

Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision

JEAN KYONGUN KOH

When a state makes a reservation to an existing or proposed multilateral treaty,¹ it takes exception to one or more provisions of that treaty.² A valid³ reservation alters the state's rights and obligations under the treaty with respect to the objectionable portion. Although reservations appear to be merely a legal technicality, a last-minute accommodation after complicated multilateral negotiations, the doctrine of reservations in fact strikes at the heart of the concept of a multilateral convention. The doctrine pits an individual state's desire to depart from the terms of the treaty against the general agreement of all parties to be bound equally by the terms of a common document.

By examining the evolution of the doctrine of reservations in this century, this Comment will explore how the successive versions of the doctrine reflect the changing conception of multilateral conventions, and will illustrate how a tiny nugget of treaty law provides a battleground for the clash between two basic opposing visions of the world: a world composed of autonomous states versus an integrated world order.⁴ This analysis⁵ will show how each version of the doctrine of

1. For purposes of this Comment, the terms "multilateral treaties" and "multilateral conventions" are used interchangeably.

2. Presumably, any exception to a treaty termed a reservation by the reserving state would be automatically considered a reservation. States hoping to avoid wrestling with the doctrine of reservations altogether often term their reservations "mere clarifications," "interpretive declarations," and the like. *Report of the International Law Commission on the Work of its Eighteenth Session*, [1966] II Y.B. INT'L L. COMM'N 172, 190; Bowett, *Reservations to Non-Restricted Multilateral Treaties*, [1976-1977] BRIT. Y.B. INT'L L. 67, 68. For purposes of this Comment, any statement fitting the definition of reservations, broadly conceived, shall be considered a reservation.

3. For purposes of this Comment, a reservation is valid if it does not disqualify the reserving state from becoming a party to the treaty. As shall be explained below, both the concept of "validity" and that of "party" will vary from system to system.

4. For purposes of this Comment, visions of the world are general pictures of international life. Cf. R. Parker, *Political Vision in Constitutional Argument* (Feb. 1979) (unpublished manuscript on file in Harvard Law School Library), at 78.

5. The methodology developed in this Comment owes a great intellectual debt to Morton J. Horwitz, Richard D. Parker, Lewis D. Sargentich, Louis B. Sohn, and Henry J. Steiner who have explored these ideas with the author in several conversations during the course of the writing of this Comment.

In addition, the methodology has been influenced by the written work of Professors Horwitz,

reservations represents a new balance struck between two competing conceptions of multilateral conventions, each of which is based on a particular vision of world society and the international legal order.

Part I describes the methodology of this analysis and outlines the nature of pure "subjective" and "purposive" views of the validity of reservations; it then describes how each of these views suggests particular visions of multilateral treaties and of international relations. Part II analyzes each of the five versions of the doctrine of reservations which have prevailed during this century and in each case derives the conflicting conceptions of multilateral treaties that each new version of the doctrine reveals. Finally, Part III, with the help of the graphical analysis presented in the Appendix, summarizes the conclusions of Part II and speculates on the implications of this analysis beyond the realm of the law of reservations.

I. METHODOLOGY AND ANALYTICAL CONCEPTS

A. First Principles

Legal doctrine⁶ is both a legal and political creature.⁷ Each legal doctrine contains a purely legal component and a purely political component and, to be properly understood, must be analyzed in terms of each. The purely legal component of legal doctrine consists of the process of systematic, rational and abstract reasoning and visions of social ordering.⁸ The purely political component consists of the struggle for power and visions of social relations.⁹ Although these ideal components

Parker, and Duncan Kennedy in British and American legal history and jurisprudence. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 209 (1980) [hereinafter cited as Kennedy, *Blackstone*]; Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351 (1973); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]; Parker, *supra* note 4.

6. For purposes of this Comment, legal doctrine consists of the rules and principles governing or proposed to govern any particular area of the law. In more colloquial terms, legal doctrine is black letter law. The Restatements and the Model Codes are examples of legal doctrine.

7. This Comment seeks to explore more precisely the widely recognized influence of politics in the creation and evolution of legal doctrine. See generally Kennedy, *Form and Substance*, *supra* note 5, *passim*; see also Kennedy, *Blackstone*, *supra* note 5, at 209-21.

8. A "purely legal vision" is a general picture of the institutional structure of order in a society. For example, the purely legal vision of the state of nature depicts no institutions and no norms structuring the society and thus no order. The purely legal vision of a world governed by one parliament passing legislation binding all world citizens depicts a world legal system integrated by sophisticated institutions and universal norms. Between these two theoretical and extreme purely legal visions of the world, one can imagine other legal visions. For instance, a third vision might reveal a world order sought through contracts among autonomous states in accordance with universal contract principles.

9. A "purely political vision" of social relations is a general picture of the nature of the relationship between individuals in a society. For example, the purely political vision of the state of nature depicts relationships of hostility and alienation among individuals. At the other extreme, the purely

do not exist in the real world, they are useful analytic tools for understanding the two distinct sets of demands placed upon legal doctrine as it seeks to function in society.¹⁰

Because it responds to the demands of pure politics and pure law, legal doctrine, although often consisting of highly specific, substantively limited norms, nevertheless reveals broad political and legal visions of the world. Doctrines of international law contain purely political components suggesting visions of the world which can be viewed on a spectrum between two poles: absolute state autonomy on the one hand and one world community on the other. The purely legal components similarly reflect visions of world ordering which can be viewed on a spectrum between two poles: absolute state autonomy on the one hand and one integrated world legal order on the other.¹¹

The doctrine of reservations to multilateral treaties, as seen in its five twentieth century versions, illustrates the way in which legal doctrine incorporates both purely legal and political elements simultaneously. In so doing, the doctrine takes on a life of its own which in turn affects the legal and political world in which it evolved.

B. *Subjectivity and Purposiveness*

To determine which legal visions of multilateral treaties and of the world legal order, and which political visions of multilateral treaties and of international relations correlate with each of the five historical positions on reservations, it is necessary to distinguish the *subjective* and *purposive* elements of each position.

A purely subjective determination of the validity of a reservation has as its sole criterion the consent of all the parties to the treaty.¹²

political vision of a world community depicts relationships of interdependence and trust among individuals. Between these two theoretical and extreme purely political visions of the world, one can imagine other political visions. For instance, a third vision might describe a society in which relationships within a certain group (e.g., a family, a state or an international organization) are characterized by amicable relations while relations between members of different groups are hostile.

10. These purely legal and purely political components must coexist in any given legal doctrine if it is to be considered legitimate. Parker, *supra* note 4, at 32 (defining "legitimacy" as the quality inspiring voluntary acceptance). For a legal doctrine to be accepted as legitimate by those it is meant to bind, it must be detached from the world enough to be objective and unprejudiced, and yet must also be sufficiently sensitive to and critical of the world to respond to concrete demands. *Id.* at 62-76. In other words, the purely legal components of the doctrine would lend it the required detachment while the purely political components of the doctrine would lend it the required sensitivity and criticism to make the doctrine relevant to the world.

11. The Appendix illustrates that in fact the political and legal spectra are not parallel but can be visualized instead as axes on a graph. See *infra* Appendix 108-16.

12. Sir Humphrey Waldock suggested this usage of the term "subjective" at the meeting of the twenty-fourth meeting of the International Law Commission in 1966, contrasting the use of an "objective criterion" with a "subjective" method which "depended on the judgment of States." *United Nations Conference on the Law of Treaties, Official Records, 1st Sess., Summary Records of Plenary Meetings and of Meetings of the Comm. of the Whole, (24th mtg. of Comm. of the Whole) at 126, U.N. Doc. A/CONF.39/11 (1968).*

Nothing short of unanimous consent can validate; nothing else can invalidate in the presence of unanimity. Thus it is easy to determine the validity of a reservation—one merely counts consenting noses.¹³ A purely subjective doctrine of reservations focuses on the form of the acceptance of the reservation to determine the reservation's validity.

A purely purposive determination of the validity of a reservation has as its sole criterion the compatibility of the substance of the reservation with the "object and purpose" of the treaty. The key factor which distinguishes the purposive validation from the subjective is the rational constraint¹⁴ placed on a state's power to consent to or oppose a reservation according to its sovereign will.¹⁵ A purposive doctrine of reservations focuses on the substance of both the reservation and the treaty to determine the reservation's validity.

13. No one inquires into the reasons for consent. In a purely subjective scheme, a state's consent is unbridled by standards or norms in any formal way. A state need explain neither its consent nor its failure to consent; its clear intention one way or another suffices. Thus, a reserving state seeking to assure validation of its reservation must attempt to persuade an objecting state to consent, using arguments relating consent to the perceived self-interest of the objecting state. Argumentation between the reserving and the objecting state is of a political rather than legal nature.

For instance, suppose in a purely subjective regime that France makes a reservation which reads "France shall be considered a party to this treaty but shall not be bound by any of its terms." All states consent. This reservation would automatically be considered valid.

14. For the purposes of this Comment, "rational constraint" is the constraint placed upon the actions of any legal person by legal doctrine. The terms of this legal doctrine restrict that person's power to take actions governed by that doctrine to the extent that the law-abiding person must be able to argue that her actions satisfy the terms of the doctrine. Thus, for instance, if a treaty contains a clause permitting certain categories of reservations and forbidding others, the reserving state must be able to argue by deductive logic or by analogy that the reservation belongs to the permitted category. Opposing states would have to argue that the reservation belongs to the forbidden category.

The "object and purpose" test and any other substantive requirement placed on reservations injects this purposive element of rational constraint. Assuming the existence of a neutral arbiter empowered to determine whether the reservation has met these substantive requirements, the unanimous consent of the parties is neither necessary nor sufficient to validate the reservation; indeed, such consent may be simply irrelevant. Thus, a reserving state seeking to assure validation of its reservation attempts to define both the reservation and the applicable standards in terms compatible one with the other. The reserving and opposing states couch their arguments in terms of interpretation of terms and the compatibility of the reservations with the applicable standards. The argumentation under an objective regime is legal.

For instance, suppose in a purposive regime that France made the same reservation as described above. *See supra* note 13. Suppose further that it is universally agreed that the object and purpose of the convention is to bind all parties equally. All states consent to France's reservation. The reservation is nonetheless considered invalid.

15. Evidently, a reservation's validation can never be completely subjective nor completely purposive. It can never be perfectly subjective because the mere concept of a treaty always contains a purposive element of rational constraint in the treaty terms themselves. A treaty represents the parties' agreement to bind themselves by its terms; though subjectively conceived, the treaty once in existence acts to constrain rationally the will of the parties. Since reservations always occur in the context of a treaty, it inherits that purposive element, for even if it is validated subjectively by the unanimous consent of all the reacting parties, each of those parties is bound into the future by the terms of the reservation.

A reservation's validation can also never be completely purposive simply because a completely purposive treaty would not allow reservations. If a treaty were completely purposive, so that the object and purpose pervaded every provision, no reservation could be made that would be compatible with

The purposive and subjective perspectives on reservations each imply distinct views of the essential nature of a multilateral convention. The subjective view of reservations implies a conception of the multilateral convention analogous to the classical nineteenth century "will theory" of contract.¹⁶ The purposive view of reservations implies a conception of the multilateral convention as a normative document for the world community somewhat analogous to domestic legislation.¹⁷

A subjective view of reservations and of the multilateral treaty rests ultimately on the sovereign right of states to control their own destinies unfettered by outside institutions or standards. A purposive view of reservations and of the multilateral treaty derives ultimately from the fact that the parties seek a shared interest that gives meaning and purpose to the treaty. A subjective view of multilateral treaties entitles states to make reservations with the consent of the other parties. A purposive view of multilateral treaties allows states to agree to modify the convention by reservation on the condition that the reservation furthers or at least does not adversely affect the purposes of the treaty.

