility criterion objectionable as a rule of general application. *Id.*

1966.²² Articles 19 through 23²³ of the Commission's final product offered a flexible construct governing reservations to treaties, incorporating two approaches: the Pan-American system and the ICJ's "compatibility with the object and purpose" criterion from its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide²⁴

The Pan-American System arose during the period between the World Wars as an alternative to the unanimity rule and acknowledged the inherent right of states to make reservations.²⁵ Under this system, before ratification, a state had to submit proposed reservations to the depositary²⁶ for circulation to the other signatories. The responses of the other signatories, either accepting or opposing the reservation, did not limit the reserving state's options.²⁷ The reserving state only had to take their replies into account in deciding whether to ratify the treaty subject to the reservation.²⁸ If the reserving state ratified the treaty subject to the reservation, then it became a party to the

22. The ILC stated that the rapid expansion of the international community since 1951, increasing the number of participants in multilateral treaties, had reduced the practicality of the unanimity rule and that the de facto system for all new multilateral treaties for which the Secretary-General of the UN acted as depositary had approximated the flexible rule. (In another resolution the UNGA instructed the Secretary-General to apply the rule of the Genocide Convention to all future, and eventually all, agreements concluded under the auspices of the UN that did not contain express provisions governing reservations.) *ILC Report*, supra note 13, at 321-22; see also HORN, supra note 10, at 21 (discussing the slow "shift in the attitude of the ILC"). None of the 110 delegations at the two sessions of the Vienna Convention favored the unanimity rule. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 289 (1991).

23. Articles 19 through 23 are draft Articles 16 through 20.

24. Advisory Opinion on Reservations to the Genocide Convention, 1951 I.C.J. 15 (Advisory Opinion, May 28) [hereinafter Genocide Convention Opinion].

25. Convention on Treaties, signed in Habana on Feb. 20, 1928, OAS Law and Treaty Series No. 3. Pan American Union, Washington, D.C., 1950, p. 21 ff. [hereinafter Habana Convention]. The Pan-American Union became the Organization of American States. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 354, 426 (1989). The Convention was never widely ratified. Bishop, supra note 7, at 278. European authors criticized this approach as unsuitable for normative treaties. Clark, supra note 22, at 290.

26. All states deposit ratifications with a depositary, ordinarily designated in the treaty. The depositary performs a communications exchange, informing interested states of developments regarding the ratifications (the numbers, reservations, objections, etc.). Whether a depositary's role extends to pronouncing the legal effect of reservations has sparked significant debate. Oscar Schachter, *The Question of Treaty Reservations at the 1959 General Assembly*, 54 AM. J. INT'L L. 372, 375-76 (1960); see also Kearney & Dalton, supra note 1, at 510.

27. Bishop, supra note 7, at 280.

28. *Id.*

treaty subject to the responses of the other states.²⁹ The treaty applied as modified by the reservation to those parties that accepted the reservation,³⁰ but no treaty relations took effect with those parties that objected to the reservation.³¹

The ICJ first enunciated the second component of the Convention's construct, the "object and purpose" test, in its 1951 Advisory Opinion on Reservations to the Genocide Convention.³² The ICJ held that the test for treaty reservations was their compatibility with the object and purpose of the treaty.³³ Although the test specifies two seemingly objective criteria, each state individually applies the test, thus transforming it into a subjective standard.³⁴ The ICJ appeared to expect the test to limit a state's ability both to make and to object to reservations.³⁵ The test prevents reserving states from making incompatible reservations and allows the states confronted with reservations to object to a compatible reservation only for substantive reasons.³⁶

29. *Rules Adopted by the Governing Body of the Pan American Union on the Procedure to be followed in the Deposit of Ratifications*, Resolution XXIX of 4 May 1932 [hereinafter *Resolution XXIX*] (See ILCYB 1956:II, p. 250).

30. *Id.*

31. *Id.*

32. Genocide Convention Opinion, *supra* note 24, at 23-24, 29.

33. *Id.* at 29. This approach was not unanimously favored. The ICJ divided sharply seven to five regarding the appropriate law governing treaty reservations. *Id.* The dissent advocated the unanimity principle. *Id.* at 31-38. In finding that the unanimity rule had not evolved to the level of customary international law, the ICJ noted the new need for flexibility in treaty-making. *Id.* The ICJ specifically noted a more general resort to reservations in the post-World War II era, the great allowance made for tacit assent, and examples of state practice allowing reserving states to become parties to a treaty in spite of objection to the reservation by some parties. Bishop, *supra* note 7, at 288-89. A key issue was whether the drafters planned for reservations to the agreement. Planning for reservations automatically negates application of the unanimity principle. Clark, *supra* note 22, at 292-93.

34. Genocide Convention Opinion, *supra* note 24, at 23-24; Clark, *supra* note 22, at 293.

35. Genocide Convention Opinion, *supra* note 24, at 24. The ICJ attempted to achieve a balance between the sovereign right of a state to make a reservation and the seemingly increasing need for reservations in multilateral treaties against the integrity of the treaty and a party's right not to be bound without its consent. *Id.* Factors affecting the Court's decision included: the universal character of the United Nations, under whose auspices the Genocide Convention was written; the wide degree of participation desired; the use of majority voting to adopt the provisions of the Convention; the purely humanitarian and civilizing purpose of the Convention; and the fact that the contracting states had no interests of their own but one common interest under this treaty (whereby no advantages or disadvantages accrued to any particular parties). *Id.* at 23. See Bishop, *supra* note 7, at 288-89 for an analysis of these factors.

36. Bishop, *supra* note 7, at 289.

The evolution of the Commission's opinion involved substantial debate and disagreement.³⁷ When the Commission arrived at its hybrid framework, there was less than a consensus.³⁸ The Commission members agreed that when a treaty is concluded among small groups of states, unanimous consent to reservations must be presumed necessary in the absence of express contrary indication in the treaty.³⁹

Disagreement arose, however, over the standards that should apply to general multilateral treaties.⁴⁰ Some members of the Commission advocated the collegiate system to protect the integrity of the agreement.⁴¹ The collegiate system prohibited the reserving state from becoming a party with the reservation if more than a certain percentage of the parties, ordinarily one-fourth or one-third, objected to the reservation.⁴² Commission members that supported the collegiate system faulted the hybrid approach for requiring states to object expressly to a reservation.⁴³ They believed that one or more parties almost always negligently would fail to object, thereby guaranteeing a reserving state of belonging to the treaty with regard to those states at least.⁴⁴

Other Commission members believed that the proponents of the collegiate system overestimated the impact of reservations on the treaty.⁴⁵ In their view, reservations ordinarily related only to particular provisions, therefore having a minimal impact on a treaty as a whole.⁴⁶ Even if the reservation related to a comparatively important provision, it would still have a minimal impact as long as the reservation was made by only a few states.⁴⁷ They believed that if a sufficient number of states became parties to the treaty accepting the great bulk of its provisions, the treaty's integrity would endure.⁴⁸

37. *ILC Report, supra* note 13, at 323.

38. *Id.*

39. *Id.*

40. *Id.* at 322-23.

41. See Clark, *supra* note 22, at 291-92, 298. The United Kingdom, Australia, and Sweden were the main supporters of the collegiate system. *Id.*

42. *ILC Report, supra* note 13, at 325.

