

# ARTICLES

## Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention

By

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### I.

#### INTRODUCTION

The use of reservations in multilateral treaties reveals a seeming contradiction: 1) the law of reservations, enshrined in Articles 19-21 of the Vienna Convention on the Law of Treaties,<sup>1</sup> favors the reserving state,<sup>2</sup> but 2) the number of reservations attached to international treaties since the adoption of the Convention has been relatively low in spite of that natural advantage.<sup>3</sup> This Article posits that Article 21(1) of the Vienna Convention is a good place to search for an explanation. This provision creates a mechanism to make reservations reciprocal: between a reserving state and a state that objects to the reservation, that part of the treaty will not be in force.<sup>4</sup> Therefore, if a state wants to exempt

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1. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The United States is not a party to the Vienna Convention. However, the international community generally accepts the Convention as an authoritative codification of treaty law. See Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, n.2 (1994).

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

3. John King Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980).

4. The precise language of the treaty is as follows:

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies these provisions to the same extent for that other party in its relations with the reserving State.

Vienna Convention, *supra* note 1, art. 21.

itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

Game Theory sheds light on understanding the efficacy, and limits, of Article 21 in preserving treaty obligations. After a treaty has been signed, states have an opportunity to attach reservations to it before ratification. Absent Article 21, the traditional prisoner's dilemma paradigm<sup>5</sup> illustrates that a state will always act in its best interest (reserve), thereby prompting other states to do the same, resulting in a sub-optimal result for both of them: a fragmented treaty with ambiguous obligations. If a state knows, however, that the mechanism of reciprocity will make its sought-after advantage automatically available to others, then, under most circumstances, the possibilities for achieving post-negotiation advantages are precluded, and a state will not attach reservations to the treaty.

Article 21 reciprocity only provides a solution to the prisoner's dilemma game when both states enter into the negotiations in symmetrical positions and it is unclear how the treaty will regulate their future relationship. For example, when two states sign an extradition treaty, neither state knows whether it will be requesting or surrendering a fugitive. By contrast, when states enter a treaty from asymmetric positions, the costs and benefits for each side are clear in advance. Therefore, they will each have incentives to attach reservations to preserve national interests as much as possible. For instance, states will have different approaches to signing multilateral agreements governing intellectual property rights, depending on whether they have highly developed entertainment industries or large capacity to produce videos or CDs cheaply. The erosion of the integrity of the treaty will be inevitable unless the parties explicitly preclude reservations as part of the treaty itself.

Finally, the observation that reservations are fairly rare does not hold true for human rights treaties. Unlike asymmetric treaties in which states have to reconcile interests of differing national importance in order to achieve an overall treaty regime that reflects a Pareto superior outcome<sup>6</sup> for all parties, human rights treaties are unilateral declarations of a state's intentions concerning the treatment of its own citizens. The equalizing mechanism of reciprocity cannot function because human rights conventions do not fit the model of contractual agreements among states. A nation has no incentive to accommodate another state's value system at the cost of its own national interest because it will not receive anything concrete in return. For instance, if a country attached a reservation to the Convention on Elimination of All Forms of Discrimination Against Women allowing it to practice female circumcision, it would hardly benefit the United States to have the same "right." As of now, the benefits of a human rights treaty are not considered tangible enough to motivate a state to give up its right to attach reservations, and the political cost for compromise on such issues may be too high for governments to pay.

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5. See *infra* note 55 and accompanying text.

6. See *infra* note 57.

## II.

HISTORY OF TREATY RESERVATIONS<sup>7</sup>A. *Pre-World War I: Unanimity Rule*

Until the late nineteenth century, accession to, and ratification of, multilateral agreements was an all or nothing proposition. Ratifying states had an opportunity to negotiate specific treaty provisions before signing a treaty, rendering *ex post* departures from such agreements suspect. As a result, if a state had a position on a particular provision that was not adopted, it had the limited choice of accepting that aspect of the treaty, in spite of national concerns, or not being a party to the entire agreement.<sup>8</sup> This approach preserved unanimity, and any treaty that did come into force had the clear backing of its constituent parties, laying a strong foundation on which compliance could be built. While this approach first began to change in the late nineteenth century with a series of conventions, starting with the International Sanitary Convention, all of the signing parties had to accept, at least tacitly, any reservation before it could be considered valid.<sup>9</sup> Although this practice became increasingly unworkable in light of the increased international cooperation that followed World War I and the establishment of the League of Nations, the leading European nations adhered to this unanimity principle.<sup>10</sup> As European nations dominated the world stage, this practice continued until after World War II.

B. *Inter-War Period: Pan-American Rule*

While the European powers continued their insistence on unanimous consent to treaty provisions, a different approach developed in Latin America. Known as the Pan-American Rule and articulated in the Havana Convention on the Law of Treaties in 1928,<sup>11</sup> it provided for three levels of reciprocal rights and obligations between signatory states. Between states that did not file reservations to treaty language, the treaty applied as written. Between a reserving state and a state that accepted the limitation, the treaty applied in its modified form. If a state attached a reservation and another state did not accept it, then the

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7. This description of the history of treaty reservations is based on the classic works outlining this development from the 19th century to the adoption of the Vienna Convention on Treaties. Specifically, it draws heavily on IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2d ed. 1984) and SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES, 1945 - 1986* (1989). See also MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW & TREATIES* 259-278 (1985); UNITED NATIONS GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, SECOND REPORT ON RESERVATIONS TO TREATIES, ANNEX I, BIBLIOGRAPHY CONCERNING RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/478/Rev.1 (1999).

8. PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 78 (trans. Jose Mico & Peter Haggenmacher) (1995).

9. SINCLAIR, *supra* note 7, at 55.

10. ROSENNE, *supra* note 7, at 356-357. See also LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW* 49 (1988).

11. Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295, 308 n.121 (1985) (quoting Article 6 of the Havana Convention). See also Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269, 274-75 (2001).

treaty would not be in force between them. Finally, if a state signed onto the treaty with a reservation after the treaty had entered into force, the agreement would not be in force between it and any other signatory state that did not accept the reservation.<sup>12</sup> This latter provision represented a significant departure from earlier refusal to allow a latecomer state any flexibility. In essence, the Pan-American rule widened the scope of engagement in a multilateral treaty by allowing for a variety of related bilateral sub-agreements under the treaty's general umbrella.<sup>13</sup>

The international community, therefore, had two methods for dealing with reservations leading into the post-War period.

### C. *Post World War II*

These two different approaches co-existed until the post-war period, when, in the aftermath of the horrors of the Holocaust, the members of the United Nations negotiated the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>14</sup> Although the treaty was meant to stand as an articulation of humanity's universal condemnation of genocide, individual states attached reservations to their ratifications of the treaty itself.<sup>15</sup> The Secretary General then faced the dilemma of whether to count signatures with reservations towards those needed for the Convention to enter into force. Accordingly, the General Assembly called upon both the International Court of Justice (ICJ) and the International Law Commission (ILC) for guidance on this matter.<sup>16</sup>

#### 1. *International Court of Justice Advisory Opinion*

The foundation for the Vienna Convention's approach to reservations lies in the International Court of Justice Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>17</sup> In that landmark decision, the ICJ had to balance the need for universal condemna-

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12. SINCLAIR, *supra* note 7, at 57. Piper, *supra* note 11, at 308. See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (May 28) [hereinafter Genocide Reservations].

13. Piper, *supra* note 11, at 308.

14. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

15. Genocide Reservations, *supra* note 12, at 22. For an overview of the Convention's scope and purpose, see Matthew Lippman, *The Convention on the Prevention and Punishment of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 451 (1998).

16. U.N. GAOR, 5th Sess., Annex, Agenda Item 5b, at 29, U.N. Doc. A/1517 (1950). See ROSENNE, *supra* note 7, at 425.

17. The ICJ addressed the following two issues at the request of the U.N. General Assembly:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(A) The parties which object to the reservation?

(B) Those which accept it?