These two views of multilateral conventions correspond in theory with political visions of international relations and legal visions of the international legal order. The pure subjective view of reservations and

that object and purpose. Moreover in such a purely purposive treaty, the will of the parties would be completely irrelevant and the rationale for reservations—the accommodation of any particular state's disagreement with specific terms of the treaty—would command no respect. Because the concept of a reservation itself assumes that some value has been placed on the will of an individual state, a reservation would have no meaning in a purely purposive regime.

16. See, e.g., M. HORWITZ, *supra* note 5, at 180-88. Just as consent of the individuals created a contract regardless of the adequacy of consideration, relative bargaining power, or any other manifestation of public policy choices, so consent of states creates a convention by joining the sovereign wills of all the participating parties. In this view, the intervention of an outside body into the making or execution of that subjectively conceived convention—an international court or other supranational body—constitutes an unjustified intrusion on the sovereignty of states and is thus inconsistent with the value of state autonomy.

17. In a purposive multilateral convention, the exercise of state sovereignty is constrained by standards agreed to by all the states. The multilateral convention, just as domestic legislation, may be viewed as explicitly serving a common need of all the parties. Cf. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, 76, 81 (Pearson ed. 1952). It makes sense in the purposive view to speak of "the object and purpose" of the treaty because the treaty is presumed to have one; much as United States legislators are considered to have a discernible "legislative intent." See, e.g., H. Hart & A. Sacks, *The Legal Process* 1413-16 (tent. ed. 1958) (unpublished manuscript on file in the Harvard Law School Library); *but see* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 900 (1982) ("judicial reliance on legislative purpose... is now perceived as usurpation of legislative power"). See also *id.* at 892 n.5. In contrast, contracts may or may not have a purpose shared by the parties. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357-8 (1978). Although in reality it may be clear that individual, separately conceived intents may have spawned the particular convention, in general the assumption has been made that there is at least one pre-eminent shared goal. See generally J. BENTHAM, *THE THEORY OF LEGISLATION* (Ogden ed. 1931); H. Hart & A. Sacks, *supra* at 1413-16; *but see infra* note 66. Often a convention itself states explicitly, if generally, an object and purpose of the endeavor.

of multilateral conventions implies a political order of autonomous, sovereign states. This world of autonomous states is safeguarded by a legal order consisting primarily of multilateral treaties functioning as contractual agreements among the states. The pure purposive view of reservations and of multilateral conventions corresponds to a vision of a world community, based on shared norms and attitudes resembling those of a domestic society. Such a vision suggests an integrated legal system unifying the world community, premised on shared norms and "legislated" through multilateral conventions.

C. *Permissibility and Opposability*

The five historical positions on the validity of reservations shall be examined in light of three criteria. First, the permissibility¹⁸ of a reservation, defined here as the extent of rational constraint upon the reserving state's ability to reserve effectively, shall be examined. Permissibility depends on substantive criteria stated in legal terms. Permissibility is the purely legal component of any historical position on reservations.

Second, the opposability¹⁹ of a reservation shall be examined. Opposability is here defined as the degree to which the rights and obligations of the reserving state are dependent upon the actions of the reacting states. Opposability depends on formal criteria, which prescribe the role of consent and the forms in which it may be manifested. Opposability is the purely political component of any historical position on reservations because it measures the interaction between the reserving state and the reacting states. Permissibility and opposability together form the test for the validity of a reservation.

Third, the legal effects of both valid and invalid reservations on the rights and obligations of the reserving states and on its relations with other parties shall be examined.

D. *Summary of Methodology*

The presence of permissibility and opposability requirements in each of the five versions of the doctrine of reservations reveals a mixture of legal and political elements within the particular version. These elements suggest that each version contains two conceptions of a multilateral treaty. These conceptions of multilateral treaties in turn

18. D.W. Bowett apparently originated the "permissibility/opposability" terminology. Bowett, *supra* note 2, *passim*. Bowett considered permissibility the "legal" element of the analysis. *Id.* at 81. His approach has been expanded herein to facilitate the comparison of the various twentieth century versions of the doctrine, so that permissibility now represents the rational constraint on a reserving state's power to make a reservation.

19. Bowett considered opposability the "policy" aspect of the analysis. *Id.* at 87. This concept has also been expanded for purposes of this Comment, so that it now represents the extent to which the rights and obligations of the reserving state are dependent upon the actions of the reacting states.

correspond to visions of the proper international legal framework and of world society. For a version of the doctrine of reservations to be internally consistent, the political visions of multilateral treaties and world society must match the legal vision of multilateral treaties and the international legal framework. Thus an imbalance between the permissibility and opposability criteria within any version of the doctrine signals not only a technical inconsistency but also ultimately a basic failure of the law to prescribe what role multilateral treaties are to serve and in what world society and international legal framework they are meant to function.

II. THE FIVE MAJOR VERSIONS OF THE DOCTRINE OF RESERVATIONS

A. *The Pre-League Practice and the League System*

Before the creation of the League of Nations, it was an established customary rule of international law that a reservation to a multilateral convention had to be accepted by all the signatory states in order to be an admissible reservation and for the reserving state to be considered a party to the treaty.²⁰ The Assembly of the League of Nations adopted a resolution in 1931 which declared that "a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention."²¹

The pre-League and League versions of the doctrine of reservations seem almost identical to each other and to the pure subjective system of reservations discussed above.²² Certainly by the third criterion—the legal effects of a valid reservation and an invalid reservation—the subjective system, the pre-League view, and the League view are indeed identical. In all three views, a valid reservation renders the reserving state a party to the treaty with its rights and obligations in relation to all the other signatory states modified to the extent of the reservation. An invalid reservation which the reserving state refuses to withdraw prevents the reserving state from becoming a party to the treaty.

Although their legal effects are the same, the pre-League system and the League system each describe a different interaction between the criteria of permissibility and opposability. The pre-League practice set absolutely no substantive limits on reservations and thus contained no permissibility criterion. Opposability was the sole concern; validity

20. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95, 112 (1975).

21. LEAGUE OF NATIONS O.J. Spec. Supp. 93, at 139 (1931).

22. See *supra* text accompanying notes 12-17.

hinged completely on the lack of opposition to the reservation by other parties.

The League system, on the other hand, created one category of reservations in which permissibility superseded opposability, i.e., a category of reservations considered instantly valid regardless of opposition from other states. This category consisted of those reservations provided for in the text of any given convention. Thus, the reserving state under the League system had to resort to legal arguments in seeking to demonstrate that its reservation qualified under the terms of the convention's provision on reservations.²³

This element of rational constraint limited a state's power to oppose a reservation. Under the League view, states were not even permitted to oppose a reservation which fell in the category specifically provided for in the treaty. Their prior agreement to the provision on reservations in the treaty implied consent to this particular reservation, thus imposing a legal constraint on the ability of a state to object to a reservation. In contrast, both the pre-League and the pure subjective view made a reservation fully opposable²⁴ by allowing any state to oppose the reservation, and by its opposition to jeopardize the reserving state's treaty participation. Thus, the opposing state's ability to withhold or grant its consent at will was rationally constrained under the League system.

Under the League system, a state which opposed a reservation permitted by the treaty had three options. The first option was to convince the other parties that the reservation was indeed not of the permitted category. Second, the state could argue that the whole provision concerning permissible reservations had to be changed. Failing these, the state could refuse to sign the treaty rather than be bound by a repugnant reservation which the treaty terms nonetheless permitted. Any of these three options required considerably more from the opposing state than a simple "nay." In the first two cases, the opposing state had to employ legal arguments in order to block the reservation. In the second and third cases, the opposing state may have been forced to trade off other general treaty interests or abandon the treaty altogether for the sake of opposing one specific reservation. In short, the League provision allowing reservations which have been specifically provided for in the treaty demanded new and more difficult methods by which an opposing state could block a reservation which it considered offensive to its sovereign interests.

23. Because the terms of the convention rationally constrain a state's formulation and defense of its reservations, this provision in the convention, though subjectively created by the consent of the parties at some earlier stage, contains a purposive element.

24. For purposes of this Comment, the more a reservation is "opposable," the more dependent upon the actions of the reacting states are the relations of the reserving states.

This limited constraint possible in the League system should not obscure the fundamental subjectivity of both the pre-League and League views, both on a theoretical level and in comparison with their historical companions.²⁵ Not even the League system contained any kind of permissibility criterion imposing universal objective standards upon parties wishing to make a reservation. And all three systems not only imposed the severest of consequences—denial of participation in the treaty—upon a state making an invalid reservation, but in addition made it relatively easy for an opposing state seeking to make a reservation invalid.

The pre-League and League systems sought to create a treaty of substantially uniform multilateral obligations despite the existence of a reservation expressing one state's departure from the treaty terms. The unanimous consent requirement was expected to insure this uniformity by demanding that all the parties not oppose any valid reservation. A treaty having such substantially uniform obligations, safeguarded in part by a unanimous consent requirement,²⁶ has been termed a treaty of "absolute integrity."²⁷ If domestic law or other insuperable obstacles prevented some states from accepting the treaty in its entirety, then the "integrity" of the treaty could still survive, provided that the principle of unanimous consent which brought the treaty into being could also endorse these occasional individual modifications.²⁸

Nevertheless, the principle of unanimous consent does not necessarily imply a treaty of absolute integrity. As will be seen below in the analysis of the Pan-American system, a subjective system cannot guarantee such a meaningful broad-based consensus among the parties. No limits on the scope of the reservation exist to ensure that the reserving state's exceptions to the treaty will be incidental. Indeed, although the absolute integrity view of the multilateral treaty seemed at first to follow from the principle of unanimous consent, this principle instead could have prevented rather than protected the absolute integrity of a treaty in the League system.²⁹ Analysis of the Pan-

25. While the League system did provide this accommodation for treaties with provisions on reservations, it is reasonable to assume that the scope of the reservations specifically permitted in the treaty would be limited, because parties would want to allow for only minor deviations from the provisions of the treaty.

26. Both the League and pre-League systems had a unanimous consent requirement, but the League's requirement was limited to those treaties which did not provide specifically for reservations. See *supra* text accompanying note 21.

27. "Absolute integrity" is the International Court of Justice's (International Court) characterization of the principle underlying the League view. *Reservations to the Convention on Genocide, Advisory Opinion*, [1951] I.C.J. 15, 24.

28. See *infra* Appendix p. 112.

29. See *infra* text accompanying notes 46-47.

American system reveals the paradoxical conflict between the pure subjective position on reservations and the absolute integrity view of the multilateral treaty which it was believed to imply.

B. *The Pan-American System*

In 1932, the Governing Board of the Pan-American Union, the precursor of the Organization of American States (OAS), provisionally accepted a new system of rules on the juridical effects of reservations, known as the Pan-American system.³⁰ While this system was never formally approved by an Inter-American Conference, it was followed in practice by the Pan-American Union and by the OAS from its birth until 1973.³¹ The core of the system was contained in three rules concerning "the juridical effects of reservations":

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations in the terms in which it was originally drafted and signed.
2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.
3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.³²

Like the pre-League and pure subjective systems, the Pan-American system contained no permissibility criterion. In fact, the second and third rules of the Pan-American system drew no absolute distinction between "valid" and "invalid" reservations; they distinguished solely between reservations which have and those which have not been accepted.³³ The Pan-American system prescribed no substantive limits on the content of reservations.