43. *Id.* at 323.

44. *Id.*

45. *Id.*

46. *Id.* In their view, the majority of reservations proposed by states were solely "to execute the act necessary to bind [the reserving states] finally to participating in the treaty." *Id.* at 324. This necessity arises out of different political, cultural, and economic conditions. Allowing for reservations of this type also furthers the goal of universality; otherwise, certain states might be unable to participate at all. *Id.*

47. *Id.* at 323.

48. *Id.* Others, particularly the East European delegates, argued for unilateralism. Unilateralism provides every state a sovereign right to make

The draft proposed by the Commission represented a compromise that attempted to establish an equality between reserving and non-reserving states.⁴⁹ The proposed articles protected the sovereign right of a state to make a reservation, while safeguarding the interests of the non-reserving states, through both the power to object and the inability of a reserving state to invoke against an accepting state the obligations changed by the reservation.⁵⁰ Throughout, these provisions safeguard the rights of all states, both reserving and non-reserving, not to be bound without their consent.

The Commission limited the applicability of Articles 19 through 23 to multilateral agreements.⁵¹ The customary international law of unanimous consent still governs reservations to bilateral agreements.⁵² Furthermore, in Article 20(2),⁵³ the Commission specified that if only a small number of states participated in a treaty and the flexible system would undermine the treaty, then the unanimity rule applied.⁵⁴ The decisive factor always remained the intent of the parties, however, rather than the number of states.⁵⁵

For multilateral treaties between large numbers of states, the ILC proposed only the flexible system. Except for agreements serving as the constituent documents of international organizations, the ILC declined to distinguish between different

unilateral reservations at will. The reserving state automatically becomes a party to the agreement as modified by the reservation regardless of any objections by other contracting states. The United States delegate rebutted the unilateralism argument by emphasizing the "countervailing and equal right of all States concerned to have a voice in the contractual commitments which are to be binding on them." Clark, *supra* note 22, at 290-92.

49. *ILC Report, supra* note 13, at 324.

50. VCLT, *supra* note 1, art. 21(1)(b), 20(4)(b); *ILC Report, supra* note 13, at 324. Whether these safeguards actually achieved an equality is questionable. *See id.* at 324, 325.

51. *See ILC Report, supra* note 13, at 318.

52. There is a debate regarding the exact status of customary international law at that time. Western European states considered the unanimity rule customary international law. Clark, *supra* note 22, at 289-91.

53. Article 20(2) of the treaty provides that:

when it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

VCLT, *supra* note 1.

54. *Id.*

55. *ILC Report, supra* note 13, at 327. The relevant inquiry for intent is whether the treaty should be applied in its entirety between all parties. *Id.*

types of multilateral agreements.⁵⁶ The ILC did allow for variation, however, by providing that parties to an agreement always may specify the rules to govern reservations.⁵⁷

The General Assembly adopted the draft articles concerning reservations in 1966.⁵⁸ During the conference in Vienna, however, the participants made various changes, including one major alteration regarding reservations.⁵⁹ After an unresolved debate concerning whether reservations to bilateral treaties were possible, the delegates deleted the express reference to multilateral treaties in the title of Section Two of the treaty to avoid prejudicing the debate.⁶⁰ The title changed from "Reservations to Multilateral Treaties"⁶¹ to simply "Reservations,"⁶² extending the scope of the reservation articles to bilateral agreements.⁶³

B. *The Reservation Articles of the Vienna Convention*

The flexible system of the Vienna Convention reversed a basic presumption regarding reservations. Prior to the Convention, and

56. *Id.* at 325.

57. VCLT, *supra* note 1, art. 19. One may wonder, however, about the overall effectiveness of a fundamental set of rules if treaties must always provide express provisions.

58. Kearney & Dalton, *supra* note 1, at 495.

59. *See id.* The newly independent states at the conference (41 of the participating states had acquired their independence after WWII) had suspicions regarding amendments proposed by the former imperialist powers. These states considered the ILC text "sacrosanct" and representing "the beginning of a new international order reflecting the views of all states." As a result, few amendments passed. *Id.* at 501-02, 533.

60. HORN, *supra* note 10, at 4. Some commentators might have interpreted limiting the application of the reservation provisions to multilateral agreements as declaring that no reservations could exist in a bilateral context. The ILC considered problems regarding reservations to arise only in the multilateral context. In bilateral agreements, a reservation constituted a counteroffer. If a state accepted the reservation, the treaty came into effect under those terms. If the state objected to the reservation, no treaty came into force under those terms. Only in multilateral situations when one state objects and another accepts a reservation do problems arise. *ILC Report, supra* note 13, at 318. For an in depth analysis discussing the theoretical possibility of reservations to bilateral treaties and the debates both within the ILC and at the conference, see Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, at *27-28 (1989) available in LEXIS, NEXIS Library; HORN, *supra* note 10, at 4.

61. HORN, *supra* note 10, at 4.

62. Edwards, *supra* note 60, at *27. Hungary proposed the deletion, subsequently adopted by the Plenary Session's Drafting Committee on Apr. 29, 1969. *Id.*

63. *Id.*

especially under the unanimity rule, states presumed that a treaty did not allow reservations unless it expressly provided otherwise.⁶⁴ Any reservation required acceptance by all parties before attaining legal effect.⁶⁵ The Convention framework, however, presumes that a treaty permits reservations in the absence of express provisions to the contrary.⁶⁶ One acceptance gives a reservation legal effect and makes the reserving state a party to the treaty.⁶⁷

1. The Object and Purpose Test

The Vienna Convention addressed all reservations as one class. Article 19(c) created a distinction only between those reservations that are or are not compatible "with the object and purpose of the treaty."⁶⁸ Nowhere in the Convention did the drafters specify the criteria necessary to determine compatibility. Initially, each state must make this determination for each reservation based on the circumstances and its own interpretation of the treaty's object and purpose.⁶⁹ The issue of compatibility ultimately remains a question of law reviewable by the ICJ upon request.⁷⁰ Article 20 then detailed the basic framework for accepting and objecting to reservations⁷¹ after

64. J.M. Ruda, *Reservations to Treaties*, 146 R.C.A.D.I. 115, 180 (1975).

65. *Id.*; HORN, *supra* note 10, at 15.

66. VCLT, *supra* note 1, art. 19; *see also* Ruda, *supra* note 64, at 180.

67. VCLT, *supra* note 1, art. 20, ¶ 5.

68. VCLT, *supra* note 1, art. 19. Article 19 addresses the permissibility of reservations, allowing a reservation:

unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

69. Ruda, *supra* note 64, at 182. Although the compatibility test appears objective in Article 19(c), Article 20 transforms this criterion into a subjective standard by requiring each state to form an independent judgment on the matter.

Id.

70. HORN, *supra* note 10, at 117-19, 121-22. *See, e.g., Genocide Convention Opinion, supra* note 24.

71. Article 20 reads:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

compatibility is determined under Article 19. Article 20 provides for a subjective analysis of whether a compatible reservation is acceptable.⁷²

Article 19 allows two readings of the object and purpose test: (1) a one-tier test based on compatibility with the treaty, interpreting permissibility and acceptability under Articles 19 and 20 as the same thing, or (2) a two-tier test analyzing first permissibility under Article 19 and then acceptability under Article 20.⁷³ The text of Article 19(c) does not favor either

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date which it expressed its consent to be bound by the treaty, whichever is later.