Genocide Reservations, *supra* note 12.

tion of genocide<sup>18</sup> with the mandate to preserve the integrity of the original agreement to which the parties agreed.<sup>19</sup> Granting states flexibility in accepting the terms of the treaty would promote ratification, but could not risk undermining the treaty itself.<sup>20</sup> The ICJ wrestled with the dilemma, which continues to vex states today.<sup>21</sup> The resulting compromise set the framework for negotiating multilateral treaties in the expanded international community that emerged from the wreckage of the War.

The ICJ found a balance between state sovereignty and the integrity of the Convention by limiting reservations to those that were compatible with the purpose of the treaty itself.<sup>22</sup> States had to accept some limitation of their prerogative to attach reservations because the Genocide Convention was more than a simple contractual treaty.<sup>23</sup> It dealt with an issue that shocked the "conscience of mankind," meaning that states could not negotiate around, or stray from, the black letter law of the Convention.<sup>24</sup> Bolstered by the fact that the General Assembly had not allowed for reservations,<sup>25</sup> and given the high moral principles involved, especially important in the immediate aftermath of World War II, the ICJ circumscribed state autonomy in treaty ratification.

Nevertheless, the ICJ could not ignore the long-standing European tradition of complete unanimity in acceptance of treaty provisions, given its grounding in the fundamental principle that no state can be bound against its will.<sup>26</sup> The ICJ therefore could not ban reservations altogether, especially since the General Assembly had hinted that reservations might be acceptable under certain circumstances.<sup>27</sup> By recognizing the need for some form of reservation but attempting to limit its scope, the ICJ created the possibility of "subtreaties." Each state would judge for itself whether a reservation was compatible with the purpose of the Convention, and, based on its conclusion, either consider the treaty in force between itself and the reserving state, or not.<sup>28</sup> It avoided binding states against their will to accept the reservations of other states because it protected the core

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18. *Id.* at 23.

19. *Id.* at 21.

20. *Id.* at 24.

21. See *Report of the International Law Commission on the work of its Forty-Ninth Session 12 May-18 July*, U.N. GAOR, 52nd Sess., Supp. No. 10, U.N. Doc. A/52/10 (1997).

22. Genocide Reservations, *supra* note 12, at 24.

23. See *id.* at 22-24.

24. *Id.* at 21-24. This theme of contract versus normative treaty has gained greater prominence in the past decades as the number of human rights conventions has increased. The trade-off between flexibility in allowing reservations and integrity of the treaty purpose has been questioned as states have used reservations and declarations essentially to undermine the intent of the treaty itself, at least in some cases. *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 1 (1994); Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERK. J. INT'L LAW 277, 293-295 (1999).

25. Genocide Reservations, *supra* note 12, at 21-24.

26. U.N. GAOR, 5th Sess., Annex, Agenda Item 5b, at 29, U.N. Doc. A/1517 (1950). See ROSENNE, *supra* note 7, at 425.

27. Genocide Reservations, *supra* note 12, at 22.

28. *Id.* at 26-27.

areas of the convention from adjustment; nevertheless it walked back from an "all or nothing approach" to facilitate universal participation.<sup>29</sup> This compromise opened the door to the solution to the reservations problem that was incorporated in the Vienna Convention some fifteen years later.

However, the ICJ's approach tips the balance in favor of the reserving state. The ICJ noted that it must be "clearly assumed" that a potential objecting state would make every effort to find the reservation acceptable, since it would be "desirous of preserving intact at least what is essential to the object of the Convention."<sup>30</sup> As a result, the ICJ ventured the hope that any divergence of views would be irrelevant in the big picture, that the states might enter into some dispute resolution process, or that there would be "an understanding between that state and the reserving states [allowing] the convention to enter into force between them, except for the clauses affected by the reservation."<sup>31</sup>

What the legal ramifications of that arrangement would be, the ICJ did not attempt to figure out. It addressed the question only by commenting on previous history:

[W]hile it is universally recognized that the consent of other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.<sup>32</sup>

Mentioning the Pan-American system, the ICJ merely noted that the European approach was not the only option<sup>33</sup> and that case-by-case analysis of how to handle reservations would be the most prudent approach. In spite of these gaps, however, the ICJ shifted the grounds of debate and laid the foundation, shaky as it might be, for Article 21 of the Vienna Convention.

## 2. *International Law Commission*

At the same time that the General Assembly asked the ICJ to offer its guidance on the question of reservations, it also turned to the International Law Commission (ILC) for its expertise.<sup>34</sup> Even after the Court rendered its opinion,

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29. One commentator has characterized this as a decision that carves out a middle ground between the Pan-American rule and the European unanimity rule. The ICJ maintained the European all or nothing approach concerning the essence of the Convention: reservations "incompatible with the treaty" are forbidden. *Id.* at 24. Each signatory state would determine for itself if the reservation of another state were incompatible; in the event that it decided in the affirmative, the Convention would not be in force between the two parties. Reservations on ancillary issues would be allowed, and the treaty would be in force between the two states, except for the reservation, reflecting the flexibility of the Pan-American rule. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, n.433 (2000).

30. Genocide Reservations, *supra* note 12, at 27. The ICJ dodged the difficult question of deciding who would have authority to determine if a reservation were compatible with the object of the treaty.

31. *Id.* at 27.

32. *Id.* at 25.

33. *Id.* at 25.

34. The General Assembly asked the ILC to "study the question of reservations to multilateral conventions both from the point of view of codification and from that of progressive development. G.A. Res. 478, 5th Sess., Supp. No. 20, at 74, U.N. Doc. A/1775 (1950).

the ILC input remained relevant because the Court, relying on the abstract nature of an advisory opinion, left many questions unanswered about how a regime would work that did not require unanimous acceptance of reservations. However, the ILC came to the opposite conclusion from the Advisory Opinion. It advocated the traditional European unanimity model, calling for the Secretary General to notify all other states that either are, or are entitled to become, parties to the Convention when any state submitted a reservation. If any other state objected within a certain amount of time, then the reservation would have to be withdrawn or the reserving state could not become a party to the treaty.<sup>35</sup>

The General Assembly thereby faced the task of reconciling these two opposing recommendations. It passed an initial resolution dodging the problem by instructing the Secretary General simply to inform all member states of any reservations to treaties of which he was the depository and allow them to draw any legal conclusions from the reserving state's statement.<sup>36</sup> This arrangement lasted until 1959, when India demanded clarification of the legal status of a reservation it had appended to a 1948 Convention.<sup>37</sup> The General Assembly then had to take a clearer stance on the question of reservations. It called upon the Secretary General to collect information on practices concerning reservations from different regions of the world and submit the information to the ILC for its further consideration.<sup>38</sup> In this way, the General Assembly gave the first signal that the unanimity rule was a thing of the past and that political, rather than legal, considerations would govern the question of reservations. The General Assembly's resolution thus ushered in the end of the dominance of the European states on the codification of international law.<sup>39</sup> Three years later, Special Rapporteur Sir Humphrey Waldock presented the ILC's new thinking on reservations,<sup>40</sup> ideas that in six additional years would become Articles 19-23 of the Vienna Convention itself.