The second and third rules made opposability the essential criterion of the validity of a reservation in the Pan-American system. But the Pan-American system established a new concept of individual opposability which in turn created a doctrine of "piecemeal validity." A Pan-American reservation was only individually opposable because a

30. Ruda, *supra* note 20, at 118-20.

31. *Id.* at 120-21.

32. These three rules are quoted by the International Court in its Genocide Convention Opinion without citing an original source. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] I.C.J. Pleadings 5, 17.

33. This terminology reflects the highly subjective flavor of the Pan-American system.

single state by its opposition could affect only its individual relations with the reserving state. The validity of the reservation, previously an all-or-nothing determination was now a matter determined anew between the reserving state and each reacting state. A single reservation could be valid vis-a-vis one state and invalid vis-à-vis another.

In comparison with the pre-League and League systems, this variation on the subjective view weakened the dependence of the reserving state's rights and obligations upon the actions of the reacting states. In the Pan-American system, nothing rationally constrained the exercise of the opposing state's subjective will. On the other hand, the opposing state was legally powerless to affect the relations between the reserving state and any other state.³⁴ In a sense the Pan-American system, also dependent on subjective criteria of validity, nevertheless turned the pure subjective/pre-League standard on its head. According to the pure subjective view, only unanimous consent could make a reservation valid. Under the piecemeal validity doctrine of the Pan-American system, only unanimous opposition could make a reservation completely invalid.

The Pan-American system also contained a doctrine of the piecemeal effectiveness of reservations. Although the first two rules reiterate the League rules of reservations, the third rule created a new concept of a treaty's piecemeal entry into force.

One commentator notes that the system was "an eclectic solution, lying between the Havana Convention and the practice of the League of Nations."³⁵ Under the Havana Convention on Treaties,³⁶ which preceded the Pan-American system but never gained widespread acceptance,³⁷ the reserving and opposing states could delete the offending clauses from their treaty relations, yet allow the unrelated clauses of the treaty to enter into force between them.³⁸ Thus, some treaty relations, even if minimal, were created between the reserving state and every other party to the treaty. Under the League practice if any state objected to a reservation, no treaty relations were created between the reserving state and any other state. In the Pan-American system, relations were created between the reserving state and any consenting state, and no relations were created between the reserving state and

34. Only by altering the terms of the treaty (and thus the terms of its own relations with other parties) could the opposing state affect the relations between the reserving and consenting states.

35. Ruda, *supra* note 20, at 119.

36. Havana Convention on Treaties of 1928, Pan-Am. T.S. No. 34, *reprinted in* 22 AM. J. INT'L L. Supp. 138 (1928).

37. Ruda, *supra* note 20, at 117-18.

38. As will be seen below, article 21(3) of the Vienna Convention on the Law of Treaties provides for similar segregation of provisions that relate to reservations from those that do not. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 21, para. 3, *reprinted in* 8 INT'L LEGAL MATS. 679, 688 (1969) [hereinafter cited as Vienna Convention].

any opposing state. This compromise position resulted in the "legal anomaly" that two states could be parties to the same treaty, even though no treaty relations whatsoever existed between them.³⁹

The multilateral treaty that the Pan-American system described could have been just a conglomerate of bilateral treaties, only vaguely resembling each other. Unanimity was achieved in one sense, because most of the parties had signed the treaty in some form or other. Nonetheless, this unanimity was really an empty concept, because there was no purposive element in the Pan-American system. The relations between one pair of states would not necessarily bear any resemblance to the relations between any other pair of states. In contrast, in the pure subjective system, one could be sure that the resulting relations between any two parties to a certain convention shared some common elements with the relationship of any other pair. And, if one party had made a reservation that had been accepted by all the other parties, relations between all the other parties and the reserving party would have been uniformly modified.⁴⁰

This examination of the Pan-American view reveals how the subjective approach and the pre-League and League views ultimately fail to produce a treaty of absolute integrity. For although the Pan-American system more clearly permitted the possibility of disparate bilateral

39. Ruda, *supra* note 20, at 122.

40. The difference between a League system treaty and a Pan-American system treaty can be visualized with the help of a hypothetical case. Assume that five states negotiate a treaty with three clauses. Upon ratification, three states make reservations: (1) B reserves that clause I does not apply to B. A opposes B's reservation; (2) D reserves that clause II does not apply to D. E opposes D's reservation; (3) E reserves that clause III does not apply to E. No one opposes. Assume further that B's reservation is incompatible with the object and purpose of the treaty and that D and E's reservations are compatible.

In the League system, B and D would not be parties to the treaty. E's relations with A and C are modified by the reservation (therefore clause II does not apply) and A and C enjoy full treaty relations. Every set of bilateral relations between the treaty parties (here A, C, and E) share a common element with every other set; in this case, clauses I and II. Picturing the treaty as a model in three dimensions, these three clauses linking the states could be seen as three parallel strings connecting wooden posts standing unanchored on a flat surface. The whole structure, representing the multilateral treaty, is kept erect by the tensions of the strings evenly distributed around the structure. Under the hypothetical in the League system, all the treaty ties of parties with B and D have been snapped as have the clause III ties between E and A and between E and C. But because of the tensions still distributed evenly among the parties in clauses I and II, the three-post structure remains stable and standing.

Under the Pan-American system, B and D would be allowed to be parties to the treaty and to have treaty relations with those who accept their reservations. Thus, while between A and B and between D and E no relations exist, modified treaty relations exist among the reserving and accepting states. The remaining sets of bilateral relations are widely differing: the relations between B and E and between B and D contain one clause, relations between A and C contain three clauses, and other sets of bilateral relations contain two. No clause involves all the parties, and four of the parties have no relations at all with one of the other parties to the treaty. In the three dimensional structure, the lack of an element shared by all sets of bilateral relations is manifested by the lack of one string distributing tension equally among all parties. The structure (i.e., the multilateral treaty) that results is unstable and may well fall to the ground with only the bilateral connections intact.

commitments forming among the parties to a multilateral treaty, the subjective, pre-League, and League views could lead to the same result. Since there is no limit on the scope of a reservation, a state could legitimately make a reservation radically altering the bulk of its obligations if it could cajole all the other parties into accepting the reservation.⁴¹ Although a common thread would run through all sets of relations (since no state would be a party to a treaty and then alter the entire agreement through a reservation), it might indeed be a very fragile thread. Thus in theory, the pure subjective view of reservations as well as the Pan-American system permits the multilateral treaty to become little more than an aggregate of independent, disparate bilateral treaties.

This theoretical possibility reveals the paradox of the pure subjective system. With "unanimous consent" as its governing principle and a treaty of "absolute integrity" as its desired end, the pure subjective view seems to suggest a new kind of multilateral treaty. Turn of the century international legal scholars may well have thought that unanimity would prove to be the link of legitimacy bridging a world of bilateral agreements and absolute state sovereignty on the one hand, and the nascent international community on the other. No one state would be able to challenge the legitimacy of a convention to which all had agreed; one could conceive of each pair of parties signing a bilateral agreement which turned out to be identical to a number of other bilateral treaties.

The element of uniformity which seemed to be implied by the principle of unanimous consent nevertheless transformed the traditional visions of the world by introducing an element of collective commitment which would keep the multilateral treaty a stable, unified structure. The principle, however, prescribed a rule of reservations that would deny a multilateral treaty any shared community norms which give it a distinct essence⁴² by destroying the certainty of uniform obligations among the parties. The logical extension of the principle of unanimous consent thus weakens, rather than supports, the unique new concept of the multilateral treaty that the principle at first seemed to imply.

Despite the loss of unanimity and uniformity under the Pan-American system, at least one commentator concluded that the system achieves a valuable compromise. According to Judge J. M. Ruda of the International Court of Justice (International Court), it was accepted that the drafters of the Pan-American system successfully combined the

41. Though this situation may seem absurd, since a state interested in adhering to so few of the treaty's negotiated provisions would probably not have joined the treaty at all, it was theoretically possible.

42. For purposes of this Comment, a multilateral treaty has a distinct essence when it is more than the sum of its bilateral parts. See *infra* Appendix p. 110.

"possibilities of maximum participation"⁴³ with "the recognition that reservations could not be imposed on the other parties to a treaty against their will."⁴⁴ Ruda concludes that, in so doing, the drafters displayed a sensitivity to the "evolution of the international community."⁴⁵ Once again, the familiar theme of protection of state sovereignty is in tension with the theme of the growth of the international community.

Upon closer scrutiny of the Pan-American system, Ruda's optimism seems misplaced. In fact, the Pan-American system favored those principles safeguarding state sovereignty over those promoting international integration. It encouraged reservations by making the sanction for an invalid or unaccepted reservation much less severe than the sanction of total exclusion described in the League system.⁴⁶ In general, the Pan-American system effectively guards each state, whether reserving, consenting or objecting, from the intrusion and even indirect control of all the others. Each pair of states strikes its own bargain with a substantial degree of independence from other states.

In its zeal to protect state sovereignty, the Pan-American system sacrificed its power to ensure that all the states would be equally bound by any legal norms and thus stripped the multilateral treaty of its element of community. Maximum participation became a mirage as well, because all the parties to the treaty could in fact have little in common. In short, the Pan-American system did not ensure that the multilateral treaty would embody community norms or represent more than the simple aggregate of many minimally related bilateral treaties.

C. *The Genocide Convention Opinion*

In 1950, a United Nations General Assembly resolution⁴⁷ requested the International Court of Justice to answer three questions regarding the validity and legal effects of reservations to the Convention on the Preservation and Punishment of the Crime of Genocide (Genocide Convention).⁴⁸ Although the International Court's Advisory Opinion⁴⁹

43. Ruda, *supra* note 20, at 121.

44. *Id.*

45. *Id.* at 132.

46. The Pan-American system prevented any opposing state from single-handedly destroying all the reserving state's treaty relations with other consenting states, but it also saved the opposing state from being bound to the reservations of another state which have been found unacceptable.

47. G.A. Res. 478, 5 U.N. GAOR Supp. (No. 20) at 74, U.N. Doc. A/C.6/L.125 (1950). In the same resolution, the General Assembly invited the International Law Commission "to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law." *Id.*

48. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277.

49. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 29. The

(Genocide Convention Opinion) did not set forth a system of reservations, it clearly merits attention here not only as background for the International Law Commission's system, to be analyzed below, but also because it represents the historical moment at which the rhetoric and reasoning of all discussion of reservations fundamentally changed.

The most striking feature of the Genocide Convention Opinion is its enunciation of the "object and purposes" test. Simply stated, the doctrine declared a reservation valid or invalid by reference to its compatibility with the object and purposes of the treaty.⁵⁰ The International Court thereby introduced purposive words⁵¹ into the vocabulary of reservations, which had previously been dominated by the term "consent."

The International Court did not elaborate on the object and purposes test, and in particular, failed to resolve three fundamental issues: first, the proof of the existence of an object and purpose to the treaty; second, the identity of the party or arbiter who determines the object and purpose; and third, the related question of the compatibility of any given reservation with the object and purpose of the treaty.

With regard to the first issue, the International Court simply assumed that the treaty had an object and purpose.⁵² For the first time in the doctrine of reservations, purposive language had invoked quasi-legislative visions of the multilateral treaty. The International Court drew a distinction between the contractual view of the multilateral convention⁵³ and the normative, "humanitarian" or "civilizing" convention.⁵⁴ The traditional contractual treaties dealt in terms of "in-

Court advised that with respect to the validity of reservations under the Genocide Convention, a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention *if the reservation is compatible with the object and purpose of the Convention*; otherwise, that State cannot be regarded as being a party to the Convention.