VCLT, *supra* note 1, art. 20.

72. *See id.* The Treaty establishes no oversight mechanism to evaluate the standards used by states to determine whether a reservation is "incompatible with the object and purpose." Objections, however, are not held to the compatibility criterion. At the Vienna Conference, several states, including Australia, Denmark, and the United States, objected to limiting the power to object, emphasizing that reservations were frequently made on other grounds. Edwards, *supra* note 60, at *19. In 1966, in response to these comments, the ILC stated that "[a]lthough an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States." YILC (1966-II), 207.

73. Clark, *supra* note 22, at 302-06. Acceptability under Article 20 is also referred to as opposability. Analysis of this second factor presupposes a reservation's permissibility. *Id.* at 303.

interpretation over the other.⁷⁴ The one-tier test requires confronted states to question only the compatibility of the reservation with the treaty based on the provisions of the treaty and the intent of the drafters.⁷⁵ A confronted state may object only if the reservation is incompatible with the object and purpose of the treaty.⁷⁶

The two-tier approach allows a confronted state to object to a reservation on grounds of either impermissibility or unacceptability.⁷⁷ The Article 19 permissibility analysis focuses on treaty interpretation: whether the reservation undermines a central premise of the agreement.⁷⁸ If the reservation does undermine a central premise, then it is incompatible.⁷⁹ If it does not, then the analysis moves to the second tier acceptability factor under Article 20.⁸⁰ The acceptability issue rests on individual policy determinations by the confronted state, including political considerations, and allows a confronted state to object to an otherwise permissible reservation.⁸¹ A state, however, may not object to any reservations expressly authorized by the terms of the agreement.⁸²

2. Manner and Effect of Acceptance and Objection

Article 20 provides a confronted state with a choice of four responses to a reservation. If state A makes a reservation to a treaty, states B and C may explicitly accept the reservation,⁸³ tacitly accept the reservation,⁸⁴ object to the reservation,⁸⁵ or object to the reservation with an express statement precluding the entry into force of the treaty between the objecting and reserving

74. *Id.*

75. *Id.* at 306.

76. *Id.*

77. *Id.* at 302-03; HORN, *supra* note 10, at 121.

78. Clark, *supra* note 22, at 303.

79. *Id.* Debate continues whether a confronted state may accept a reservation otherwise incompatible with the object and purpose of the treaty. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 302.

83. VCLT, *supra* note 1, art. 20, ¶ 4, § b. For the text of Article 20, see *supra* note 71.

84. VCLT, *supra* note 1, art. 20, ¶ 5. This option is evidenced in state practice pre-dating the Vienna Convention. *ILC Report*, *supra* note 13, at 328. Today, tacit acceptance is the most common form of acceptance. Ruda, *supra* note 13, at 184. A state tacitly accepts a reservation if it fails to object to the reservation within 12 months. VCLT, *supra* note 1, art. 20, ¶ 5.

85. VCLT, *supra* note 1, art. 20, ¶ 4, § b.

states.⁸⁶ Express or tacit acceptance of the reservation by state B initiates treaty relations as modified by the reservation between states A and B, the reserving and accepting states, respectively.⁸⁷ If state C only objects to the reservation, the treaty enters into force between states A and C, the reserving and objecting states, but the status of the provision that is the object of the reservation is not clear.⁸⁸ An objection by state C to the reservation with an express statement precluding treaty relations between the two states has the stated effect.⁸⁹ Ironically, in the latter situation, if state B has accepted the reservation, then both states A and C, the reserving and objecting states, may be parties to the same treaty without that treaty being in force between them.⁹⁰

Article 20 provides two specific exceptions to these general rules. First, if both the limited number of parties and the object and purpose of a treaty demonstrate that the treaty's application in its entirety between all parties is an essential element of the consent of each party to be bound by the treaty, then a reservation requires the acceptance of all parties to the treaty.⁹¹ Again, the intent of the negotiating states that the treaty should

86. *Id.* art. 20, ¶ 4, § b.

87. *Id.* art. 21, ¶ 1.

88. *Id.* art. 21, ¶ 3. The extent to which the reservation applied is frequently the subject of debate. Jerry Sztucki, *Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties*, 20 GERMAN Y.B. INT'L L. 277, 290-91 (1977). Some members of the ILC noted that allowing a confronted state to object to a reservation yet still enter into treaty relations with the reserving state, excluding only those provisions to which the reservation applied, was the functional equivalent of an acceptance, amounting to no more than a declaration of a political character. Objecting to the "extent of the reservation" under Article 21(3) was never explicitly clarified. The phrase may refer only to the provisions of the agreement specifically referred to in the reservation or may extend to all provisions affected by the reservation. HORN, *supra* note 10, at 144, 172-73, 282-83.

State practice allows confronted states to enter extended objections. An extended objection is based on the broader interpretation of this language, allowing an objecting state to exclude not only the provisions specifically targeted by the reservation but also any provisions that the objecting state considers affected by the reservation. An extended reservation, however, technically qualifies as a reservation under Article 1(d) of the Convention. Sztucki, *supra*, at 290-94.

89. VCLT, *supra* note 1, art. 19, ¶ 4, § b.

90. *ILC Report*, *supra* note 13, at 328. These flexible rules establish a relative system of participation. This system envisages the possibility of every party to a multilateral treaty not being bound by the treaty vis-à-vis every other party. *Id.*

91. VCLT, *supra* note 1, art. 20, ¶ 2; *ILC Report*, *supra* note 13, at 331.

be applied in its entirety between all parties—not the number of states—determines whether the exception is invoked.⁹²

Second, Article 20(3) provides that reservations to constituent instruments of international organizations require acceptance by the competent organ of the organization.⁹³ This exception allows the members of the organization, through the competent organ, to determine how far any relaxation of the integrity of the instrument may extend.⁹⁴ In the case of constituent instruments alone did the Commission and negotiating states consider the need for the integrity of the agreement to outweigh the other considerations.⁹⁵

III. APPLYING THE VIENNA CONVENTION FRAMEWORK TO TREATIES

Most international agreements fit into one of two categories: reciprocal rights treaties or legislative treaties.⁹⁶ Despite significant differences between the two, the Vienna Convention attempted to establish one framework to govern reservations to all treaties. An examination of the effects of the Convention's provisions on different types of treaties, presuming that the negotiators included no express provisions regarding reservations, illuminates the shortcomings of Articles 19 through 23.⁹⁷

92. *ILC Report*, *supra* note 13, at 327. The ILC had divided in its opinion on whether an agreement among a particularly small group of states required unanimous consent in the absence of express provisions within the agreement governing reservations. *Id.* at 323.

93. VCLT, *supra* note 1, art. 20, ¶ 3. At the 1959 United Nations General Assembly debates, even though the delegates expressed great opposition toward the unanimity rule, the delegates simultaneously acknowledged certain special exceptions, such as constituent instruments establishing international organizations, which worked best under the unanimity rule. Schachter, *supra* note 26, at 377.