### III.

#### THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties became available for signature in 1969 and came into force in 1980, culminating negotiation efforts begun in 1949. The purpose of the Convention was to articulate the framework for treaty-making, codify practice on how treaties should be concluded, entered into force, applied, and interpreted, as well as determine the procedural rules for

35. ROSENNE, *supra* note 7, at 428-29.

36. G.A. Res. 598, U.N. GAOR, 6th Sess., Supp. No. 20, at 84, U.N. Doc. A/2119 (1952).

37. ROSENNE, *supra* note 7, at 431 (citing U.N. GAOR, 14th Sess., Annex I.65 (1959)).

38. G.A. Res. 1452, U.N. GAOR, 14th Sess., Supp. No. 16, at 56, U.N. Doc. A/4354 (1959).

39. ROSENNE, *supra* note 7, at 434.

40. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, FIRST REPORT ON THE LAW OF TREATIES; BY SIR HUMPHREY WALDOCK, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/144 (1962), and add., U.N. Doc. A/CN.4/144/Add1, *reprinted in* [1962] 2 Y.B. Int'l Comm'n 27, 80, U.N. Doc. A/CN.4/SER.A/1962, Add.1.

treaty administration. It represents a comprehensive set of principles and rules governing significant aspects of treaty law.<sup>41</sup>

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

The Vienna Convention defines a reservation as “a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>42</sup> Echoing the Genocide Convention language, Article 19 allows states to include reservations in their acceptance of treaty obligations, unless the treaty itself expressly forbids reservations or the reservation is incompatible with the object and purpose of the treaty.<sup>43</sup> Article 20 outlines the rules for accepting and objecting to reservations. It differentiates between types of treaties,<sup>44</sup> but for the majority, if State B does not object to State A’s reservation, it modifies the treaty relations between the two states according to the scope of the reservation.<sup>45</sup> An objection to a reservation does not, however, automatically preclude entry into force between the two states. The objecting state must declare that it does.<sup>46</sup> Furthermore, if State B does not object to a reservation from State A within a set amount of time, its silence is construed as tacit acceptance.<sup>47</sup> Once the reservation is in place, however, Article 21 restores the balance in the relationship between the two states by declaring that the reservation is reciprocal, namely, the non-reserving state is also not bound by the provision.<sup>48</sup> Some commentators have criticized this approach as effectively eliminating the ability of states to object to reservations: under the Vienna regime, State B is left with the option of accepting State A’s reservation or not having the treaty in force at all between the two countries. Given the drastic remedy, the argument is that states have little recourse other than to accept an unpalatable reservation.<sup>49</sup> Another strategy would be to invoke good faith in negotiation as a basis for rejecting the reservation and hope that the reserving state backs down, at least as the reservation applies between the two nations.<sup>50</sup>

41. For a complete listing of all U.N. Documents covering the negotiation of the Vienna Convention, see International Law Commission, *Law of Treaties* (1998), available at <http://www.un.org/law/ilc/guide/treaties.htm>.

42. Vienna Convention, *supra* note 1, at art. 2(1)(d). For a drafting history of the definition of reservation, see UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, THIRD REPORT ON RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/491/Add.1 (1998), to be reprinted in [1998] 2 Y.B. Int’l L. Comm’n, U.N. Doc. A/CN.4/SER.A/1998/Add.1.

43. Vienna Convention, *supra* note 1, at art. 19.

44. *Id.* at art. 20(1)–(3).

45. *Id.* at art. 20(4)(a).

46. *Id.* at art. 20(4)(b).

47. *Id.* at art. 20(5).

48. *Id.* at art. 21(1)(b).

49. See, e.g., Grieg, *supra* note 2, at 322 (considering the context of a disagreement between France and the United Kingdom over reservations to the 1958 Continental Shelf Agreement and arguing that the final legal effect of protesting and accepting a reservation are the same, as long as the objecting state wants to maintain some level of obligation).

50. *Id.*



In light of the relatively liberal approach to reservations in the Vienna Convention, one might think that the number of reservations appended to multilateral treaties would be relatively high. In fact, few states actually do attach reservations to their accession to a treaty. Although the percentage of treaties with reservations rose after World War II, when reservations became more widely accepted, the high point, as of 1980, was only six percent of treaties in force.<sup>51</sup> We suggest that the reciprocity mechanism of Article 21(1) plays an important role in limiting the number of reservations. One reason may be that realization that if too many states attempt to tailor treaties precisely to parochial interests by attaching reservations, the resulting patchwork will ultimately undermine the value of the agreement itself. Something more must be involved, however, given the practical limitations to effective objection to a reservation. While the threat of a reservation may be useful as a bargaining chip in negotiations, a reservation itself is a double-edged sword because of Article 21(1) and therefore not as useful a weapon as might appear at first glance. As explained in the section below, the prisoner's dilemma game illustrates how reciprocity provides a powerful deterrent on the appendage of reservations to multilateral contract-type treaties.

#### IV.

##### TREATY RESERVATIONS AND THE ECONOMICS OF ARTICLE 21(1)

Game theory is a useful tool for understanding the effects of reciprocity on states' reservations to treaties. Signing a treaty gives a state the *option* to be bound by the treaty but until ratification, the state has no enforceable obligation to adhere to it. Absent effective contractual constraints in the pre-ratification phase, states would have a clear opportunity for strategic behavior and therefore would rationally introduce unilateral reservations at the time of ratification.<sup>52</sup> Left unconstrained, this strategy would dominate in equilibrium. To cope with this reality, basic norms of reciprocity have emerged as international law. In particular, Article 21(1)(b) of the 1969 Vienna Convention creates a mirror-image mechanism to counteract unilateral reservations.<sup>53</sup> The effects of this automatic reciprocity mechanism are similar to a tit-for-tat strategy<sup>54</sup> with the added advantage that states do not need to retaliate actively: whenever one state

51. Gamble, *supra* note 3, at 378. Recent multilateral conventions have precluded the use of reservations entirely or severely limited them. This reflects the same calculus, however: although the Vienna Convention allows reservations, states find it in their interest to give up use of that mechanism. See *infra* Part V. For examples of multilateral treaties that prohibit or limit reservations, see, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, reprinted in 33 I.L.M. 81,110 (1982); Kyoto Protocol, Dec. 10, 1997, reprinted in 37 I.L.M. 22, 42 (1998); Marrakesh Agreement Establishing the World Trade Organization, art. XVI(5).

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

53. The specific language is as follows: "Legal Effects of Reservations and of Objections to Reservations: A reservation established with regard to another party . . . modifies those provisions to the same extent for that other party in its relations with the reserving state." Vienna Convention, *supra* note 1, art. 21(1)(b).

54. See *infra* note 59 and accompanying text.

modifies a treaty unilaterally in its favor, the reflexive result will be a *de facto* across-the-board introduction of an identical reservation against the reserving state. In the following section, we will illustrate how, by imposing a symmetry constraint on the states' choices, this rule offers a possible solution to prisoner's dilemma problems.<sup>55</sup>

#### A. Prisoner's Dilemma, Reciprocity and Incentive Alignment

Given a perfect alignment of incentives, no state would want to introduce unilateral reservations, nor would it have a reason to fear that other signatory states would introduce them. In such an ideal world, stable treaty relationships of mutual cooperation would preclude the need for international treaty reservations and the equilibrium would converge towards mutually desirable outcomes. Because strategies that maximize an individual state's expected payoffs would also maximize the interest of other states, no player would have any reason to challenge the emerging equilibrium. The perfect alignment of states' incentives can be either endogenous or exogenous. In the former case, signatory states naturally find themselves in such a heavenly relationship.<sup>56</sup> In the latter case, outside constraints induce the parties to behave "as if" their incentives were perfectly aligned, thereby overcoming any underlying conflict of interests.

The Article 21(1) reciprocity constraint is an important example of such exogenous force because it shapes states' strategic choices. Although each player can cause the joint enterprise of the international agreement to fail by defecting (that is, by introducing reservations), no state can, in fact, obtain the unilateral reservation payoff. Withholding complete ratification of the treaty triggers a mirror-image reduction in the other states' implementation of the treaty with respect to the reserving state. Under most circumstances, this reciprocity mechanism prevents unilateral defection and free-riding strategies from dominating in equilibrium because states can only *reduce* the anticipated benefit of the treaty for other states, and, by doing so, for themselves. In the end, the unilateral veto effect of the reciprocity rule only creates an illusion that the agreement is fragile; in reality, it makes the negotiated cooperative solution more robust.