Id. at 29 (emphasis added).

As to the legal effects of opposition to reservations, the Court advised:

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

Id. at 29-30.

50. *Id.* at 29-30.

51. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 22-25. While the analysis logically extends the purposive style of treaty interpretation used by the International Court, its specific application to the doctrine of reservations was wholly new.

52. This is the approach to domestic statutory interpretation taken by Hart & Sacks, *supra* note 17 at 1413-16. See *supra* note 17 and accompanying text; see also *infra* notes 58 & 66 and accompanying text.

53. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 22, 24. See also *id.* at 51 (Alvarez, J., dissenting).

54. *Id.* at 23.

dividual advantages and disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties"⁵⁵ of states. Such a treaty results from the bargaining of two parties pursuing individually conceived ends, and therefore does not necessarily contain an object and purpose.⁵⁶

Conversely, in a humanitarian convention such as the Genocide Convention, "the high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."⁵⁷ The International Court observed that a common object or purpose, not self interest, leads parties to create a humanitarian convention.⁵⁸

The revolutionary nature of this purposive view of the treaty did not escape the judges, who challenged traditional notions of state sovereignty. In such a convention the contracting states are not pursuing narrow, individual interests; they instead have a common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention. Consequently, the International Court concluded, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties of states.⁵⁹

Regarding the second question of who determines the object and purpose of a treaty and the third related question of whether a reservation is compatible with that object and purpose, the majority of the International Court stated:

As no state can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its *individual appraisal within the limits of the criterion of the object and purpose* stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State.⁶⁰

The International Court here apparently sought to reconcile the subjective demands of classical treaty doctrine with its new objective element.

55. *Id.*

56. Fuller calls this form of ordering "organization by reciprocity," or creating a bargain effective only because the "participants want different things." Fuller, *supra* note 17, at 357-58.

57. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 23.

58. *Id.* Fuller terms this form of ordering "organization by common aims," or a cooperation in which "the participants want the same thing or things." Fuller, *supra* note 17, at 357-58. See *supra* note 17 and accompanying text.

59. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 23.

60. *Id.* at 26 (emphasis added).

This attempt at reconciliation created two anomalies in the jurisprudence of reservations developed up to this point. First, it severed the previous legitimate connection between a state's opposition to the reservation and its rationally unconstrained sovereign will.⁶¹ A state now had to justify its opposition in legal terms describing its vision of the object and purpose of the multilateral convention. Its sovereignty was penetrated by an external standard which rationally limited its ability to invalidate another state's reservation at will. Thus, at the same time that the International Court reaffirmed the principle that no state can be bound by a reservation to which it has not consented,⁶² the International Court transformed the ability of a state to consent.

The International Court created the second anomaly when it asserted that each reservation has one essential nature at its core, either compatible or incompatible with the treaty's object and purpose, but then ignored the fact that there could be multiple and very possibly conflicting perceptions of that nature by other parties.⁶³ This anomaly in turn destroyed the uniformity of the treaty and proliferated the definitions of the treaty's object and purpose. First, leaving the judgment of compatibility to a number of independent arbiters, each with its own individual political considerations at stake, put the reserving states at the mercy of the calculations and legal agility of the other parties. While the appointment of a single arbiter⁶⁴ to determine the singular nature of the treaty seems highly sensible, the International Court could not bring itself to suggest such an arrangement. Without such a neutral arbiter, the extreme result possible under the Pan-American system could also result under the Genocide Convention Opinion approach; several pairs of parties to the treaty could have had no relations between them, while other pairs exchanged full relations. This is hardly the uniformly binding, normative convention the judges envisioned.

Second, the object and purpose of a treaty and compatibility therewith may be variously defined. The majority believed that one "clear assumption" would prevent such chaos: the assumption that "the contracting States are desirous of preserving intact at least what is essential to the object of the Convention."⁶⁵ Given the politics of treaty-making and the overriding, divergent individual interests of the states, it is hard to be as sanguine.⁶⁶

61. Although opposing states may still be acting out of their subjective interest, the mere fact that they must now couch their objections to reservations in terms of the compatibility of the reservation with the object and purpose of the treaty represents an element of rational constraint. *See supra* note 14 and accompanying text.

62. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 21.

63. *Id.* at 26-27.

64. *Id.* at 21-26.

65. *Id.* at 27.

66. It is conceivable that states have signed the treaty with no regard for its object and purpose,

The two anomalies illustrate vividly the perils of mixing subjective and purposive views of reservations. The Genocide Convention Opinion approach provided enough rational constraint to interfere with the exercise of a state's sovereign will, but too little to breath life into the concept of a universally recognized object and purpose of each treaty. The dissenters pointed out that "integrity of the terms of the Convention" was sacrificed for "mere universality in its acceptance;"⁶⁷ and as the comparison to the Pan-American system suggests, universality of acceptance does not guarantee that the parties to the treaty truly have anything in common. The Genocide Convention resulting from the International Court's suggestions would be a fragmented commitment, interpreted in various inconsistent ways by frustrated parties.

Thus, although the Genocide Convention Opinion ushered in a new form of reasoning and a new vision of multilateral treaties, the opinion at the same time foreshadowed the limitations of a mixed subjective/purposive approach. It boldly introduced purposive analysis, multiplied the categories of multilateral treaties,⁶⁸ and attacked extreme claims of state sovereignty, but then struggled to coax these new square purposive pegs into old subjective round holes. Both their innovations and their failures survived in the International Law Commission's flexible system and the Vienna Convention on the Law of Treaties (Vienna Convention).⁶⁹

D. The International Law Commission's Flexible System

A new approach to reservations to multilateral treaties was suggested by Sir Humphrey Waldock in a 1962 report (Waldock Report) to the International Law Commission (ILC).⁷⁰ This approach, which has been termed "the flexible system,"⁷¹ was never put into effect, but did in-

or that states have widely differing views on the nature of the object and purpose. Kennedy argues, in the context of domestic legislation, that legislative decisions do not necessarily have a universally recognized object and purpose. Kennedy, *Legal Formality*, *supra* note 5, at 356. Legislative decisions instead reflect the "natural 'surround' that determines the force of the competing values or interests, rather than the specific intention of a particular actor." *Id.* at 358. Since the legislature approves them only as a whole, legislative decisions must be considered as a whole. *Id.* at 368-69. Its essence, therefore, cannot be reduced to its supposed object and purposes.

67. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. 15, 46 (Joint Dissenting Opinion).

68. See *supra* text accompanying notes 53-58.

69. Vienna Convention, *supra* note 38, reprinted in 8 INT'L LEGAL MATS. 679 (1969).

70. *Report to the International Law Commission on the Conclusion, Entry into Force and Registration of Treaties*, [1962] II Y.B. INT'L L. COMM'N 60-68 [hereinafter cited as *Waldock Report*]. This report drew on the work begun by the International Law Commission (ILC) following the invitation by the General Assembly in 1951, but largely rejected the approaches of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, Waldock's immediate predecessors as Rapporteurs of the Commission. Ruda, *supra* note 20, at 161-67.

71. This new approach is contained in three of the proposed articles suggested in the *Waldock Report*. *Waldock Report*, *supra* note 70, at 60-62, arts. 17-19.

fluence the drafters of the Vienna Convention in their codification of the law of treaties.

The flexible system presupposed a classification of treaties according to the number of signatory parties. A "bilateral" treaty was, as always, a treaty between two parties.⁷² The term "plurilateral" treaty⁷³ described a treaty restricted to a few participants with provisions dealing with matters of concern only to those parties. "Multilateral" treaty⁷⁴ referred to:

. . . a treaty which, by its terms or by the terms of a related instrument, has either been made open to participation to any state without restriction, or has been made open to participation by a considerable number of parties *and* either purports to lay down general norms of international law or to deal in a general manner with matters of general concern to other states as well as to the parties to the treaty.⁷⁵

The provisions of the flexible system have been charted below.⁷⁶ The salient characteristics may be briefly summarized. Bilateral treaties demanded the consent of the other party for validation of the reservation, which then became a new term of the treaty. For plurilateral treaties, a reservation did not need to meet any permissibility requirements and had to be accepted by all the parties. The reservation therefore would have had the effect of modifying the relations between the reserving state and every other state, as in the League system.⁷⁷ For "multilateral" treaties, the requirements nearly duplicated those of the Pan-American system, since a reservation did not need to meet any permissibility requirements, must have been accepted by at least one other party, and would have had the effect of modifying the relations between the reserving state and every state that accepts the reservation. As the League and Pan-American systems have been analyzed above, the analysis here shall concentrate on the three new contributions of the flexible system to the permissibility and opposability requirements. First, the reserving state now had a duty to

72. *Id.* at 31, art. 1(d).

73. *Id.*

74. For purposes of this Comment, "multilateral" treaty in quotation marks will refer to the specific International Law Commission definition; multilateral treaty otherwise refers to the general category.

75. *Waldock Report*, *supra* note 70, at 31, art. 1(d) (emphasis added).

76. The chart on the following page summarizes the major provisions of the *Waldock Report*. See *supra* note 70. The chart excludes definitions of consent, special regulations for constituent instruments of international organizations, and the formal procedure on reservations.

77. The chief differences between the League requirements and the requirements for plurilateral treaties lie in the International Law Commission requirement that a state shall have regard to the object and purpose of the treaty, the ILC provisions on implied consent, and the ILC special provisions for international organizations. See *infra* text accompanying notes 81-88.

REQUIREMENTS OF THE FLEXIBLE SYSTEM

	PERMISSIBILITY	OPPOSABILITY	EFFECTS
TREATY PROVISION ON RESERVATIONS	1) Reserving state "shall have regard to the compatibility of the reservation with the object & purpose of treaty" 2) Reservation permitted unless: a) "Nature of treaty" or established usage of int'l body prohibits; or b) No reservations permitted; or c) Not of category specifically permitted; or d) Of category specifically prohibited	1) Reservation prohibited by treaty inadmissible without unanimous prior consent of other parties 2) Subsequent acceptance not required for reservation allowed by treaty	Relations between reserving state and every other state modified by admissible reservation
NO TREATY PROVISION ON RESERVATIONS	1) Reserving state "shall have regard to the compatibility of the reservation with the object & purpose of treaty" 2) No other specific substantive requirements	<i>Bilateral</i> Acceptance by the other party required for reservation to be admissible	<i>Bilateral</i> Treaty amended by admissible reservation
		<i>Plurilateral</i> Acceptance by all parties required for reservation to be admissible	<i>Plurilateral</i> Relations between reserving state and every other state modified by admissible reservation
		<i>"Multilateral"</i> Acceptance by at least one other party required for reservation to be admissible	<i>"Multilateral"</i> Relations between reserving state and every consenting state modified by admissible reservation

have regard for the object and purpose of the treaty in formulating reservations. Second, detailed definitions were now given for express and implied consent. Third, special consent requirements were established for conventions which were constituent instruments of international organizations.

Article 17(2)(a) of the Waldock Report set forth a requirement that a reserving state "shall have regard to the compatibility of the reservation with the object and purpose of the treaty."⁷⁸ This added an additional, if mild, purposive element to the permissibility requirement. The flexible system required much less purposive consideration than did the International Court in the Genocide Convention Opinion. While in that opinion the International Court wanted all states, whether reserving, consenting, or opposing, to ponder the object and purpose of the treaty at hand, the flexible system imposed that duty only upon the reserving state. The reacting states presumably could have reacted as their subjective will dictated, free from the duty to justify their consent or opposition in legal terms. The rights and obligations of the reserving state were still very dependent upon the actions of the reacting states. Thus the flexible system had an overwhelmingly subjective tone.