94. *ILC Report*, *supra* note 13, at 327.

95. *Id.*

96. Clark, *supra* note 22, at 316. This division is not the only possibly treaty classification. Many means of classifying treaties can be derived. This system is but one which works well for analyzing the impact of reservations and the need for different rules governing reservations to different types of treaties. For another option, see H.G. Schermers, *The Suitability of Reservations to Multilateral Treaties*, 6 N.T.I.R. 350 (1959) (categorizing multilateral treaties into the constitutions of international organizations, treaties rendering mutual benefits to the states-parties, and treaties rendering benefits to others than the states-parties).

97. VCLT, *supra* note 1, art. 19. This provision allows the negotiating parties to include express provisions governing the issue of reservations for that particular treaty. One may wonder what use the system would be under the Vienna Convention if states always had to draft around it. .

A. Reciprocal Rights Treaties

Reciprocal rights treaties are analogous to domestic contracts in that both are written for specific parties with a specific purpose in mind.⁹⁸ These treaties involve an exactly negotiated balance of reciprocal rights and obligations of each state to the other and ordinarily concern purely private interests of states, such as commercial interests or extradition.⁹⁹ They may be either bilateral or multilateral agreements.¹⁰⁰ Examples of such agreements include the North Atlantic Treaty,¹⁰¹ the Agreement on Trade in Civil Aircraft,¹⁰² the Convention on Extradition¹⁰³ between the American states, the Extradition Treaty¹⁰⁴ between Mexico and the United States, and the Agreement Relating to the Establishment of a Peace Corps Program in El Salvador.¹⁰⁵

1. Bilateral Agreements¹⁰⁶

Bilateral agreements have only two parties.¹⁰⁷ As already mentioned, the International Law Commission did not intend the reservation provisions of the Vienna Convention to apply to bilateral treaties.¹⁰⁸ During the conference, however, the delegates deleted the reference limiting these provisions to multilateral treaties, thereby making them generally applicable to all international agreements between states.¹⁰⁹

98. Clark, *supra* note 22, at 316-17. In analyzing a treaty as a contract, Malkin described the acceptance of the treaty, in final form, by the other parties as the consideration for a state to accept the treaty. Allowing a reservation not only excludes a state from certain obligations, but impairs or even destroys the other states' consideration for signing. "[T]he other signatories are not in fact getting what they bargained for." Bishop, *supra* note 7, at 276.

99. *Id.*

100. *Id.*

101. 63 Stat. 2241, TIAS No. 1964, 34 U.N.T.S. 243 (founding NATO).

102. *in force* Jan. 1, 1980, 31 U.S.T. 619, T.I.A.S. No. 9620, 1186 U.N.T.S. 170.

103. *in force* Jan. 25, 1933, 49 Stat. 3111, T.S. 882, 165 L.N.T.S. 45.

104. (U.S.-Mex.), *in force* Jan. 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656.

105. (U.S.-El. Salv.), *in force* Nov. 13, 1961, 12 U.S.T. 2983, T.I.A.S. No. 4899, 433 U.N.T.S. 221.

106. See *supra* notes 51-63 and accompanying text for a discussion of why the Convention applies to bilateral treaties. Particularly note the sources cited in note 60 as to the theoretical possibility of reservations to bilateral treaties. This discussion presumes reservations to bilateral treaties are possible.

107. GERHARD VON GLAHN, *LAW AMONG NATIONS* 488 (5th ed. 1986).

108. See *supra* notes 51-63 and accompanying text.

109. *Id.*

In contract terms, a reservation to a bilateral treaty constitutes a counteroffer.¹¹⁰ Two scenarios may arise under Article 20. First, the unanimity rule might apply under Article 20(2), which requires acceptance of the reservation by all parties if necessary because of the limited number of parties and the nature of the agreement.¹¹¹ If the reserving state could show, however, that the intent of the parties as demonstrated by the nature of the treaty did not require acceptance of the reservation by the other party, Article 20(2) would not apply by its own terms.¹¹²

If the treaty does not fit within the specific terms of Article 20(2), the general provisions of Article 20(4) apply.¹¹³ The other state has the option of accepting the reservation based on its determination of whether the reservation is compatible with the object and purpose of the treaty under Article 19(c).¹¹⁴ According to Article 21, if the state accepts the reservation, the treaty enters into force as modified by the reservation.¹¹⁵

If the state objects to the reservation, one of two scenarios occurs. At the option of the objecting state, treaty relations may enter into force excluding the provisions to which the reservation pertained,¹¹⁶ or the treaty may not enter into force at all.¹¹⁷ When objecting, a state should express its intent that the objection preclude all treaty relations.¹¹⁸ Otherwise, the treaty enters into force merely excluding the provisions to which the reservation applied.¹¹⁹

110. Bishop, *supra* note 7, at 267. Judge Lauterpacht once noted that "[r]eservations raise important questions of principle because they modify the terms of the offer which a State in signing or ratifying or acceding to a treaty purports to accept." *Id.* at 250.

111. VCLT, *supra* note 1, art. 20, ¶ 2.

112. *See id.*

113. *See supra* notes 91-95 and accompanying text.

114. VCLT, *supra* note 1, art. 19.

115. *Id.* art. 21.

116. *Id.* art. 21, ¶ 3. The extent of a reservation frequently sparks significant debate, especially with strongly interrelated and interdependent treaty provisions. *See Sztucki, supra* note 88, at 290-91.

117. VCLT, *supra* note 1, art. 20, ¶ 4, § b.

118. *Id.* Objecting states rarely express an intent to preclude all treaty relations with the reserving state, as demonstrated by the Convention on the Elimination of All Forms of Discrimination Against Women in which no objecting state explicitly excluded treaty relations with a reserving state. Clark, *supra* note 22, at 307.

119. VCLT, *supra* note 1, art. 21, ¶ 3.

The system created by Articles 19 and 20 undermines the negotiated balance of rights and duties.¹²⁰ Under this construct, a state could negotiate a treaty, carefully balancing the advantages and disadvantages, and then make a substantive reservation at the time of ratification in an attempt to make the treaty more favorable to its interests (and most likely less favorable for the other party).¹²¹ The reserving state cannot lose.¹²² If the other party accepts the reservation, then the reserving state achieves its end of rewriting the terms of the agreement.¹²³ If the other state objects, then the reserving state is either bound to the treaty excluding those provisions to which the reservation applied¹²⁴ or not bound at all.¹²⁵ In all possible scenarios, the reserving state is not bound by the objectionable but previously bargained for terms of the original agreement.¹²⁶ The non-reserving state loses, being forced to choose between accepting the terms for which it did not bargain or rejecting the result of possibly prolonged and intense negotiations, thereby losing whatever benefits it had sought and was to gain under the treaty.¹²⁷

120. See Sztucki, *supra* note 88, at 299 (recognizing that states have interests of their own which may factor into decisions regarding reservations).