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55. In the classic prisoner's dilemma scenario, two perpetrators are arrested by the police and held in isolation from each other. If neither confesses, the D.A. will have to cut a favorable plea bargain in which each will serve one year in prison. If one confesses and the other does not, the silent one will receive a ten-year sentence and the confessor will go free. If both confess, then both will receive a five-year sentence. Although it would be in their interest to keep quiet, neither can trust the other not to try to opt for the best deal by confessing, and therefore they will inevitably end up with five year sentences, a less than optimal outcome for both. ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 17-19 (Blackwell Publisher 1994).

56. The perfect alignment of individual interests, however, rarely occurs in real life situations. In the absence of proper enforcement mechanisms, even a Pareto improving exchange opportunity creates a temptation for shirking and ex post opportunism. When shirking and post-contractual opportunism becomes a dominant strategy for one or both players, the exploitation of opportunities for mutual exchange becomes difficult or unobtainable. See Anthony Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORG. 1, 5 (1985).

However, we should point to the important fact that, while the principle of reciprocity of Art. 21(1) solves conflict situations characterized by a prisoner's dilemma structure (in both symmetric and asymmetric cases), reciprocity is, on its own, incapable of correcting other strategic problems. Reciprocity constraints are effective only if there are incentives for unilateral defection. As will be discussed below, reciprocity will be ineffective in other strategic situations (for example, asymmetric cooperation games, Battle of the Sexes games, and pure conflict situations).

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

Reciprocity constrains states' action. The well-known prisoner's dilemma game illustrates in interesting ways how Article 21(1) can influence states' incentives related to treaty ratification because it aptly depicts the ratification problem faced by sovereign states. Unlike the atomistic world of non-strategic economics, the ability to introduce unilateral reservations may produce sub-optimal equilibria. Game theory teaches that such strategic problems result when players are only allowed to choose strategies, but cannot single-handedly determine outcomes, as in our situation when states can only choose their level of ratification and cannot unilaterally compel full ratification by the other states. If there were no reciprocity constraints, each state would try to gain national advantage by accessing the unilateral reservation payoffs through introducing unilateral reservations, thereby submitting to the temptation to defect from optimal strategies. The combined effect of such unilateral strategies would generate outcomes that are not Pareto optimal<sup>57</sup> for all states, as in the classic prisoner's dilemma setting.

By eliminating access to asymmetric outcomes of the game, Article 21(1) induces states to choose ratification strategies that take into account the reality of reciprocity, namely that the reward for unilateral defection is unobtainable. As a result, no rational state would employ defection strategies (unilateral reservations) in the hope of obtaining higher payoffs, nor would it select reservation strategies as a merely defensive tactic. Automatic reciprocity mechanisms thus guarantee the destabilization of mutual defection strategies and the shift toward optimizing cooperation in the ratification of international treaties.<sup>58</sup>

This mechanism of automatic reciprocity produces effects that are similar to a tit-for-tat strategy without any need for active retaliation by other states.<sup>59</sup>

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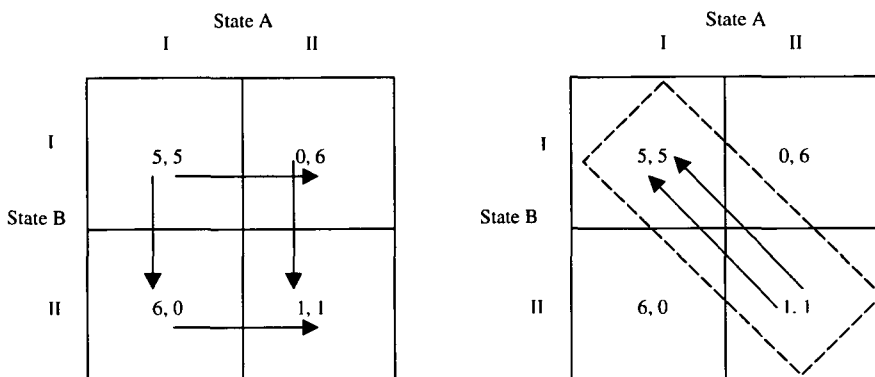
57. Pareto optimal refers to the condition in which players have achieved an optimal allocation of benefits in reference to each other. Once in a Pareto optimal allocation, no player can move to increase his advantage without putting another player in a less desirable position. Conversely, a Pareto superior opportunity allows a welfare improvement for at least one party, with no prejudice for the other parties.

58. For a similar argument relying on tit-for-tat strategies in iterated games, see R. M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); R.M. Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 306-307 (1981).

59. The tit-for-tat strategy can be undertaken in repeated prisoner's dilemma games. According to the tit for tat strategy, in round one, Player A undertakes a cooperative strategy. In round two, Player A continues the interaction with his opponent undertaking the same strategy that his opponent, Player B, chose in round one. Under certain conditions, this may facilitate cooperation be-

Whenever one state makes a unilateral modification in its own favor, it will be as if all the other states had introduced an identical reservation against the reserving state. This rule imposes a symmetry constraint on the parties' choices and offers a possible solution to prisoner's dilemma problems. In Figure (1) the equilibrium obtained in the absence of reciprocity (left matrix) is contrasted with the outcome induced by a reciprocity constraint (right matrix).

FIGURE (1): RECIPROCITY CONSTRAINT FOR A TREATY RATIFICATION PROBLEM WITH SYMMETRIC STATES



For the sake of graphical clarity, Figure (1) depicts the simplest scenario of two states faced with a ratification problem, although the results also hold in the more complex case of multilateral treaties described in the present paper. In Figure (1) we consider the choices of two states faced with a treaty ratification problem. Both states have a choice between strategy I, full ratification, and strategy II, unilateral reservation. The payoffs for State A's choices between two strategies (strategy I and II) are marked on the right side of each of the eight boxes. Likewise, State B's choices between strategy I and II, are marked on the left side of each of the eight boxes.

As shown by the payoff matrix on the left, in the absence of a reciprocity constraint similar to the one introduced by Article 21(1) of the Vienna Convention, each state would be better off, winning six points, if it were able to obtain the ratification of the other state, while introducing a unilateral reservation itself. Thus, as shown by the direction of the arrows, the Nash strategies<sup>60</sup> of the par-

tween the players since Player B will lose in the second round whatever advantage he might have had over Player A in the first round. For instance, if Company A prices candy bars at seventy-five cents and Company B sells them for seventy cents, Company A will then lower its price. Company B either has to sell at a greater loss or give up its advantage and settle on seventy cents as the price. For a brief explanation see Robert Shenk, *Tit for Tat*, available at <http://ingrimayne.saintjoe.edu/econ/IndividualGroup/TitForTat.html> (last accessed Oct. 8, 2002). See generally AXELROD, *supra* note 58.

60. A party's Nash strategy is the conditional best response to the opponent's choice of strategy (i.e., it is the strategy that will make the player better off than all other courses of action, given the opponent's move).

ties tend to produce the outcome that both states introduce reservations, which in turn yields the lowest aggregate payoff for the two states (1, 1). Indeed, both states face dominant strategies of unilateral reservation (that is, reservation is the best response to the other state's action under all conditions). Similar to a prisoner's dilemma, this yields a single Nash equilibrium<sup>61</sup> of bilateral defection. In our context, the equilibrium would be characterized by mutual reservations of all states.

The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. By eliminating access to asymmetric outcomes, reciprocity compels a party to take into account the effect of the opponent's reciprocal choice when selecting its own optimal strategy. In this way, the dominant strategy of attaching reservations, obtained in the absence of reciprocity, is transformed into a dominant strategy of full ratification, producing optimal levels of treaty ratification for the signatory states (5, 5).

## V.

### TREATY RESERVATIONS IN PRACTICE: THE ICJ AND THE ENFORCEMENT OF RECIPROCITY

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

#### A. *Norwegian Loan Case*

In considering cases related to reservations, the ICJ has raised the price of attaching one to a treaty and thus perhaps discouraged their use. The concept of reciprocity has played an important role in this, as the ICJ has been generous in allowing others states to take advantage of an exception insisted upon by a particular signatory. For instance, in *Certain Norwegian Loans*, Norway was able to use a French reservation to argue successfully to the ICJ that it did not have jurisdiction to hear a dispute between France and Norway over repayment of loans that Norwegian banks made to France.<sup>62</sup>

Both France and Norway had submitted to the jurisdiction of the ICJ, but with differing declarations. Specifically, the French added the following reservation to its declaration: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."<sup>63</sup> As Norway took the position that the resolution of the loan repayment dispute was a question governed by munici-

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

62. *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9, 11 (July 6).