But this requirement, however mild, did take the flexible system a quantum leap in the purposive direction. For even if only one state had to consider the object and purpose, the flexible system made the same crucial assumption as the International Court had made in its Genocide Convention Opinion: that there exists a universally recognized object and purpose to be discerned. The flexible system imagined a common will on the part of the treaty signatories and, consequently, a community bound by this common will. Indeed, even bilateral treaties were assumed to have had an object and purpose, transcending mere reciprocity.⁷⁹ "Multilateral" treaties were defined as those proposing to lay out general norms, approaching the level of legislation. Thus with one small stroke, the flexible system created communal relations among the parties to the treaty. The application of the League and Pan-American requirements, while familiar, will have to be considered in this new light.

To the opposability requirement, the flexible system added the new feature of implied consent.⁸⁰ The flexible system described in detail both express and implied consent. Article 18(2)(a) of the Waldock Report described the formal mechanisms by which a state expressly consents

78. *Waldock Report*, *supra* note 70, at 60, art. 17(2)(a).

79. *See supra* notes 61-62.

80. Although the Pan-American drafters, among others, had discussed implied consent earlier, Ruda reports that the concept was always controversial. Ruda, *supra* note 20, at 165.

to a reservation. Consent to general treaty provisions which authorized a category of reservations was classified by article 18(2)(b) as express consent to any specific reservation of that category which was made thereafter.

Article 18(3)(a), which defined implied consent, provided that a party that had not necessarily consented to the general treaty provision authorizing a category of reservations but which did not object to a reservation falling in that category was to be deemed to have consented. Paragraph 3(b) set deadlines by which time a state had to give notice of its objection, but loosened the requirements somewhat in the case of a multilateral treaty and a ratifying or acceding state. Paragraph 3(c) defined implied consent for acceding states. In the case of a plurilateral treaty, performing all the acts necessary for the state to become party to the treaty implied its consent to a reservation already formulated. In the case of a "multilateral" treaty, performing all the acts necessary for the state to become party to the treaty without signifying an objection implied the state's acceptance of the reservation.

Although these definitions of express and implied consent merely refined the essentially subjective concept, they also imposed external constraints on the state's right to consent or object at any time for any reason. While theoretically there should be no time limits on a state's right to object to another state's reservation, now a state had to watch the clock while reaching its position on each reservation. Moreover, these categories of express and implied consent tended to standardize intent, making the form and not the substance of will the key element.⁸¹ Gradually, a state's idiosyncratic will could easily have gotten lost in the shuffle of its own formal carelessness and an independent arbiter's duty to look no further than form alone. Thus the flexible system's attempt to formalize consent ran the risk of inadvertently thwarting the subjective wills of the states.

The flexible system contained a third innovation in its special provision for plurilateral or multilateral treaties which are "constituent instrument[s] of an international organization."⁸² Waldock added special requirements in the opposability criteria in both the consent and objection provisions. Article 18(4)(c) required in both plurilateral and multilateral treaties that consent of the organization itself was necessary to admit a reservation and to make the reserving state a party to the treaty. Article 19(4)(d) provided that "the decision of the com-

81. Horwitz, in lectures on United States legal history from the Civil War to the present, has called this concern with outward manifestations of will the "objective" view of contract. His "subjective" view of contract is the domestic counterpart of the "subjective" view of multilateral treaties as used in this Comment. M. Horwitz, Lectures on American Legal History, given at the Harvard Law School (Fall, 1980).

82. *Waldock Report*, *supra* note 70, at 61, art. 18(4)(c).

petent organ of the organization rejecting the reservation shall exclude the reserving state from participation in the treaty."⁸³

This is the third time in the twentieth-century discussion of reservations that lawmakers have divided multilateral conventions into different categories. The International Court in the Genocide Convention Opinion distinguished contractual from humanitarian treaties; the Waldock Report initially divided the universe of conventions into three categories based upon the number of signatories. Now from within two of these numerical categories, the flexible system identifies a fourth category.⁸⁴ The inclusion of a new actor, the international organization, set this species of treaty apart from the rest.⁸⁵

While the flexible system consistently muted the subjective power of the reacting states, it zealously safeguarded the subjective prerogative of the international organization. No formal deadlines limited the organization's ability to consent or object; consent was never implied from any less than an outright decision of its competent organ. Most remarkably, the system made the organization's consent crucial to the reservation's admissibility in the case of a "multilateral" treaty. Without the organization's consent, the treaty as modified could not go into effect even as between the reserving state and any consenting states.

Thus, the system broadly guarded the right of states to accept reservations and relations with reserving states regardless of the actions of other states, but specifically prohibited states from so doing under the treaty in the face of the organization's disapproval.⁸⁶ The organization's decision additionally constrained the state's power to exercise its subjective will. Now, in order to be permitted to establish relations with the reserving state under the treaty, assuming that acceptance of the reservation required a majority of member states, the consenting

83. *Id.* at 62, art. 19(4)(d).

84. This fourth type of convention is important even in those treaties where the individual signatories are identical with the membership of the international organization. Since the fourth type requires only the consent of the organization to validate a reservation, generally a majority of the states will suffice. Thus states in the minority who opposed the reservation would be bound to recognize its validity despite their clear opposition. This is the first suggestion in the doctrine of reservations that a state could be bound against its sovereign will. See *infra* text accompanying note 109.

85. Conceivably, any two states by themselves could sign a bilateral treaty resembling the multilateral treaty but with the reservation in play. The fact that this does not seem quite the same as signing a multilateral treaty, even though the effect in that kind of case would be almost identical, reinforces the intuition that a multilateral treaty contains something extra that a batch of bilateral treaties containing the same provisions cannot duplicate.

86. Article 18(4)(c) makes this clear:

In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument. *Waldock Report, supra* note 70, at 61.

state not only had to consent itself but also had to persuade through legal argumentation a majority of its colleagues to vote to accept the reservation.

Since it would be rare for any state individually to reject a reservation but vote to accept it as a member of the international organization, it is unlikely under this provision of the flexible system that a reserving state would be allowed to have treaty relations with less than half of the states. Under the Pan-American system, such a state of affairs was theoretically possible. To achieve the same result under article 19(4)(d) of the flexible system, some very persuasive political jawboning was required. The evolution of the reservations doctrine from the Pan-American to the flexible system shows the growing role of the theme of international community. It is to be expected that this theme would be the strongest in those multilateral treaties that pertain to international organizations, which are the closest to the realization of international communities in this century.

Although these three innovations taken together served to constrain each state's subjective will, it is important to emphasize that the orientation of the flexible system remained overwhelmingly subjective. Apart from those treaties where tacit consent and international organizations were involved, the sole purposive elements of the flexible system were the normative definition of "multilateral" treaty, the requirement that a reserving state regard the object and purpose of the treaty and the provision that treaties may themselves provide specially for reservations. But for these elements, one would be thrust back into the rules of the earlier, more subjective systems. Consent was still clearly the linchpin of the reservation mechanism.

The flexible system reveals no coherent picture of multilateral treaties. The highly normative definition of "multilateral" treaties, in contrast to the more cut-and-dried numerical description of plurilateral treaties, suggests that Waldock meant to distinguish between normative and contractual treaties. "Multilateral" treaties assumed a legislative function for the sake of the common weal.⁸⁷ But the actual changes in the doctrine hardly lived up to its revolutionary potential. The subtle restraints imposed on the reacting states were too weak to transform the "multilateral" treaty into a community endeavor. Waldock's one explicit invocation of the object and purposes test was an even more milquetoast version of the International Court's tentative formulation in 1951. Most significantly, the system of reservations which Waldock provided for in this new normative treaty mirrored the Pan-American system, which allowed fragmented, non-uniform, and highly individualized treaty commitments. Actual treaties concluded

87. See *supra* notes 17, 52, 58, and 66 and accompanying text.

under the flexible system of reservations might well have resembled an aggregate of haphazardly related bilateral treaties rather than world legislation.

In the end, the flexible system contained enough purposive elements to confuse any subjective analysis, but failed in any substantial way to balance the weight of state sovereignty notions with the pull of the vision of an international community. Its hybrid orientation, however, formed the uneven foundation upon which the current international law on reservations, codified in the Vienna Convention, is built.

E. The Vienna Convention Doctrine

Twenty years of research, deliberation, and negotiation on the law of treaties culminated in 1969 in the Vienna Convention on the Law of Treaties,⁸⁸ which entered into force in January 1980. The Vienna Convention doctrine of the law of reservations is the most elaborate of this century. As a result, its interpretation has created controversy and outright disagreement among contemporary legal scholars. These disagreements stem directly from the tensions between the purposive and subjective elements embedded in the doctrine.

The Vienna Convention doctrine on reservations is contained in articles 19 through 23 of the convention. The chart below presents the provisions regarding "formulation and acceptance" of the reservations⁸⁹ and the legal effects of reservations.⁹⁰

The Vienna Convention lays out its permissibility criterion in article 19.⁹¹ This article divides the universe of treaties into two categories: those

88. Vienna Convention, *supra* note 3^o, reprinted in 8 INT'L LEGAL MATS. 679 (1969). The treaty entered into force upon ratification by the thirty-fifth state in 1980. Although over half of the signatory states, including the United States, have yet formally to ratify the convention, it is generally accepted that the convention is "already recognized as the authoritative guide to current treaty law and practice." United States President, Message from the President transmitting the Vienna Convention on the Law of Treaties to Congress, S. EXEC. DOC. L., 92d Cong., 1st Sess. 1 (1971). Thus the Vienna Convention may be considered a codification of international law which represents binding law for all states.

89. See *infra* text accompanying notes 96-102.

90. The chart on the following page summarizes the major provisions of the Vienna Convention reservation articles. See Vienna Convention *supra* note 38, reprinted in 8 INT'L LEGAL MATS. 679 (1969). The chart excludes tacit consent, withdrawal, and procedure on reservations.

91. Article 19 states:

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate 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.

Vienna Convention, *supra* note 38, art. 19, reprinted in 8 INT'L LEGAL MATS. 679, 686-87 (1969).

REQUIREMENTS OF THE VIENNA CONVENTION

	PERMISSIBILITY	OPPOSABILITY	EFFECTS
TREATY PROVISION ON RESERVATIONS	Reservation permitted unless: a) No reservations permitted; or b) Not of category specifically permitted; or c) Of category specifically prohibited	No subsequent acceptance required for expressly authorized reservation	Reserving state's relations with all other parties to treaty modified by established reservation
NO TREATY PROVISION ON RESERVATIONS	Reservation permitted unless incompatible with object and purpose of treaty	<i>Treaty with few parties and unitary object and purpose</i> Acceptance by all parties required for reservation to be established	
		<i>Constituent instrument of international organization</i> Acceptance by competent organ of int'l body required for reservation to be established	
		<i>All other treaties</i> Acceptance by one state required for reservation to be established	<i>All other treaties</i> 1) Consenting state's relations with reserving state modified by established reservation; 2) At objecting state's option: a) Deletion of all reservation-related provisions from treaty relations with reserving party; or b) No treaty relations with reserving party

which provide specially for reservations and those which do not. Prohibited reservations or those not specifically allowed (in those treaties providing that only specified reservations can be made)⁹² may not be made to treaties which provide for reservations. For treaties which do not provide specially for reservations, reservations incompatible with the object and purpose of the treaty are not permitted.⁹³ One may generally presume that reservations not falling into any of the above categories are permissible.⁹⁴

1. The Object and Purpose Test

The Vienna Convention heralds the first full-fledged appearance of the object and purpose doctrine in established international law on reservations, which heretofore had been dominated by the unanimous consent rule. As illustrated in the discussion of the object and purposes test in connection with the Genocide Convention Opinion,⁹⁵ imputing a purpose to every treaty describes a new ideal of the multilateral treaty as a legislative document embodying the general will of the community of nations. Now reservations are deemed to have an essential nature apart from the collective whims of the reacting parties. The unanimity rule is relegated to a specific minority of cases.