121. *Id.*

122. *Id.* at 294. An "objection is incapable of providing any legal protection against the effects of a reservation." *Id.*

123. *Id.*

124. VCLT, *supra* note 1, art. 21, ¶ 3.

125. *Id.* art. 20, ¶ 4, § b; Sztucki, *supra* note 88, at 294. Sztucki proposes two options, either an extended objection or a total rejection of applicability of the treaty between the two parties. *Id.*

126. Sztucki, *supra* note 88, at 294. A reservation is "automatically impossible" if in practice an objection has the same legal effect as an acceptance. An objection provides the confronted state with no legal protection because an objection results in the nonapplicability between the reserving state and the objecting state of the provisions to which the reservation applied. *Id.* at 293-94. Commentators generally agree that an objection is the equivalent of an acceptance for reservations excluding a treaty provision, but some contend that an objection to a reservation modifying a treaty provision has a different effect than an acceptance of the same provision. HORN, *supra* note 10, at 182. However, an objection to a modifying reservation only excludes the provision "to the extent of the reservation" and does not exclude automatically the entire provision. An objection to a modifying reservation, therefore, has the same legal effect as an acceptance. Clark, *supra* note 22, at 309.

127. The non-reserving state might not lose completely in this scenario because the non-reserving state also would no longer need perform any obligations under those specific provisions. However, a non-reserving state could have achieved non-performance of its obligations simply by accepting the reservation. The non-reserving state's objection implies that the non-reserving state considered any obligations under those provisions acceptable to achieve whatever benefits might have been gained through the reserving state's performance of its obligations under the same provisions.

Article 20(5) gives the reserving state a further advantage by allowing tacit acceptance of a reservation after twelve months if a state-party has neither expressly accepted or objected to the reservation.¹²⁸ The treaty would take effect as modified.¹²⁹ Although this scenario seems less plausible in a bilateral context because a state presumably would keep abreast of developments and respond more quickly under such circumstances, tacit acceptance remains a realistic and justifiable concern.

2. Multilateral Agreements

Multilateral agreements have more than two parties, creating a more complex set of interwoven relationships.¹³⁰ Multilateral reciprocal rights agreements are often regional or universal in scope and may address such issues as the environment, transportation, trade, or extradition.¹³¹ The International Law Commission intended for the provisions of the Vienna Convention to govern reservations to multilateral agreements.¹³²

Applying Articles 20 and 21 in a multilateral treaty context achieves the same result as in the bilateral treaty context: the reserving state cannot lose. Assuming that the agreement does not fall within the provisions of Article 20(2), which requires acceptance of reservations by all parties because of the limited number of states involved and the nature of the agreement, the other parties may only accept or object.¹³³

Under a two-tier analysis, states may object to a reservation as incompatible with the object and purpose of the treaty under Article 19(c) or as unacceptable under Article 20.¹³⁴ The Vienna Convention requires subjective application of the objective criteria for incompatibility under Article 19. Article 20 further allows other factors, such as political ties and importance, to intrude on a state's analysis of a reservation's acceptability, biasing that state's individual determination.¹³⁵ Frequently, states differ in

128. VCLT, *supra* note 1, art. 20, ¶ 5.

129. *Id.* art. 21, ¶ 1.

130. VON GLAHN, *supra* note 107, at 488.

131. See *supra* notes 100-05 and accompanying text for examples of treaties of this sort.

132. See *supra* notes 51-55 and accompanying text.

133. VCLT, *supra* note 1, art. 20.

134. *Id.* arts. 19-20.

135. See Karl Zemanek, *Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS* 323, 333-34 (1984) (discussing the unilateral rights of states both to object and to accept).

their determinations of the compatibility of a reservation under Article 19 and the opposability of a reservation under Article 20, as evidenced by some states' accepting a reservation while others object to it.¹³⁶ The Convention wanted to clarify the legal status of the parties when this situation arises.¹³⁷

Article 21 makes states that expressly or tacitly accept the reservation parties to the treaty with the reserving state as modified by the terms of the reservation.¹³⁸ The larger the number of parties, the more likely one or more will accept the reservation, especially with the tacit acceptance provisions in Article 20(5).¹³⁹ Many states lack the administrative resources necessary to track all reservations and determine their compatibility within the twelve-month deadline.¹⁴⁰ The administrative processes necessary before taking a final government position frequently hinders even those states with substantial technical resources from meeting the deadline.¹⁴¹ Thus, the reserving state almost is guaranteed party status.¹⁴²

The objecting states, on the other hand, have limited recourse against a reservation. States objecting to the reservation, as with bilateral treaties, have the option of precluding all treaty relations with the reserving state or precluding treaty relations only as to those provisions affected by the reservation.¹⁴³ The reserving state obtains its objective under either response; the terms to which a state makes a reservation can never bind that state absent a withdrawal of the reservation.¹⁴⁴

136. See Clark, *supra* note 22, at 282-89.

137. See VCLT, *supra* note 1, art. 21.

138. VCLT, *supra* note 1, art. 21, ¶ 1. This scenario presumes that the reservation is not automatically impermissible under Article 19 (a) or (b). See *supra* note 68 for the text of Article 19.

139. See *ILC Report*, *supra* note 13, at 323. The larger the number of parties, the more likely one will neglect to accept or object within the 12 month period, thereafter being deemed to have assented tacitly to the reservation, making the state a party to the treaty. See *id.*

140. Clark, *supra* note 22, at 312.

141. *Id.*

142. See *id.* at 312-13 Under Article 20(4)(c), a reserving state becomes a party to a treaty as soon as one other party accepts the reservation. VCLT, *supra* note 1, art. 20, ¶ 4.

143. VCLT, *supra* note 1, arts. 20, 21.

144. *ILC Report*, *supra* note 13, at 324. See *supra* notes 126-27 and accompanying text for a discussion of why the reserving state never loses. If the point was important enough to make, however, why withdraw? If the reserving state is only trying to obtain a better agreement, it is attempting to renegotiate, and the ratification stage is not the proper time and a reservation not the proper means for renegotiating. One reservation could spark an endless series of

The differences between regional multilateral treaties and more universal multilateral treaties also affect the policies underlying the Convention's hybrid approach. Parties to regional agreements typically present a more homogeneous class,¹⁴⁵ with common interests and backgrounds that provide additional bases of understanding. Reservations, therefore, are less likely because all of the parties have similar interests. The provisions also tend to have a comparable impact on all of the parties because strongly objectionable provisions probably would be objectionable to the majority of parties and, therefore, would never be included in the first place.¹⁴⁶

The absence of this homogeneity at the global level may inspire additional reservations to more universal multilateral treaties. Parties to universal multilateral treaties ordinarily have more diverse cultural, political, and economic backgrounds and interests, making certain provisions less desirable for some states.¹⁴⁷ In such situations, the parties must make greater compromises to arrive at an original agreement.¹⁴⁸ More reservations are likely because certain provisions inevitably will have disparate impacts, advantaging or disadvantaging select states more than others.¹⁴⁹ Reservations may facilitate agreement, but they also simultaneously undermine the agreement by splintering the multilateral treaty into a network of bilateral and plurilateral agreements.¹⁵⁰ Multiple states can be parties to the same treaty without that treaty being in force between them.¹⁵¹

reservations. Frequently one state will make a reservation in accepting the reservation of another state. See Sztucki, *supra* note 88, at 294.

145. See *ILC Report*, *supra* note 13, at 321.

146. If all the negotiating states' interests are similar, then the provision would be mutually distasteful and therefore less likely to be put in the treaty. This situation is neither an absolute nor limited to the regional context but would logically occur more often in that context.