63. *Id.* at 23. It is worth noting that the validity of the reservation itself was not in doubt, although it did aim to circumscribe the jurisdiction of the Court and therefore perhaps enter the zone of the "essential function" of the Statute creating the court, as envisioned in the Genocide Advisory Opinion. *Id.* at 27.

pal, not international, law,<sup>64</sup> it sought to avail itself of the French reservation blocking the ICJ from considering questions within national jurisdiction. Accordingly, it insisted that, although it "did not insert any such reservation in its own Declaration. . . it has the right to rely upon the restrictions placed by France upon her own undertakings."<sup>65</sup> The ICJ agreed that the basis of its jurisdiction was the voluntary, reciprocal submission of the parties, and so "consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation."<sup>66</sup> Accordingly, Norway, taking advantage of France's reservation, could shield from the ICJ a dispute with France that Norway felt was in the purview of its national jurisdiction, although it originally has not restricted the scope of its participation in the ICJ.<sup>67</sup>

### B. *The Interhandel Case*

Shortly after the Norwegian Loans case, the ICJ set down the guiding principle for handling reservations to submission to its jurisdiction. In *Interhandel*, a dispute between the United States and Switzerland over unfreezing Swiss assets after World War II,<sup>68</sup> the ICJ found that "[r]eciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration."<sup>69</sup> This would seem to be in keeping with the Pan-American Rule, later reflected in Article 21 of the Vienna Convention, that a reserving state must share the advantage that it is trying to preserve within the framework of its bilateral relations with other parties to the treaty. The ICJ went further, however, by limiting the benefit of the reservation to the other states, rather than the reserving state. The United States had limited its submission to the jurisdiction of the ICJ to disputes arising after the treaty entered into force; Switzerland did not have any such restriction.<sup>70</sup> The United States tried to argue that because Switzerland *could* have invoked the reservation against the United States to avoid the jurisdiction of the court, as Norway did against France, that the United States should, under the reciprocity principle, be able to claim lack of jurisdiction based on the date of the dispute.<sup>71</sup> The ICJ rejected that argument:

Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in

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64. *Id.* at 22.

65. *Id.* at 23.

66. *Id.*

67. *Id.* at 24.

68. *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21).

69. *Id.* at 23.

70. *Id.* at 14-15.

71. *Id.* at 23. This was an issue because the ICJ rejected the primary U.S. argument that the dispute had arisen before the U.S. had submitted to the compulsory jurisdiction of the court. *Id.* at 21.

this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.<sup>72</sup>

In short, the effect of a reservation cannot bounce back to the reserving state simply because the other party has the option of availing itself of the limitation. Seen against the backdrop of the Advisory Opinion effort to prevent reservations that would contradict the "essential object of the treaty," the ICJ wanted to limit the natural tendencies of states to hedge their submission to the jurisdiction of the Court when another state was trying to press its case.

## VI.

### THE LIMITS OF RECIPROCITY AND EMERGING PROBLEMS IN TREATY RESERVATIONS

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

States often find themselves with asymmetric treaty interests at the time of treaty ratification. This enables states to calculate how they and other nations will benefit from the agreement. If there is no uncertainty about the effects of treaty terms, then the costs and benefits of attaching reservations become much clearer. In such situations, states may face incentives for unilateral reservations, in spite of reciprocity constraints. We suggest that the principle of reciprocity, while solving conflict situations characterized by a symmetric prisoner's dilemma structure, may by itself be incapable of correcting other strategic problems. In spite of the reciprocity constraint of Article 21(1), states can find it valuable to introduce reservations that impose asymmetric costs and benefits on the various participants.

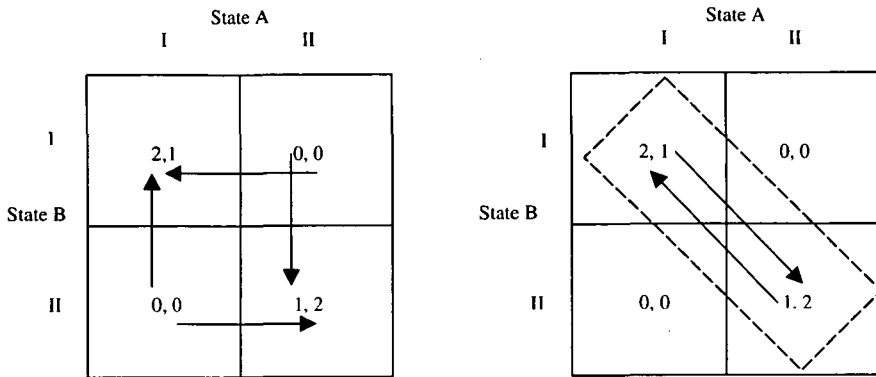
Reciprocity constraints are, indeed, effective only in those cases that generate incentives for unilateral defection. Figure (2) illustrates a situation where reciprocity is ineffective. The matrix depicts a Battle of the Sexes game,<sup>73</sup> but the same conclusion would hold for a pure-conflict (zero-sum) situation.<sup>74</sup> This figure again presents the simplest scenario of two states faced with a ratification problem, although here too the results hold in the more complex case of multi-lateral treaties, considered in the present paper. For example, this scenario could illustrate a treaty for the coordination of communication or transmission frequencies. If states do not coordinate, but rather choose to depart unilaterally from the treaty regime, they will literally not be able to communicate, and no one will benefit. Coordination is paramount, but states have different preferences on how to cooperate, given differing national technological standards and infrastructure.

72. *Id.* at 23.

73. In the classic Battle of the Sexes scenario, the husband wants to go to a sporting event and the wife to the opera, yet both want to spend time together. There is no uncertainty in this situation, yet also no solution that will avoid some loss of enjoyment for one of the parties (either one will have to go to an unenjoyable event or both will have to forego the pleasure of each other's company). RASMUSEN, *supra* note 55, at 25-26.

74. A zero sum game is one in which players are competing for a finite number of resources; a gain by one necessitates a loss by another.

FIGURE (2): A CASE OF INEFFECTIVE RECIPROCITY



In Figure (2) we illustrate the choices of two states faced with such a treaty ratification problem. For both states, strategy I represents a choice of full ratification, while strategy II represents a choice of unilateral reservation. Recall that State A chooses between strategies I and II, yielding the payoffs marked on the right side of each of the eight boxes. Likewise, State B chooses between those two strategies, attempting to maximize the payoffs marked on the left side of each of the eight boxes. The payoff matrix on the left shows the states' optimal strategic choice in the absence of the reciprocity constraint found in Article 21(1) of the Vienna Convention. Similar to a Battle of the Sexes game, this mixed coordination and cooperation problem yields multiple Nash equilibria. The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. The reciprocity constraint introduced by such a rule eliminates the possibility of asymmetric outcomes and compels each party to take into account the effect of the opponent's reciprocal choice. Yet, Figure (2) illustrates the limits of the reciprocity, as, despite its restraining force, both scenarios produce identical results.