Curiously, having thus stated the object and purpose test, this test is not significantly explained or reinforced elsewhere in the articles on reservations. As a result, commentators differ as to the requirements of validity under the Vienna Convention doctrine and the relationship of the permissibility and opposability provisions. For purposes of the following discussion, the two leading schools shall be labelled the permissibility school and the opposability school.

The permissibility school argues that, in a treaty that does not provide for reservations, a reservation incompatible with the object and purpose of the treaty is immediately and incurably invalid. No acceptance by any or all states can validate an impermissible reservation. In fact, one commentator feels compelled to conclude that states may not even accept an impermissible reservation:

The contradiction in the conduct of a Party which accepts a treaty and then "accepts" a reservation which it acknowledges to be con-

92. Ruda emphasizes that the addition of the word "only" changed one of the flexible system's presumptions. Under the flexible system, it was assumed that treaties which allowed certain reservations prohibited all others. Under the Vienna Convention, only treaties which stated explicitly that reservations not specified were prohibited had that effect. Ruda, *supra* note 20, at 181.

93. Vienna Convention, *supra* note 38, art. 19(c), *reprinted in* 8 INT'L LEGAL MATS. 679, 687 (1969).

94. *Id.* art. 19, *reprinted in* 8 INT'L LEGAL MATS. 679, 686-87 (1969).

95. *See supra* text accompanying notes 57-59.

trary to the object and purpose of that same treaty is self-evident. Thus, the conclusion ought to be that impermissible reservations cannot be accepted.⁹⁶

The permissibility school thus considers permissibility to be the primary and dominant aspect of the analysis of validity.

The opposability school, on the other hand, considers opposability the predominant criterion:

In the last analysis, under this system, the validity of the reservation depends solely on the acceptance of the reservation by another contracting state. It is, of course, to be presumed that a state has no interest in accepting a reservation which conflicts with the object and purpose of the treaty, but such considerations may of course be displaced, for example, in favour of political motivations; there is nothing to prevent a state accepting a reservation, even if such reservation is intrinsically contrary to the object and purpose of the treaty, if it sees fit to do so.⁹⁷

The opposability school therefore concludes that the permissibility criterion has "no practical juridical importance."⁹⁸ It may serve as a guide or rationalization for a state objecting to a reservation, but fulfills no more concrete purpose.

The confusion arises because the Vienna Convention provides no mechanism by which the object and purpose of the treaty can be determined. While the Genocide Convention Opinion and the International Law Commission specified that the parties should have regard to the object and purpose, the Vienna Convention treats the object and purpose of a treaty as an unaffiliated metaphysical concept. Since the Vienna Convention does not specify who is to determine the object and purpose of the treaty and the compatibility of the reservation with that object and purpose, two interpretations have arisen. The permissibility school suggests that an international court would be well suited to adjudicate a dispute about an allegedly impermissible reservation.⁹⁹ The opposability school, like the International Law Commission in the 1960s, prefers to leave it to the parties.¹⁰⁰

This doctrinal dispute holds tremendous jurisprudential implications for the law of multilateral treaties in general. If the opposability school's interpretations were to prevail, the view of treaties implied by the Vienna Convention would remain overwhelmingly subjective. The

96. Bowett, *supra* note 2, at 83.

97. Ruda, *supra* note 20, at 190.

98. *Id.*

99. Bowett, *supra* note 2, at 70.

100. Ruda, *supra* note 20, at 190.

sovereign rights of states would, in most cases, prevail over the vision of the treaty as quasi-legislation for an integrated world community. The validity provisions would then closely resemble the flexible system with its symbolically significant but practically unimportant purposive elements. But if the permissibility school's interpretation prevails,¹⁰¹ the purposive view of reservations will firmly plant the seed of the purposive, quasi-legislative multilateral treaty ideal into established international law. The bold repudiation of the absolute sovereignty of states by the International Court in its Genocide Convention Opinion would be given concrete effect.

Even if the permissibility school's view is a minority position, it illustrates that a new sort of argument about reservations, and thus about treaties in general, has been overtly accepted in international discourse. The International Court introduced this line of reasoning but in a limited context. The Vienna Convention made the object and purpose test at least an element in the majority of treaties and, if the permissibility school's test is accepted, a threshold requirement for a reservation's validity. The decisive shift towards purposiveness has been made and all subsequent discourse on reservations will have to wrestle with its jurisprudential consequences.

2. The Eclectic Structure of Opposability

The inclusion of the object and purpose test in the codification of treaty law is the first salient innovation of the Vienna Convention doctrine. The eclectic structure of the rules concerning opposability is the second.¹⁰² Article 20¹⁰³ incorporates all three of the logical alternatives of

101. The opposability school's interpretation of the Vienna Convention reservation articles may be the most stable. See *infra* Appendix at pp. 115-16.

102. The analysis in the text makes the conservative assumption that the opposability school's conception of the relationship between permissibility and opposability prevails. This does not represent an endorsement of the opposability school's view. Rather it will be shown that the Vienna Convention doctrine on reservations holds startling implications in its structure of opposability, its provisions on effects, and its provisions on consent even if the conservative view of the opposability school is adopted. This startling quality is only intensified if the permissibility school's more progressive approach is adopted.

103. Article 20 states:

Acceptance of and objection to reservations

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

2. When it appears from the limited number of the negotiating States and the object and purpose of the 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:

necessary acceptance. In treaties which have a limited number of signatories and whose object and purpose require 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,"¹⁰⁴ the reservation must receive *unanimous* acceptance. In a treaty which is a constituent instrument of an international organization (unless it otherwise provides), the reservation must be accepted by the organization's competent organ, or in other words, reasons the opposability school, by *majority* vote.¹⁰⁵ In all other treaties which do not provide specifically for reservations, acceptance by *one* state suffices to constitute the reserving state a party to the treaty.

The treaty described in article 20(2) closely resembles the plurilateral treaty of the flexible system which also required unanimous consent to its reservations. Like the plurilateral treaty, the article 20(2) treaty by its numerical restriction seems to disqualify itself from being a legislative document for the international community. As such, it reaches back to old contractual notions of legitimization and demands unanimous consent for its reservations. But ironically, the article 20(2) treaty clause also presents an ideal opportunity for creating a treaty which could begin to transcend state sovereignty;¹⁰⁶ the potential community orientation of this type of treaty is signalled by the only other appearance of the object and purpose test in the Vienna Convention articles on reservations. Article 20(2) presents in microcosm the head-on confrontation between subjective and purposive reasoning about reservations and exposes a clash of visions of multilateral treaties.

The second type of treaty not specially providing for reservations mentioned in article 20 is a treaty that is a constituent instrument of an international organization. In the Vienna Convention, only the

(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 on which it expressed its consent to be bound by the treaty, whichever is later. Vienna Convention, *supra* note 38, art. 20, reprinted in 8 INT'L LEGAL MATS. 679, 688 (1969).

104. Vienna Convention, *supra* note 38, art. 20(2), reprinted in 8 INT'L LEGAL MATS. 679, 688 (1969).

105. Ruda, *supra* note 20, at 187.

106. Ruda suggests that this treaty clause is most frequently used in treaties concerning regional economic integration and cooperation, which may be seen as signalling the beginning of community norms overcoming absolute state independence. *Id.* at 186.

competent organ has to accept a reservation for it to become valid. Assuming that most international organizations have rules that reduce that consent to a majority vote, article 20(3) introduces the "collegiate system"¹⁰⁷ of reservations. Several states had suggested the collegiate system as the appropriate compromise mechanism for resolving a controversy as to the validity of a reservation.¹⁰⁸

But again, a compromise appearance belies a revolutionary essence. In addition to this restriction placed on the argumentation used by the parties, the collegiate provision of article 20(3) is the first provision on reservations that imposed an offensive reservation on *non-consenting* states. Even in the Pan-American and flexible systems, an opposing state did not have to have any relations with a reserving state. Under article 20(3), an opposing state can conceivably be forced not only to have treaty relations with the reserving state, but also to give effect to a reservation which it has rejected outright. It is notable and no coincidence that this most severe intrusion on state sovereignty occurred in just those treaties which most resemble in formation and substance a type of embryonic legislation for an international community.

Article 20(4) describes opposability rules for the third category, i.e., all other treaties that do not provide specially for reservations. Subsections (a) and (c) incorporate the Pan-American rule into the Vienna Convention structure. By so doing, the Vienna Convention system may inherit the second anomaly of the Genocide Convention Opinion,¹⁰⁹ since the Pan-American rule when combined with the purposive element of article 19 increases the probability that some states may consent to a reservation on the grounds that it is compatible with the treaty's object and purpose, while other states may oppose the reservation on the ground that it is incompatible. More generally, the explicit assumption that a treaty has an object and purpose confronts the possibility that two parties to the treaty may actively disagree as to the nature of the treaty's object and purpose.

3. The Provision on Effects

The remaining provisions of article 20 introduce the third and fourth innovations of the Vienna Convention system: the provision on legal effects and the codification of tacit consent. As to legal effects, subsection (b) provides that "an objection by another contracting State to

107. In a collegiate system, the parties collectively determine the validity of the reservation, often by vote. Bowett, *supra* note 2, at 81-82.

108. Ruda, *supra* note 20, at 190. A collegiate system is especially attractive where it is important for the parties to decide once and for all whether the reservation is compatible with the object and purpose of the treaty. See *supra* text accompanying notes 66-72.

109. Ruda, *supra* note 20, at 190.

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."¹¹⁰ Article 21,¹¹¹ which deals with legal effects of objections to reservations, provides in its first paragraph that an accepted reservation modifies the relations between the reserving and accepting states, and in its second paragraph, provides that the reservation "does not modify the provisions of the treaty for the other parties to the treaty *inter se*." Finally, article 21 provides in its third paragraph that when an objecting state has not opposed the entry into force of the treaty as between itself and the reserving state, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. Unlike the League system whose provision on effects cut out of the treaty altogether any reserving state whose reservation is opposed, and unlike the Pan-American system which dissolved all relations under the treaty between every reserving and opposing state, the Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing states. Although this attempt seems sensible and even laudable, it threatens to obliterate the difference between an accepted and an opposed reservation, and renders objection to the reservation a fruitless endeavor.¹¹²

110. Vienna Convention, *supra* note 38, art. 20(4)(b), reprinted in 8 INT'L LEGAL MATS. 679, 687 (1969).

111. Article 21 states:

Legal effects of reservations and of objections to reservations

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 those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Vienna Convention, *supra* note 38, art. 21, reprinted in 8 INT'L LEGAL MATS. 679, 688 (1969).

112. For instance, in the case of a reservation in which a state declares that one clause of the treaty will simply not apply to it, the acceptance of the reservation would effectively delete that clause from the treaty as regards the relations between the reserving and opposing states. An objection to the reservation, pursuant to article 21(3), would do the same vis-à-vis the opposing state. Therefore, in the case of such a reservation, an opposing state is faced with only two real alternatives: accept the reservation or object and oppose the entry into force of the treaty. The intermediate path the Vienna Convention tries to provide is an illusion.