147. See *ILC Report*, *supra* note 13, at 324. For example, certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women appealed less to Muslim states. See Clark, *supra* note 22, at 284.

148. The parties frequently use majority voting in agreeing on the individual provisions of the treaty. Bishop, *supra* note 7, at 288.

149. See Sztucki, *supra* note 88, at 300 (discussing compatibility versus opposability). The opposite scenario might occur in this context too. Some global agreements come closer to the lowest common denominator, thus including few if any objectionable provisions. Unfortunately, the lowest common denominator frequently contains less substance as well.

150. Schermers, *supra* note 96, at 351.

151. *Id.*

B. Legislative Treaties

A legislative treaty regulates a specific area of international law, representing the parties' agreed-upon understanding of the law, either as it is or as they want it to be.¹⁵² With these agreements, there is usually a greater interest in protecting the integrity of the treaty, but a high degree of participation is still desirable.¹⁵³ This category includes agreements such as codifications of customary international law, agreements governing international conduct, and constituent documents of international organizations.¹⁵⁴

1. Codifications of Customary International Law

Codifications purport to reflect the current status of customary international law.¹⁵⁵ These agreements ordinarily strive for universal participation¹⁵⁶ because the underlying customary international law already binds all states.¹⁵⁷ With such a large number of parties, codifications would not fall under Article 20(2) requiring acceptance of a reservation by all parties. Therefore, under the Vienna Convention, in the absence of express provisions to the contrary, reservations to provisions of a codification are permissible.¹⁵⁸

Thus, the Convention is logically inconsistent. As customary international law, the law applies to all states, yet as a codification of customary international law, states may opt not to be subject to this law as conventional international law. Other states would most likely object to such a reservation. Without objective criteria to restrict a state's determination of compatibility under Article 19 and acceptability under Article 20, combined with the concept of tacit acceptance, however, the reserving state is likely to become a party to the codification as modified vis-à-vis at least a few other states.¹⁵⁹

152. See Clark, *supra* note 22, at 316-17.

153. *Id.*

154. *Id.* Human rights agreements, which may be either codifications of customary international law or agreements regulating international conduct, depending on the content, generally attract large numbers of reservations. *Id.* at 283.

155. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 74 (2d ed. 1987).

156. See ILC Report, *supra* note 13, at 260.

157. HENKIN, *supra* note 155, at 10-12. Persistent objectors, if theoretically possible, represent a possible exception. *Id.* at 131, 1253 n. 2.

158. VCLT, *supra* note 1, art. 19.

159. See *supra* notes 138-42 and accompanying text.

Codifications of international standards characterized as *jus cogens*¹⁶⁰ pose a particular problem under the Convention's framework. Although later articles of the Convention prohibit treaties conflicting with *jus cogens* and automatically void them,¹⁶¹ the drafters did not prohibit reservations to treaties concerning *jus cogens*. Under Articles 19 through 23, a state arguably could propose a reservation to a tenet of *jus cogens*, again almost certain of tacit acceptance by a few states, and thereby circumscribe a peremptory norm of international law.¹⁶² If a state may not violate *jus cogens* outside a treaty, it should not be able to make a reservation to that effect within a treaty.¹⁶³ The drafters certainly could not have intended to give states this option, but the Convention's flexible system favors universality over integrity.¹⁶⁴

2. Agreements Regulating International Conduct

Treaties regulating international conduct typically establish principles governing the actions of states.¹⁶⁵ These treaties function best with maximum participation, thereby effectuating the objective of one standard of conduct.¹⁶⁶ Moreover, such

160. *Jus cogens* refers to peremptory norms of international law. VCLT, *supra* note 1, art. 53.

161. *Id.*

162. See *ILC Report*, *supra* note 13, at 323.

163. Note that quite likely under Article 53 the treaty as applied between the reserving and accepting states would be void as violating *jus cogens*. However, a state could tailor the reservation so that the modified provisions do not conflict with *jus cogens*, but merely remove that state from the sphere of applicability of that norm. A state could then be a party to such a treaty without those provisions being enforceable against it, giving it a stronger argument that the norm is not *jus cogens*. The law of *jus cogens* also continues to evolve. A reservation to a codificatory treaty could have the opposite effect of advancing *jus cogens* norms. For an interesting analysis of the possibility of developing customary international legal norms other than by state practice, see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

164. Schachter, *supra* note 26, at 374; Bishop, *supra* note 7, at 275-76; see also *ILC Report*, *supra* note 14, at 324.

165. Clark, *supra* note 22, at 316-17. Examples of treaties regulating international conduct include the Genocide Convention and the International Convention on the Elimination of All Forms of Racial Discrimination. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, DEP'T ST. BULL., Sept. 1988, 5 I.L.M. 352.

166. *ILC Report*, *supra* note 13, at 324. Sometimes "fewer parties to a treaty is more of an obstacle to the development of international law than the possibility of weakening the integrity by liberal admission of reserving States." *Id.*

agreements rarely advantage or disadvantage particular states and have no contractual balance of rights and obligations to be maintained.¹⁶⁷

Negotiating states frequently use majority voting procedures for treaties regulating international conduct to facilitate the treaty-making process.¹⁶⁸ Reservations further this end. States that could not otherwise join the treaty because of some domestic law conflict now may make minor procedural reservations and become parties. However, the broad reservations permitted under the Vienna Convention also allow a state to propose substantive reservations, possibly even reservations undermining the purpose of the treaty.¹⁶⁹ The subjective acceptance criteria, as well as tacit acceptance after twelve months, almost guarantees that some state will consent to the reservation, making the reserving state a party.¹⁷⁰

3. Constituent Documents of International Organizations

As discussed earlier, Article 20(2) establishes a special rule governing reservations to constituent documents of international organizations. The members of the organization, through the competent organ, make the ultimate decision on the permissibility

167. Bishop, *supra* note 7, at 288.

168. *Id.* at 264. Majority voting reflects a new means of adopting treaties. Negotiations between a small number of parties allows for a greater chance of complete agreement (or at least compromise) on all terms to the treaty. With an ever-increasing number of states participating in multilateral negotiations, consensus rather than complete agreement serves as the goal.

The parties adopt the text of the treaty by majority vote or consensus voting. Attempting to reach complete compromise among a large number of states would slow the negotiating process and possibly stall treaties all together. Under the majority system, unless a party has a major disagreement with a specific provision, the negotiators adopt the text. States then make reservations to resolve any minor disagreements with various provisions.

Reservations are essential to a majority voting scheme. Without reservations states might never agree on a final text. The use of reservations then permits states to agree on the basic premises of a treaty without having to agree on every detail. See generally *id.* at 264.

169. Again, the subjective application of the Article 19 criteria allows a state-party to accept an impermissible reservation. The other states-parties to the agreement do have recourse, however, through judicial review, for the question of permissibility under Article 19 is a question of law and judicially determinable.

170. *ILC Report, supra* note 13, at 323. Reservations to human rights treaties pose additional problems, similar to those arising with codifications. See Clark, *supra* note 22 (examining the particular problems of applying the Convention's framework to the Convention on the Elimination of All Forms of Discrimination Against Women and human rights treaties generally).

of reservations.¹⁷¹ This special provision acknowledges the exceptional nature of these instruments.