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

### B. *Asymmetric Reservations and the Concept of the "Package Deal"*

When states discover during treaty negotiations that they have asymmetric interests, they have an opportunity to introduce reservations that, in spite of the reciprocity constraint of Article 21(1), would create asymmetric costs and benefits for the various participants. For example, a state that has extensive coastlines may have a different substantive interest in the definition of territorial water limits than states with coastlines of average length. Likewise, a state with



uniquely configured coastal contours may have different preferences than the majority with respect to rules defining bays, straits, archipelagoes, and so on. This limitation in constraining the strategic action of states explains the emergence of the concept of the “package deal” to ensure ratification of treaties involving multiple states with substantially different underlying interests. Articles 309 and 310 of the Law of the Sea Convention offer an important illustration of this concept.<sup>75</sup>

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

Until the late nineteenth century, the law of the sea operated on the basis of customary norms, but the trend towards codification influenced it as well. Milestones in this process included the Hague Codification Conference of 1930, the Geneva Conventions of 1958 and finally the United Nations Convention on the Law of the Sea, which ended with a Convention text in 1982 that largely reflects existing customary rules pertaining to the law of the sea.<sup>76</sup>

Although the Convention itself may reflect customary international law, the negotiations demonstrated an important shift towards treaty drafting by consensus. The General Assembly set the tone with a resolution recognizing that the main issues, such as territorial waters, the continental shelf, and the ocean floor beyond national jurisdiction are “closely linked together,” leading to the concept that they should all be treated as a “package.”<sup>77</sup> The final clauses of the treaty enshrined this consensual approach. Nations saw this part of the treaty that regulated procedural matters including the approach towards reservations, as critical for preserving the integrity of the Convention.<sup>78</sup> A report of the Australian delegation noted that solution on the substantive issues and agreement on the prohibition on reservations were linked, as states were not willing to give up the latter until they were convinced that they had secured every advantage in the former.<sup>79</sup> Although states attempted to use the final clauses as a bargaining chip to secure favorable language in the substantive provisions, there was an underlying understanding that, in the end, acceptance of the treaty would have to be an all or nothing proposition.<sup>80</sup> The United States was even more direct: “Since the Convention is an overall ‘package deal’. . . to permit reservations would inevitably permit one State to eliminate the ‘quid’ of another State’s ‘quo.’ Thus

75. United Nations Convention of the Law of the Sea, Dec. 10, 1982, art. 309-310, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982) [hereinafter *Law of the Sea Convention*], available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (last visited Nov. 8, 2002).

76. Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT’L L. 871, 871 (1985).

77. G.A. Res. 2574A, U.N. GAOR, 24th Sess., Supp. No. 30, at 10, U.N. Doc. A/7630 (1969), quoted in Caminos, *supra* note 76, at 874.

78. Department of Foreign Affairs, *Report of the Australian Delegation*, 3d UN Conference on the Law of the Sea, 9th Sess., at 25 (1980).

79. *Id.* at 25-26.

80. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: the Ninth Session*, 75 AM. J. INT’L L. 211, 248 n.172 (1981).

there was general agreement in the Conference that in principle reservations could not be permitted."<sup>81</sup>

A 1979 President's note outlining the discussion at an August 1 informal plenary also drew the link between the substantive provisions of the treaty and states' willingness to give up the right to append a reservation. Describing the realization of the delegates that the question of reservations was both "delicate" and "complicated," the report captured the consensus that the "basic and overriding policy" would be to preserve the "package deal," which could be fatally undermined by allowing a wide range of reservations.<sup>82</sup> Discussion ensued on how best to achieve that objective. A 1976 Report by the Secretary General listed four options for handling reservations.<sup>83</sup> The informal plenary discussed the possibility of allowing reservations under limited circumstances, although no state specified to what provision it might attach a reservation.<sup>84</sup> The current of the discussion ultimately ran against allowing reservations, however. For instance, concerns were raised about permitting reservations "not incompatible with the treaty," because there was no agreed mechanism for determining which reservations would meet that standard.<sup>85</sup> Other arguments for not allowing any reservations centered around the unique character of the Convention as a whole and a variety of global policy considerations.

In the end, Ambassador Jens Evensen from Norway, the chief drafter of the Final Clauses, followed the Convention's overall approach of negotiation by consensus to introduce a draft text of a one paragraph prohibition on all reservations: "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."<sup>86</sup> This approach mirrored the general agreement among the states that they would have to accept the good and bad of the Convention because the "rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations."<sup>87</sup> It does not appear that this approach precluded participation in the treaty itself because the question of reservations barely appeared in the official declarations that were made

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81. REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 449 (Myron Nordquist & Choon-ho Park eds., 1983).

82. President's Note, Informal Plenary on Final Clauses, FC/6 7 Aug. 1979.

83. 1) allow no reservations; 2) allow reservations only on specific provisions of the treaty, thereby balancing the need for consensus with the rights under the Vienna Convention to apply reservations; 3) designate a limited number of provisions to which reservations may be attached; or 4) include no provisions on reservations, allowing Article 19 of the Vienna Convention to be the default position. Third U.N. Conf. on the Law of the Sea Off. Records at 125-27. Another suggestion was to preclude reservations for twenty-five years after the treaty went into force and then to hold a review conference to identify which provisions could be accepted as customary international law or integral parts of package deals. President's Note, *supra* note 82, paras. d-e.

84. President's Note, *supra* note 82, para. e.; Department of Foreign Affairs, *supra* note 78, at 26.

85. Presidential Note, *supra* note 82, para. f.

86. Jens Evensen, *Wrapping Up the UNCLOS III 'Package': At Long Last, the Final Clauses* 20 VA. J. INT'L. L. 347, 365 (1980); Law of the Sea Convention, *supra* note 75, art. 309.

87. Statement of Tommy Koh, President of the Third Conference of the Law of the Sea, quoted in Caminos, *supra* note 76, at 886.

after the negotiations were concluded.<sup>88</sup> Even the United States did not mention the reservation issue, in spite of the fact that more flexibility might have induced the Reagan Administration to change its policy and sign the Convention.<sup>89</sup> Finally, 157 states signed the Convention, certainly a strong turn-out, 35 of which added declarations. The treaty entered into force on November 16, 1994, and currently has 137 ratifications, 50 of which include some sort of declaration.<sup>90</sup>

Although the language of Article 309 prohibiting reservations mirrors the approach of the treaty as a whole, the states did preserve the right to attach declarations and other indications of national understanding of the treaty and its ramifications. Article 310 allows states to make declarations explaining the integration of their "laws and regulations . . . with the provisions of [the] Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of [the] Convention in their application to that State."<sup>91</sup>

There was some concern that states would use Article 310 as a vehicle to declare reservations to the treaty under another label, thereby winning for themselves an advantage without the restraint that the principle of reciprocity offers in a straightforward reservation. Where the admonition of the President of the Convention was gentle,<sup>92</sup> the warning of the delegate from the Ukrainian Soviet Socialist Republic was blunt: "we are going to object categorically to the proposals aimed at amending by any pretext the provisions of the Conventions . . . the Ukrainian S.S.R. will abstain from the declarations provided for in Article 310 of the Convention. We expect the same approach from other delegations."<sup>93</sup> An analysis of the declarations themselves, done five years after the treaty was completed, revealed that few of them could be interpreted as reservations in fact, if not in form; few appeared to have the potential to change the legal effect of the treaty itself.<sup>94</sup> It appears that Article 310 fulfilled its purpose as a platform for national interpretations of the treaty, but that the basic commitment was to preserving the terms of the treaty in their entirety, showcasing the general understanding that individual state interest on specific items would have to be set aside in favor of a consensual comprehensive regime.

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

89. Gamble, *supra* note 88, at 631.

90. STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (2002), available at [http://www.un.org/Depts/los/reference\\_files/status2002.pdf](http://www.un.org/Depts/los/reference_files/status2002.pdf) (last visited Oct. 10, 2002).

91. Law of the Sea Convention, *supra* note 75. For a discussion of these declarations, finding that about a dozen of the 146 declarations may, in fact, cross the line into de facto reservations, see Gamble, *supra* note 88, at 644.

92. Statement by Tommy T.B. Koh, President, 185th meeting, held 6 Dec. 1982 in Vol. 17 Third United Nations Conference on the Law of the Sea Official Records, U.N. Press Release SEA/MB/1/Rev.1, Dec. 6, 1982, at 6.