Ruda goes so far as to claim that even an opposing state considering a reservation modifying but excluding the application of a clause faces the same diminished range of choices:

A textual interpretation of [the] phrase ["to the extent of the reservation"] leads to the result, contrary to the explanations given, that the clause to which the reservation relates may be ap-

While generalizations are difficult, it seems clear that in a large number of cases this new feature of the Vienna Convention eliminates the practical difference between an accepted and an opposed reservation. In its zeal to smooth the path of the reserving state, the Vienna Convention seemed inadvertently to lay a trap for the unwary opposing state. The Vienna Convention doctrine thus succeeds in enhancing the reserving state's autonomy, but at the price of limiting an opposing state's ability to exercise its sovereign will.

4. Tacit Consent and the Formulation of Consent

Paragraphs 1 and 5 of Article 20 provide the Vienna Convention's standards for implied consent. Under paragraph 1, a state is deemed to have consented to any reservation expressly authorized by the treaty. Paragraph 5 states:

[F]or 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 on which it expressed its consent to be bound by the treaty, whichever is later.¹¹³

These provisions incorporate some of the flexible system's elaborate provisions on express and implied consent into the established law of treaties.¹¹⁴ Again, these provisions, though seeming merely to clarify the notion of consent, operate as subtle restraints on the power of states to oppose offending reservations at will.

Article 23 lays down formal requirements for the making of reservations, expanding upon the flexible system's efforts.¹¹⁵ The formaliza-

plied to a certain extent, "to the extent of the reservation," whatever this may be, even when there is an objection. In the case of a reservation the intention of which is not to exclude but to modify the application of a clause, this clause should, therefore, be applied between the objecting and the reserving state "to the extent of the reservation." This textual interpretation of the Convention leads us to think that ultimately the legal effects of an objection and an acceptance of a reservation are identical, when the treaty remains in force between the objecting and reserving state.

Ruda, *supra* note 20, at 200.

113. Vienna Convention, *supra* note 38, art. 20(5), reprinted in 8 INT'L LEGAL MATS. 679, 688 (1969).

114. See *supra* text accompanying notes 80-81.

115. Article 23 states:

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to

tion of consent also marks a shift away from the pure subjective will of the parties, as discussed above.¹¹⁶ By standardizing intent and categorizing consent, the law of reservations has already begun to make the form rather than the substance of will the focus of attention. Again, subtle restraints further invade the pure power of opposing states to exercise their sovereign will.

5. Conceptual and Practical Implications of the Vienna Convention Doctrine

While the Vienna Convention leaves the current state of the law of reservations unsettled, certain conceptual and practical implications of the Vienna Convention doctrine can be seen in the analysis of the subjective and purposive elements of the doctrine as it presently stands.

First, the Vienna Convention codifies a conceptual change in the view of multilateral treaties which the Genocide Convention Opinion and the flexible system had tentatively formulated. The Vienna Convention creates functional categories of multilateral treaties and thus represents the first formal acknowledgment in the law of reservations of the widely varying roles that multilateral treaties can play in international relations.¹¹⁷

Second, the Vienna Convention's failure to clarify the relationship of its purposive and subjective elements means that the decision on the balance between the elements can only emerge from current practice. If a dispute between the interpretations arises in current practice, as is likely to occur, the dispute will probably be settled either by resort to the International Court of Justice or by a clarification of the Vienna Convention by its parties. If the International Court resolves the dispute, it will be important to note whether it uses a contractual

be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Vienna Convention, *supra* note 38, art. 23, reprinted in 8 INT'L LEGAL MATS. 679, 688-89 (1969). Article 22, not considered here, lays out the formal requirements for withdrawal.

116. See *supra* text accompanying note 81.

117. For instance, article 20(3) describes a treaty resembling a legislative document both in substance and in form of enactment. Article 20(2) appears to describe the earlier League-style treaty which depends on unanimous consent and not normative values for its legitimacy. However, article 20(2) incorporates a clash of visions by its very terms. See *supra* text accompanying note 106. Article 20(4) seems to take a Pan-American/flexible system approach, implying a view of the multilateral treaty as the sum of its bilateral parts. In fact, the visions of treaties that these provisions actually describe will depend in large part on whether the permissibility school's or the opposability school's interpretation of the relative importance of the object and purpose test prevails. See *supra* text accompanying notes 97-108.

analysis (looking primarily to the subjective wills of the parties to the Vienna Convention) or whether it instead uses a statutory interpretation based on its conception of the object and purpose of the Vienna Convention. The International Court's choice will indicate the importance it attaches to the purposive element in the modern doctrine of reservations.¹¹⁸

By the same token, if the parties to the Vienna Convention undertake to clarify the convention in order to resolve the interpretive dispute, it is likely that they will decide the matter by redrafting and voting. The terms of the voting would be quite revealing. If a strict majority vote is required to resolve the question, one would be able to discern a legislative attitude toward the convention. If, on the other hand, a near unanimous vote is required, the emphasis on state sovereignty and the contractual attitude would be clear.

Finally, if no such dispute brings the interpretive problem to light, this is likely to be because states employ the flexible standards and allow other states to accept impermissible reservations. The absence of a dispute, then, would suggest that the more subjective approach and vision of the opposability school prevails.

In short, the Vienna Convention doctrine fails to answer the old questions and contradictions raised by its predecessor doctrines and raises a number of new problems. Only a conscious and realistic appraisal of the clash of visions behind these problems can lead to their fruitful resolution.

III. CONCLUSIONS

With the aid of the graph developed in the Appendix, the conclusions reached intuitively in Part II can be described more precisely. The League and the Pan-American systems represent by far the most subjective of all the positions and are quite stable, but depend for their stability on their capacity to maintain the integrity of the bilateral components of their multilateral treaties. The Genocide Convention Opinion, with its disparity between purposive rhetoric and Pan-American-style deference to state sovereignty, falls far short of equilibrium and stability. All three categories of treaties under the International Law Commission's flexible system make the quantum leap towards purposiveness, but without making the concomitant sacrifice of state sovereignty necessary to remain internally consistent. The op-

118. The object and purpose test as presented in the Vienna Convention reservation articles seems to apply equally to all three types of treaties described in articles 20(2)-(4). No suggestion is made to the contrary, and the object and purpose requirement in article 19(c) is cast in very general terms for treaties that do not provide for reservations. Thus the International Court's evaluation of the object and purpose test in the Vienna context will signal its position on the importance of the purposive element in multilateral treaties.

possibility school's interpretations of the Vienna Convention articles 20(2) and 20(4) treaties are generally more stable than those of the permissibility school, because the permissibility school incongruously pairs a pre-eminent object and purpose requirement with the League and Pan-American systems of enforcement, respectively. The shared interpretation of the article 20(3) provision is stable because the visions implied therein require a high degree of political integration which is matched by the extent of rational constraint.

This historical and conceptual analysis of the doctrine of reservations suggests three conclusions beyond the realm of reservations and treaty law. First, the key to understanding and perfecting legal doctrines lies in larger visions of political relations and legal order. On a practical level, the application of a legal doctrine is aided by an understanding of the legal and political visions which "structure and animate" the doctrine itself.¹¹⁹ A legal doctrine, which is found to be clearly unworkable, as the Genocide Convention Opinion doctrine would have been in practice, may well be repaired when its conceptual assumptions are examined and realigned.

Second, as analytic tools, legal doctrines probe the very heart of central political and legal debates of our time. One might reverse the order of analysis suggested by the graph in the Appendix, and analyze the evolution of legal doctrines over time, as seen in Part II, in order to discover the vertical component of political visions and the horizontal component of legal vision which the doctrines reveal.¹²⁰

Finally, once the visions are revealed, the choices and challenges which they pose must be responsibly and earnestly pondered. For if even the relatively minor doctrine of reservations reflects a fundamentally ambivalent image of international society, then the great debate of state sovereignty versus world community truly pervades every aspect of international law. And if international law is to be refined and ex-

119. Parker, *supra* note 4, at 79-80.

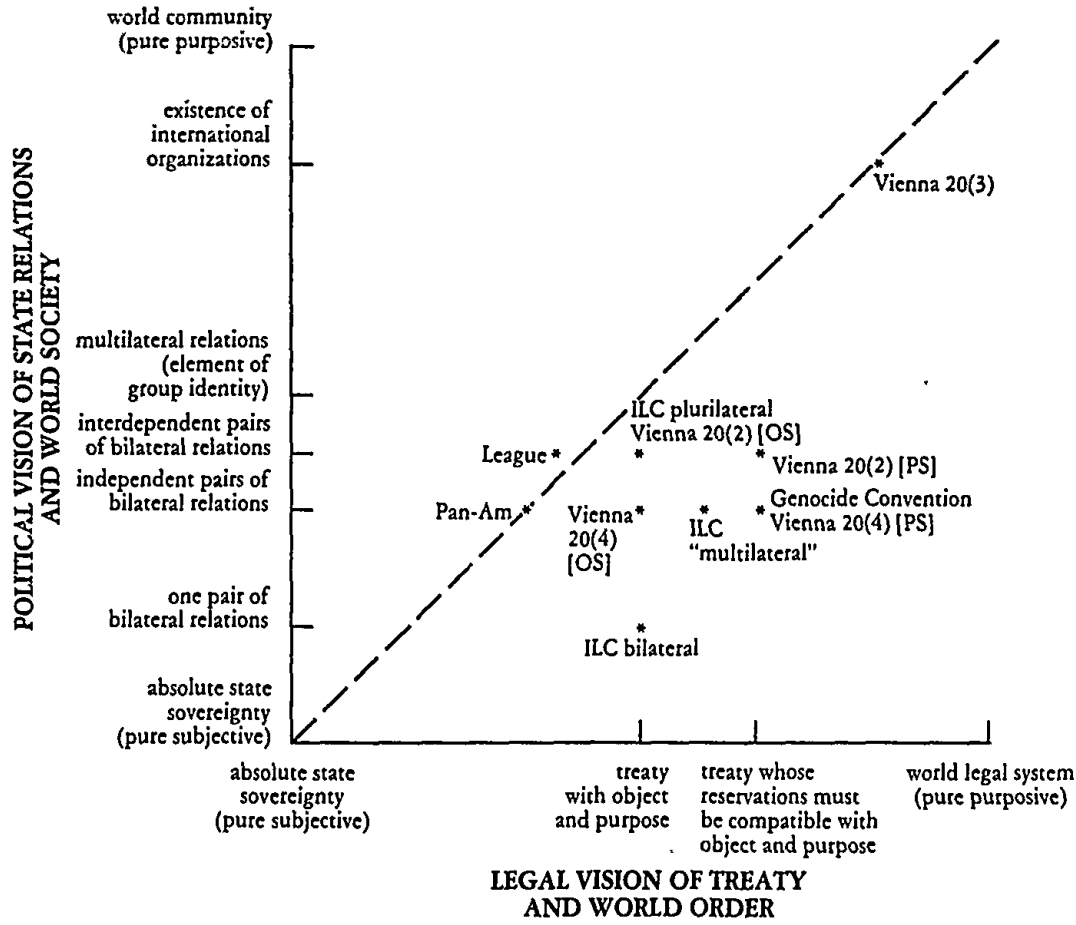
120. For instance, this analysis of the five versions of the doctrine of reservations prompts some observations about the legal and political agendas of the twentieth century. First, the relative stability and subjectivity of the League of Nations position on reservations suggests that legal thinkers in that period felt comfortable with traditional legal and political notions of state sovereignty, despite their rhetoric about world community.