The International Law Commission and the negotiators at Vienna understood a special need to protect the integrity of constituent documents.¹⁷² They assigned to the international organization itself the duty of balancing this need against the desire for broader participation rather than having the standard presumption apply.¹⁷³ The member states as a whole, via the competent organ, decide whether to accept the reservation, allowing the parties as one body to choose universality or uniformity.¹⁷⁴

IV. ELIMINATING DEFAULT RULES: AN ALTERNATIVE SYSTEM

The default rules of the Convention governing reservations should be discarded. Many international scholars have noted that "no single framework uniformly applied could be wholly satisfactory to cover all cases."¹⁷⁵ The existence of such rules encourages reliance on them. Discarding the rules would require the drafters of every international agreement to give more thought to whether reservations to that agreement should be allowed and, if they should be allowed, to which provisions. The drafters could then incorporate these decisions into the terms of the agreement itself.¹⁷⁶ This system creates a specially-tailored set of rules for every agreement. Although Article 19 of the Convention currently allows the drafters this option, the existence of default rules encourages drafters not to weigh the issue as seriously and to rely on the Convention's framework to resolve questions concerning reservations.

171. VCLT, *supra* note 1, art. 20, ¶ 2. This system was consistent with the established practice for admitting new members to those organizations. ROSENNE, *supra* note 25, at 218-23.

172. *ILC Report*, *supra* note 13, at 327. The drafters considered the integrity of these instruments to outweigh all other considerations. *Id.*

173. *Id.*

174. *Id.*

175. *ILC Report*, *supra* note 13, at 320; Clark, *supra* note 22, at 282 (quoting Lord McNair's belief that tailoring individual reservation regimes for every treaty is an "imperative necessity"). The U.N. Convention on the Law of the Sea presents a notable example. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc.A/CONF.62/122, art. 309, *reprinted in* 21 I.L.M. 1261 (1982).

176. This is now common practice, as demonstrated by the 1982 United Nations Third Convention on the Law of the Sea, *supra* note 175.

If entirely discarding the Convention's reservation framework seems drastic to some commentators, three modifications would improve the current framework governing reservations to treaties. First, reversing the presumption of acceptability of reservations to favor the confronted states would bar default acceptance of reservations for noncompliance with technical rules and force the confronted states to either accept or object to every reservation. Second, adopting different frameworks for different types of international agreements would better address the policy concerns for reservations to each type of agreement. In the alternative to the second suggestion, establishing an authoritative decision-maker would depoliticize the process and better preserve the integrity of the agreement.

A. *Reversing the Presumption*

The Vienna Convention's current framework presumes the permissibility of reservations to treaties.¹⁷⁷ The tacit acceptance provision of Article 20(5) transforms this presumption of permissibility into a presumption of acceptability favoring the reserving state and its reservation.¹⁷⁸ This presumption of tacit consent should be reversed because of the high burden imposed on confronted states.

Prior to the Vienna Convention, reservations to treaties were presumed impermissible and unacceptable, whether under the unanimity rule, the Pan-American system, the principle of the Genocide Convention, or the collegiate system.¹⁷⁹ If the confronted states failed to respond, the reserving state did not become a party to the agreement.¹⁸⁰ Under the Convention, the reserving state automatically becomes a party to the agreement as modified by its reservation if any other party fails to respond within twelve months.¹⁸¹ The Convention forces the confronted states to evaluate the reservation and funnel a response through the appropriate political and administrative channels within the

177. See VCLT, *supra* note 1, arts. 19, 20, ¶ 5.

178. Clark, *supra* note 22, at 312-14 (arguing against the 12 month tacit acceptance rule).

179. See HORN, *supra* note 10, at 15-16, 30; *ILC Report*, *supra* note 13, at 325, 328; Bishop, *supra* note 7, at 275-280, 288-89; Genocide Convention Opinion, *supra* note 24, at 23-24.

180. See HORN, *supra* note 10, at 15-16, 30; *ILC Report*, *supra* note 13, at 325, 328; Bishop, *supra* note 7, at 275-280, 288-89; Genocide Convention Opinion, *supra* note 24, at 23-24.

181. VCLT, *supra* note 1, art. 20, ¶ 5.

relatively short period.¹⁸² Failure to do so allows the reserving state to rewrite the treaty unilaterally. After the twelve month period, a confronted state's only recourse would be to withdraw from the treaty or to terminate the treaty if this recourse is possible and permissible.¹⁸³

B. *Different Frameworks for Different Types of International Agreements*

The Convention's framework imposes one artificial framework to govern reservations to all types of treaties. This framework inadequately serves the needs of the different types of international agreements.¹⁸⁴ Separate frameworks tailored to meet the specific needs of different types of treaties would better serve the interests of the international community and the policies underlying the agreements.

1. Bilateral Reciprocal Rights Agreements

The unanimity rule best governs reservations to bilateral agreements because it furthers the interests of both parties to the agreement. As discussed earlier, an international agreement at the bilateral level resembles a contract between the two states.¹⁸⁵ Reservation at the time of ratification is equivalent to an attempt by one party to alter the terms of the agreement. The unanimity rule would reverse the current presumption of acceptability under the Convention, presuming a reservation ineffective unless expressly accepted by the confronted state.

2. Multilateral Reciprocal Rights Agreements

The collegiate system best governs reservations to multilateral reciprocal rights agreements, and it should require acceptance of a reservation by a majority, but better yet by two-thirds or three-fourths, of the states-parties.¹⁸⁶ Requiring this high percentage of parties to accept a reservation checks each

182. Clark, *supra* note 22, at 312. A lack of administrative infrastructure and political considerations often hinder states from responding within the 12 month period. *Id.*

183. Withdrawing from or terminating the treaty may involve breaching the agreement, facing sanctions, and losing the benefits of the agreement, in addition to gaining an undesirable international reputation.

184. See *supra* part III.

185. See *supra* notes 110-27 and accompanying text.

186. See *supra* notes 41-44 and accompanying text.

individual state's determination of the acceptability of the reservation. This system guards against politicization of the process because multiple states must reach the same conclusion.¹⁸⁷ Again, this framework utilizes a presumption of ineffectiveness until accepted by a majority of parties, reversing the Convention's presumption of acceptance.

This system also guards against excessive fragmentation of multilateral agreements. The high degree of consensus necessary to accept a reservation would prevent the agreement from denigrating into a network of bilateral and plurilateral agreements. One acceptance alone would no longer allow the reserving state to become a party to the agreement. All states-parties would enter into the same relationship with the reserving state.

3. Legislative Treaties

a. Codifications of Customary International Law

True codifications of international law require application of the unanimity rule. As discussed earlier, states may not reserve themselves out of customary international law obligations.¹⁸⁸ Agreements representing simultaneous codification of customary international law and progressive development of the law also should require application of the unanimity rule. The drafters of these treaties ordinarily intended the progressive development provisions to evolve into customary international law. Allowing reservations at the time of ratification would undermine the integrity of these provisions and hinder their future acceptance as law.¹⁸⁹ The framework of the unanimity rule best serves the policy needs of such agreements.

187. Politicization is still possible if one state equals greater than one-fourth or one-third of the parties or its decision is the deciding one.