93. Statement by V.N. Martynenko, Chairman of the Ukrainian S.S.R. Delegation, made at the Law of the Sea Convention Plenary Session of Dec. 7, 1982, at 3, *quoted in* Gamble, *supra* note 88, at 630.

94. Gamble, *supra* note 88, at 630.

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

### C. *The Irrelevance of Reciprocity in Human Rights Conventions*

Although reciprocity is a fundamental principle of international law that governs treaty relations between states, it does not form the foundation for human rights treaties. These conventions do not represent agreements among states, but often amount instead to unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens.<sup>95</sup> A human rights treaty often nets the signing state little in concrete benefits. It is instead an assumption of obligations for purposes of prestige. As a result, the mechanism of reciprocity is not a direct factor in the implementation of such treaties.<sup>96</sup>

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95. Curtis Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, CHICAGO PUBLIC LAW AND LEGAL WORKING PAPER No. 10 at 2-3 (2000); *Report of the International Law Commission on the Work of its Forty-Ninth Session*, para. 69, U.N. Doc. A/CN.4/483 (1998) (expressing the view of some states that human rights are not based on reciprocity and therefore are beyond the scope of the Vienna Convention); *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 8 (1994) (stating that "(a)lthough treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction"). See also *id.* at para. 17 (declaring that "the principle of inter-State reciprocity has no place" in the human rights context).

96. The ICJ drew this distinction in *Barcelona Traction*, when it considered whether Belgium had the right to press for compensation for shareholders of a Canadian company who were Belgian nationals. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5). The ICJ distinguished between the "obligations of a State towards the international community as a whole," and those arising out of bilateral relations between states. *Id.* at 32. In the latter case, a state must demonstrate a basis for a right to bring action against another state in a dispute. The court listed as examples of such universal obligations "outlawing of acts of aggression, and of genocide, . . . [and enforcement of] rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." *Id.* Because of the importance of these objectives, they are "obligations erga omnes" and all states have the legal authority to bring action against other states that violate them. The basic reciprocal nature of treaty rights breaks down and nations ratify, or encourage enforcement, of treaties based on political calculations and value judgments, rather than the desire to maintain the status quo through recognition of bilateral rights and responsibilities. See,

Because of this essential difference, the circumspection with which countries approach reservations in the context of contractual treaties does not hold in the arena of human rights conventions. For instance, the Convention on the Elimination of Discrimination Against Women, although negotiated and adopted very quickly, came into force with at least 23 of 100 states attaching a total of 88 significant reservations.<sup>97</sup> The International Covenant on Civil and Political Rights met with a similar reaction, as 46 states attached 150 reservations to the treaty by November 1, 1994.<sup>98</sup> Resistance to human rights treaties is not limited to non-democratic countries. The United States ratified the Covenant on Political and Civil Rights but attached five reservations, as well as some understandings and declarations, to the twelve Articles of the agreement, essentially insulating itself from any obligation to change its laws to comply with it.<sup>99</sup>

By their very nature, human rights treaties touch on sensitive cultural issues, meaning that states may hesitate to object to a reservation for fear of causing unnecessary tension in existing bilateral relationships.<sup>100</sup> The focus is on a state's individual actions and the extent to which it meets international standards, or fails to do so, so that other states generally do not have a vested interest in policing how closely a reserving state is respecting the letter of the convention.<sup>101</sup> Although states may object to a reservation, each convention has an international body that is responsible for monitoring implementation, although it does not have any enforcement powers in the event it determines that a reservation is incompatible with the intent of the treaty.<sup>102</sup>

As a result, states generally do not hesitate to attach reservations to ratifications of human right treaties. While reciprocity forces states to assess the pluses and minuses of attaching reservations in a contractual setting, acting as a general deterrent for reservations, this mechanism is absent in the human rights arena. This leads to obvious abuses of the system and reservations that are arguably contrary to the object and purpose of the treaty in violation of the Vienna Convention prohibition against reservations.<sup>103</sup> The United Nations has been grap-

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*e.g.*, the Nuclear Tests cases and the East Timor Case, in which Australia and Portugal, respectively, asserted the right to represent the international community in a dispute.

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

98. *General Comment on Issues Relating to Reservations*, *supra* note 95, at para. 1.

99. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1289-90 (1993). See also Louis Henkin, *Comment: U.S. Ratification of Human Rights Conventions: the Ghost of Senator Bricker*, 89 A.J.I.L. 341 (1995) (urging that the United States be less restrictive in its ratification of human rights treaties).

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

101. Baylis, *supra* note 24, at 312.

102. See also *Report of the International Law Commission*, 48th Sess., ch. 6, para. 129-32, U.N. Doc. A/51/10 (1996).

103. For references to official expressions of concern, see *Review of Further Developments in Fields With Which the Subcommission Has Been or May Be Concerned: Reservations to Human*

pling with this problem for nearly a decade with no indication that a solution is in the offing.<sup>104</sup>

The International Law Commission put the question of reservations to treaties on its agenda in 1993 and named as Special Rapporteur Alain Pellet of France, who has submitted seven reports since then.<sup>105</sup> The overall purpose of the effort is to draft a guide to practice regarding reservations, that would provide guidance on determining if a reservation is compatible with the purpose of a treaty and develop a mechanism for indicating acceptance or objection to the reservation.<sup>106</sup> Pellet rejected, however, the idea that the question of reservations to human right conventions should be handled outside the regime of the Vienna Convention.<sup>107</sup>

One impetus for the decision to review reservations practice was the attempt by the Committee on Human Rights to assign itself the responsibility of reviewing reservations to human rights treaties to determine if they were in harmony with the object and purpose of the treaty.<sup>108</sup> If they were not, the Committee asserted it would be able to disallow the reservation while still holding

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*Rights Treaties*, Subcommission on Prevention of Discrimination and Protection of Minorities, Fifty First Session, para. 1, U.N.Doc. E/CN.4/Sub.2/1999/28 (1999). See also *Review of Further Developments in Fields With Which the Sub-Committee Has Been or May Be Concerned: Views of the Six Human Rights Treaty Bodies on the Preliminary Conclusions of the International Law Commission: Report of the Secretary General*, 50th Sess., U.N. Doc E/CN.4/Sub.2/1998/25 (1998). The terms of the Vienna Convention favor the reserving state, as objecting states' only options are 1) not to accept the reservation, meaning that the provision is not in force between them or 2) declare the entire treaty not in force between reserving and objecting state. Furthermore, a state could theoretically attach a reservation to an obligation that it would otherwise have under international norms, thereby potentially circumventing this obligation. See Hylton, *supra* note 1, at 441.

104. Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* note 103, at para. 35 (describing the current debate on the use of reservations in human rights treaties as having "reached an impasse"). Although the Special Rapporteur intends to address the specific problem of human rights treaties again sometime in 2003, a parallel study has been initiated by the Commission on Human Rights, leading to a bureaucratic turf battle that promises to complicate the issue further.

105. *Seventh Report on Reservations to Treaties*, International Law Commission, 54th Sess., para. 12, U.N.Doc. A/CN.4/526 (2002).

106. *Id.* at para. 11 (noting that a full survey of the "ambiguities and gaps" related to reservations is included in the First Report on the Law and Practice Relating to Reservations to Treaties, International Law Commission, 47th Sess., A/Cn.4/470, paras. 91-149 (1995)) and para. 15.

107. Specifically, he rejected the idea of exempting human rights treaties from the Vienna Convention regime for the following reasons: (a) The Vienna regime was designed to be universal and, in fact, is derived from a ruling on a human rights treaty (see *supra* Part I(C)); and (b) no state or international body, including the Human Rights Committee in its Comment 24, had challenged the applicability of the Convention to human rights treaties and the majority of such treaties contained specific provisions outlining how reservations would be handled, providing further clarity. He acknowledged the dilemma, first enunciated in the Genocide Case, of balancing broad participation with preservation of the treaty, yet believed that the current reservations regime contained the requisite flexibility to achieve that equilibrium. He also found dispositive the fact that the drafters of the Convention had considered, and rejected, exempting normative treaties from the general reservations regime. *The Report of the International Law Commission on the Work of the Forty-Ninth Session*, U.N. GAOR, 52nd Sess., 75-76, U.N. Doc. A/52/10 (1997), available at <http://www.un.org/law/ilc/reports/1997/97repfra.htm>. See also *Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102, at para 123- 24.