188. See *supra* notes 155-58 and accompanying text. A counter-argument provides that allowing reservations at that time, however, would allow for continued disagreement as to the trend of progressive development of the law. A state, however, could always become a party to the agreement and merely make public declarations that those provisions were not customary international law.

189. Substantive reservations to progressive development provisions also could later be used by the reserving states as evidence of the rule not being customary international law or at least of their status as a persistent objector to the rule if it had so evolved, further undercutting respect for the rule.

b. Agreements Regulating International Conduct

A collegiate system best serves the policy goals of treaties regulating international conduct. These agreements strive for a high degree of participation but simultaneously require substantial uniformity in the application of its provisions. The collegiate system in this context would serve the same purposes as in the multilateral reciprocal rights agreement context. If a majority of states-parties understood a reservation to undermine the basic principles of the agreement, these states could preclude the reserving state from becoming a party to the agreement. The majority requirement insulates the process to an extent from excessive politicization. The collegiate system prevents a reserving state from becoming a party to the agreement for the sake of political correctness while in effect shirking all substantive obligations under the agreement.

c. Constituent Documents of International Organizations

The Convention's provisions governing constituent documents of international organizations address well the needs of these agreements.¹⁹⁰ The Convention's special terms entrusting the members, through the international organization, with determining the acceptability of a reservation allow the states-parties to maintain the integrity of the agreement without rigidly prohibiting all minor reservations.¹⁹¹ The states-parties themselves must evaluate whether a ratification with reservation sufficiently binds the reserving state to the agreement.

C. Establishing an Authoritative Decision-Maker

Establishing one decision-maker to determine the compatibility of reservations offers an alternative to adopting the different frameworks for each category of treaty. The appointment of one authority to apply the test would depoliticize the process and would both increase the consistency of determinations and better preserve the integrity of the agreement.

This concept depends on several factors: state consent; appointment of a central decision-maker; and a one-tier approach. Removing the decision whether to accept or object to a reservation from the states-parties themselves would require their explicit consent. The current system allows states to apply the

190. See VCLT, *supra* note 1, art. 20, ¶ 3.

191. See *supra* notes 172-74 and accompanying text.

“object and purpose” test using their own subjective criteria. This relinquishment, however, would not come without benefits. One decision-maker would provide reserving states with assurance that their reservations would be evaluated strictly on their merit rather than on political factors. The confronted states would benefit from all states-parties’ entering into the same treaty relations with the reserving state, minimizing the fragmentation of the agreement.

The international community could place responsibility on the drafters of each agreement to designate a decision-maker, either an individual or an entity, and specify the bases on which that decision-maker should make its determinations, or create a default rule automatically appointing someone, such as the depositary, as decision-maker. Under either approach, the depositary would be the most convenient person to perform this task. By receiving instruments of ratification and tallying membership, the depositary is aware of reservations filed by any prospective party. The depositary easily could apply an objective compatibility test at that time. The drafters’ could establish a review process so that if a specified majority of the states-parties disagreed with the depositary’s ruling, they could override its determination. Otherwise the decision would stand, with parties responding accordingly.

The central decision-maker approach would work best under a one-tier system.¹⁹² The one-tier approach limits a party’s right to object to a reservation to incompatibility with the object and purpose of the treaty.¹⁹³ If the decisionmaker decided the reservation was permissible, and therefore compatible with the agreement, the states-parties to the agreement would be unable to object to the reservation. Yet, if the decision-maker determined the reservation incompatible with the “object and purpose” of the agreement, the parties would have to accept the reservation.

A two-tier system would work only if the decision-maker determined both compatibility and acceptability.¹⁹⁴ The states-parties otherwise would retain the power to object to the reservation on the basis of unacceptability even if compatible. Presumably, no state-party would argue an incompatible reservation were acceptable, although the possibility would exist. Having one central decision-maker therefore would work best with

192. See *supra* note 75 and accompanying text (explaining the one-tier approach).

193. *Id.*

194. See *supra* notes 77-81 and accompanying text (explaining the two-tier approach).

the one-tier approach, under which a state could not undermine the decision-maker's final ruling.

The different frameworks advocated in Part IV.B. obviate the necessity of establishing an authoritative decision-maker by using frameworks requiring a high degree of consensus. One authoritative decision-maker and the high degree of consensus both obtain the same end—uniformity of result, minimizing the likelihood of political abuse of the process. An impartial decision-maker better achieves this end, but states may not be willing to relinquish so much authority to a third-party. Either system would work best in combination with reversing the presumption favoring acceptability.

V. CONCLUSION

The flexible construct adopted by the Vienna Convention holds potential for great abuse. The lack of objective criteria for determining compatibility combined with a state's right to make reservations can quickly transform a treaty into a fragmented series of bilateral or plurilateral agreements sharing only a title.¹⁹⁵ In providing a new framework to correct the problems of the unanimity principle, the drafters of the Vienna Convention swung the pendulum too far. They did not achieve balance but established a new bias, one favoring the reserving state at the expense of the non-reserving states and the integrity of the agreements.¹⁹⁶

Treaty law governing reservations evolved tremendously in the post-World War II era. However, this evolution has stagnated at a crucial point. After the Vienna Convention, the search for new constructs seems to have disappeared. Rather than striving for ways to improve the system, the international community has accepted the Convention as the final word on the issue.¹⁹⁷ With

195. Schermers, *supra* note 96, at 351.

196. *ILC Report*, *supra* note 13, at 324. The ILC conceded that its safeguards for the non-reserving states failed to achieve full equality between the reserving and non-reserving states. *Id.* In his dissent in the Genocide Convention Opinion, Judge Alvarez noted that allowing reservations gives some "legal effect in favour of the states making the reservation." Genocide Convention Opinion, *supra* note 24, at 44.

197. The 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations evidences the lack of development of international law regarding reservations. The articles of this second Vienna Convention on the Law of Treaties concerning reservations parallel the framework established in the 1969 Convention. See Vienna Convention on the Law of Treaties Between States and International

the recent shifts in international relations and a greater willingness on the part of states to cooperate to achieve mutually beneficial ends, the international community may be more willing to decide these points now than the International Law Commission believed states were in the 1960s.¹⁹⁸

Ideally, states should discard the default rules and draft specific reservations provisions for each international agreement. The Vienna Convention left states this option which they have too frequently failed to use. In the absence of discarding the Convention's framework, the three simple modifications proposed in this Note, reversing the presumption of acceptability, adopting different frameworks best-suited for different types of treaties, or establishing an authoritative decision-maker, would significantly enhance the current framework and help to shift the pendulum back closer to the center. The changes would allow for the exercise of a state's sovereign right to make reservations while better protecting the confronted states' rights to object and protect the integrity of the treaty.

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Organizations or Between International Organizations, done at Vienna, Mar. 21, 1986, U.N. Doc. A/CONF.129/15 (1986), reprinted in 25 I.L.M. 543 (1986). The inclusion of more provisions governing reservations within specific agreements does not evidence the forging of change but simply the inadequacies of the current framework and the need for continued evolution of universally applicable rules.

198. See generally Kearney & Dalton, *supra* note 1 (discussing the difficulties of adopting the Convention in its current form).

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