108. *General Comment on Issues Relating to Reservations*, *supra* note 20, at para. 18 ("It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.").

the country in question accountable for compliance with the treaty as a whole.<sup>109</sup> While the International Law Commission has drawn the preliminary conclusion that monitoring bodies do have the authority to make that assessment, it did not accept the idea that the Committee could act unilaterally on that conclusion.<sup>110</sup> The obvious drawback to the Committee's approach is that it violates state sovereignty and the consensual basis of international treaty law because the Committee is essentially enforcing a treaty against a state in spite of its expressed unwillingness to take on that obligation.<sup>111</sup> Because the Committee was contradicting this basic premise of international law, its approach met with a great deal of protest.<sup>112</sup>

Because of the negative reaction, the declaration of a right to review reservations in Comment 24 has virtually never been tested.<sup>113</sup> In his seventh report, the Special Rapporteur referred to the increasing willingness of human rights monitoring bodies to take a more cooperative approach to working with states to ensure full compliance with the provisions of the convention.<sup>114</sup> Earlier, he had also suggested that facilitated mediation between reserving and objecting states and continued monitoring for compliance with the Vienna Convention by human rights bodies could serve as important tools for ensuring treaty compliance.<sup>115</sup> Although important activities, on their own these will not provide the answer.

If the analysis in this paper is correct, the premise of the Special Rapporteur that human rights treaties fall squarely within the framework of the Vienna Convention maybe wishful thinking from the point of view of game theory analysis.<sup>116</sup> Although undoubtedly correct as a matter of law, and supported by the

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109. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." *Id.*

110. Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195, 203 (2000).

111. *Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102.

112. For instance, the U.S. Congress attempted to cut off funding for U.S. obligations under the Covenant unless the Committee recognized the validity of U.S. reservations. Baylis, *supra* note 24, at 318.

113. The sole exception was a decision by the European Court of Human Rights, *Belilos v. Switzerland*, that adopted the Committee's logic in holding that Switzerland's reservation to the European Convention on Human Rights concerning rights to a fair trial was invalid both because it was not sufficiently specific and because Switzerland had not followed proper procedures. The Court then held Switzerland to the Convention obligations as written, in spite of the fact that it had clearly not intended to be bound to the letter of the agreement. *Belilos v. Switzerland*, European Court of Human Rights, Docket no. 20/1986/118/167 at <http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sifu/19.txt> (last visited Oct. 8, 2002). The Plaintiff had been arrested and fined by a Police Board for taking part in an unauthorized demonstration. She argued that this action violated the European Convention on Human Rights because the same municipal authority had charged, judged, and fined her in violation of the due process rights afforded her under the convention. *Id.*

114. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, SEVENTH REPORT ON RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/526 (2002) at para. 50.

115. *Report of the International Law Commission on the Work of the Forty-Ninth Session*, *supra* note 107, at 77.

116. The Special Rapporteur asserted that "problems with regard to the 'non-reciprocity' of undertakings and problems of equality between the parties were not likely to prevent the 'Vienna

majority of states, this premise ignores the critical role of reciprocity in the functioning of reservations, notably absent in the enforcement of human rights treaties in general.

Although work will continue on finding a way to reduce the number of reservations to human rights treaties, the most promising path might inject some aspect of reciprocity into the human rights protection. As illustrated above, a "package deal" approach is an effective way to ameliorate the problem of excessive reservations: expressly limiting the opportunity to make reservations in the human rights treaty itself would obviously solve the problem. The political will for such national hand-tying will come when nations begin to review the human rights conditions in other countries as vital to their own national interest. This connection has been made in a paper by Françoise Hampson, sponsored by the Subcommission on Prevention of Discrimination and Protection of Minorities.<sup>117</sup> In it, Hampson points out the essential link between promotion of human rights and international stability: "human rights norms do not exist in a legal vacuum. One of the objects of the Charter of the United Nations is the promotion of human rights and there has been increasing recognition of the link between respect for human rights and the fundamental goal of any international legal order, that of maintaining international peace and security."<sup>118</sup>

Certainly Americans now understand the importance of promoting education in Afghanistan with a clarity that would have been unthinkable two years ago.<sup>119</sup> Both the repression that allowed the Taliban to keep its grip on power and the subsequent need for Afghanistan to rebuild its economy have directly affected the interests of the American taxpayer. The National Security Strategy for the United States currently has, as its first point, the championing of human dignity around the world.<sup>120</sup> Now that the connection between human rights and national security has been made, perhaps human rights treaties will be seen less as unilateral declarations and more as tools of diplomacy to achieve international stability. Ideally, the greater engagement of states will lead to a greater alignment with the "package deal" model and, thereby, adherence to human right obligations.

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Regime' from being applicable." Although the regime may be applicable, this paper illustrates that such application is problematic. *Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102, at para 126.

117. Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* note 103.

118. *Id.* at para. 12.

119. Consider, for example, the efforts of a variety of U.S. educational associations to raise money to raise two million dollars to build on an existing effort to distribute school supplies to Afghan children. Information is available at <http://www.bluepack.org> (last visited Nov. 12, 2002).

120. National Security Strategy for the United States, at <http://www.whitehouse.gov/nsc/nss.html> (last visited Nov. 12, 2002).



## VII. CONCLUSION

Our study of the history and evolution of the law of treaty reservations has revealed conflicting policy goals. On the one hand, allowing unilateral reservations at the time of signature or ratification facilitates broad participation in major international treaties. On the other, the unconstrained introduction of unilateral reservations risks corroding the unity and cohesiveness of multilateral treaties, reducing the net benefits of treaty participation for potential signatory states.

The exceptions carved by the Vienna Convention to the default rules governing unilateral treaty reservations create the possibility of a large number of situations in which states would choose to make reservations in an uncoordinated way, leading to negative results. Although the great majority of cases covered by Articles 19-21 of the Vienna Convention favor the reserving state, it is striking that the number of reservations attached to international treaties is relatively low in spite of that natural advantage. In this Article we have tried to explain this phenomenon by positing that Article 21(1) of the Vienna Convention establishes an effective reciprocity constraint on the uncoordinated reservation choices of states: if a state wants to exempt itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

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

However, the game-theory analysis of reciprocity under Article 21 reveals that such mechanisms only guarantee a solution to symmetric strategic problems, such as when states enter into the negotiations with similar interests or when the way the treaty will affect states' future relationships is sufficiently unclear as to make their position statistically symmetrical. This analysis thus unveils the limits of reciprocity in situations where states have asymmetric interests and so have reason to introduce unilateral reservations in spite of the automatic reciprocity effect of Article 21(1)(b). In such cases, erosion of treaty

integrity may be inevitable unless the parties explicitly preclude reservations in the treaty itself.<sup>121</sup>

This analysis suggests the reason that human rights treaties have a much higher rate of unilateral reservations than other categories of treaties. Broad treaty participation is paramount, but the package deal approach does not yet provide a solution to reconciling asymmetric state interests. Human rights conventions obligate states to benefit third parties, thereby rendering the automatic reciprocity effect of reservations less effective than usual. In this scenario, the players have an irreconcilable clash of values and there is no unique equilibrium point; thus reciprocity does not offer a way out of the dilemma. Rather, the only solution is a liberal reservations regime that makes it easy for states to ratify human rights conventions, even though the unilateral reservation of one state would hardly benefit the other non-reserving states by guaranteeing the same "right" to deny human right protection under similar circumstances. In turn, our analysis suggests that only when states view human rights treaties under the "package deal" model, namely when the states see the well-being of third party beneficiaries as critical to their national interest, will states be precluded from weakening their commitment to human rights treaties.

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