Second, the relative instability of the doctrines appearing after 1950 seems to reflect a fundamental indecision about the structure of the post-World War II world. The categorization of treaties with distinct rules for each category allowed the Vienna Convention framers to include traditional notions of state sovereignty, i.e., by incorporating the League and Pan-American enforcement systems in the Vienna Convention doctrine on reservations, while at the same time encouraging political and legal integration in the article 20(3) doctrine.

Finally, the legal drafters involved in these post-war efforts seemed to envision quite purposive legal institutions but their efforts to activate those institutions were hobbled by their abiding instincts valuing state autonomy. In a similar way, the United Nations Security Council projects the image of international legal unity, but the veto power of the post-War Big Five limits the Council's effectiveness on pressing issues.

panded so that it effectively provides order and rational constraint in the world, one must begin with a precise and realistic picture of the type of international society which this law is to serve.

GRAPH OF THE VERSIONS OF THE DOCTRINE OF RESERVATIONS*



*"Pan-Am" refers to the Pan-American system of reservations. "ILC" refers to the International Law Commission. "OS" refers to the opposability school's position on the Vienna Convention reservation system; "PS" refers to the permissibility school's position.

APPENDIX

The dual influences of the political and legal dynamics on the evolution of the doctrine of reservations may be portrayed on a graph, as illustrated *supra* at p. 108.

The origin, being the intersection of the political and legal axes, represents the notion of state sovereignty in its most extreme form. Absolute state sovereignty in the political sense connotes complete political independence of states in international society. Absolute state sovereignty in its legal sense connotes the raw will of the state, unconstrained by any international legal order or obligations. The intersection of the two axes at this shared point of absolute state sovereignty represents a point in legal and political theory with no ordering and no social relations.

The two axes represent, horizontally, the spectrum from the pure subjective to the pure purposive views of legal relations among states and, vertically, the spectrum from the pure subjective to the pure purposive views of political relations among states.¹²¹ The horizontal coordinate of any given position represents the extent of rational constraint on state sovereignty and thus represents the permissibility aspect of that position. The vertical coordinate of any given position represents the political constraint on state sovereignty, i.e., the extent to which state power becomes dependent upon the power of other states, and thus represents the opposability aspect of that position.

The horizontal axis represents a legal spectrum that spans the two divergent legal visions of treaties which in turn reflect two visions of world order. At the origin, one vision depicts no legal relations among states, no intrusions into the absolute sovereignty of states and thus complete legal independence of states. At the opposite end, another vision depicts a multilateral treaty which is so broad in scope and uniform in application that it in fact creates an integrated world legal system.¹²²

Moving from left to right along the horizontal axis, legal relation-

121. At the subjective ends of the axes, both political and legal relations are chosen: states choose to ally themselves with some states and not others, they also choose to sign treaties with some states and not others. At the purposive end, both political and legal relations are dictated by standards external to individual state discretion: the demands of a world community and a world legal order.

In pure theory, legal relations and political relations would more or less mirror each other. Legal relations would become a formal codification of political relations. They ought to reflect each other because a legal doctrine describing a predominantly purposive legal component (such as the primary importance of the object and purpose test) and an extremely subjective political component (such as a requirement of only acceptance by one state to validate a reservation) is contradictory in describing at once both substantial and minimal constraints on state sovereignty. Yet it is not difficult to imagine actual cases in which the patterns of political and legal relations between states diverge widely. As is revealed graphically, a legal doctrine may indeed embody such contradictions.

122. The section of the legal spectrum representing absolute state sovereignty is the subjective end; the world legal system represents the purposive end.

ships among states occur more often and become increasingly defined. On the left half of the axis, where the subjective vision dominates, treaty relations are determined by the subjective will of the parties; thus the treaties are essentially reciprocal contractual relationships among the parties.¹²³

Treaties plotted at the midpoint of the horizontal axis are presumed to contain a minimal but distinguishable object and purpose. This midpoint corresponds to the intuitively defined multilateral treaty that differs from the raw conglomeration of bilateral relations. The minimal object and purpose provides that element of collective commitment that gives the concept of the multilateral treaty a separate essence.¹²⁴ The multilateral whole, which now includes an extra ingredient of common aim, becomes more than just the sum of its bilateral parts.

Moving to the pure purposive end of the axis, the object and purpose of the treaty becomes more and more assertive in its demands on state sovereignty and embraces more and more of the treaty's substance. At the extreme, such a "treaty" would be, in effect, a world constitution. All elements of the treaty would serve the object and purpose of world government.¹²⁵

The importance of the permissibility criterion increases as one moves from left to right along the horizontal axis, because the rational constraint upon the reserving party's ability to reserve effectively increases until, at the end of the axis, no reservations are allowed.¹²⁶

The vertical, political axis spans the two divergent political visions of the world. As already noted, the vision at the graph's origin depicts a world of completely autonomous, independent states. The vision at the other end of the axis depicts a fully integrated world community in which states no longer exist as separate entities.¹²⁷

Moving up along the political axis, there is a steady progression

123. See *supra* note 16 and accompanying text; see also *supra* notes 55-56 and accompanying text. Such treaties are dominantly a form of what Fuller calls organization by reciprocity, epitomized in his example of a potato farmer and an onion farmer trading excess crops. A reciprocal multilateral treaty is merely the aggregate of the bilateral relations which the treaty creates; nothing of substance relates the bilateral relations to each other. Each set of bilateral relations, however, achieves its exchange-based ends as a reciprocal bilateral treaty would. Reciprocity requires that "the participants must want different things;" the only "general grounds" on which it may be defended are that "it's good for me and it's good for him." See Fuller, *supra* note 17, at 358, 367.

124. See *supra* text accompanying notes 57-59.

125. The bilateral and multilateral treaties on the right half of the axis are dominantly a form of what Fuller calls "organization by common aims," illustrated by the example of two men who contract to cooperate in moving a boulder blocking a common access road. This type of organization requires that participants want the same thing or things; and the "general grounds" on which any particular actions may be defended are rational arguments relating the action to the common aims. Fuller, *supra* note 17, at 366.

126. See *supra* note 15.

127. The absolute sovereignty end is the subjective end of the political spectrum; the world community vision appears at the purposive end.

towards greater and greater interaction among states, until, at the midpoint of the political axis, multilateral relations among states possess a minimal but distinguishable element of group identity, i.e., these states view themselves as a group with common interests. Along the upper half of the axis, states become increasingly interdependent, forming ever more cohesive international organizations, until at the top, they have formed a world community.

The opposability element, or the degree to which the relations of the reserving state are dependent upon the actions of the reacting states, corresponds to this political axis. Opposability increases as restraints on the reserving state's sovereign will increase, until at the top of the axis, community needs eliminate the reserving states ability to reserve at all.¹²⁸

The line which bisects the axes (the line $x = y$), at which the degrees of the political and legal integration are equal, carries normative importance. Simply put, this line represents those positions at which the political constraints on state sovereignty equal the legal constraints on state sovereignty.¹²⁹

Even along the $x = y$ line, one may distinguish between doctrines on reservations which reflect multilateral treaties with a distinct essence and an ingredient of common aim, and those doctrines which reflect multilateral treaties that are nothing more than the sum of their bilateral parts. The doctrines reflecting collections of bilateral treaties appear on the line where the horizontal and vertical values are below the midpoint values; the doctrines reflecting the new distinctive multilateral treaties, i.e., those treaties having a broader common purpose such that they are more than merely an aggregation of bilateral treaty relationships, appear at the midpoint values and above.

A legal doctrine is likely to be unstable in both internal logic and application unless it evolves to a form in which the legal and political demands on state sovereignty are roughly equal.¹³⁰ The line $x = y$ is therefore descriptive of the equilibrium which all views of reservations must approach.¹³¹

128. *See supra* note 15.

129. This is of course true in an algebraic sense; its conceptual validity can be shown by considering the factors used to determine the coordinates. The political coordinate of the position on reservations increases as the reserving state's dependence upon the reacting states increases. The legal coordinate increases as the degree of rational constraint on the reserving state's ability to reserve increases. If a legal doctrine embodies incongruous political and legal restraints on state sovereignty, tension will encourage change in the doctrine until the two sets of restraints become more equal.

130. Only on that line does the doctrine prescribe the same degree of constraint on state sovereignty in both political and legal relations. And thus it is only on or near that line that legal doctrine can balance the demands which pure law and pure politics place upon it. When legal doctrine strays far from that line, legal and political visions clearly diverge, prescribing conflicting views of state sovereignty.

131. The line $x = y$ seems also to be associated with the concept of legitimacy. *See supra* note

It is now possible to plot the historical versions of the doctrine of reservations as points on the graph. Although absolute numerical values mean nothing in this exercise, the relative locations of the different versions can be determined by comparing their x and y values with each other.

A. The League System

The legal coordinate of the League system approaches the midpoint of the horizontal axis because it guarantees some uniformity of bilateral commitments through the unanimous consent requirement.¹³² It falls short of the midpoint of the axis because the treaty does not necessarily contain an object and purpose.¹³³

The political coordinate approaches the midpoint of the vertical axis because the unanimous consent requirement makes pairs of bilateral relations dependent upon each other. That is, no reservation can come into effect between any two parties until it has been accepted by all the other parties. The political coordinate falls short of the midpoint because there is no guarantee the parties acknowledge any group identity or common interest; in fact, the unanimous consent requirement acts as a sort of veto by any party and thus safeguards each party's sovereign will against the group will with regard to reservations.

The League system approaches but falls short of equilibrium because it does not guarantee that a perfect matching of demands on state sovereignty will occur between the political and legal values; it demands unanimous consent for reservations, thus creating relatively high political interdependence but otherwise does not guarantee that the treaty will represent much more than the sum of its bilateral parts.¹³⁴ Nevertheless, it falls close to the line of equilibrium and thus represents a nearly stable doctrine.

B. The Pan-American System

The Pan-American system has a horizontal value less than the League

10. On this line, the quality of detachment (represented by the legal coordinate) is perfectly balanced with the qualities of sensitivity and criticism (represented by the political coordinate).

The association of this line with the concept of legitimacy is suggested further by the example of the Genocide Convention Opinion doctrine. As seen below, this doctrine falls far from the $x=y$ line. The subsequent history of the doctrine of reservations supports the suggestion that the Genocide Convention Opinion doctrine is not legitimate, that is, not possessing the quality which inspires voluntary acceptance. Neither the International Law Commission nor the Vienna Convention adopted the doctrine or reasoning of the International Court in their later codification of the law of reservations.

132. See *supra* note 40 and text accompanying notes 26-29.

133. See *supra* text accompanying notes 41-43.

134. See *supra* text accompanying notes 40-41.

system because it places less rational constraint upon state sovereignty—it does not provide for treaty provisions on reservations and guarantees no shared element in the treaty commitments of all parties.¹³⁵ The Pan-American system has a vertical value which is less than that of the League system because each pair of bilateral relations is independent of the others, in that the acceptance of a reservation by one reacting party will not bind another reacting party, and the objection to a reservation by one reacting party will not prevent the reservation from going into effect between the reserving state and a consenting party.

The Pan-American system thus lies on the line of equilibrium, but only because it reduces every multilateral treaty to its bilateral components. It successfully balances a legal vision of bilateral legal ordering and a political vision of independent bilateral relations, each of which hinges on the integrity of bilateral involvements. The Pan-American system, however, fails to give the multilateral treaty any independent usefulness as an alternative to the bilateral treaty as a form of legal ordering.

C. The Genocide Convention Opinion

The Genocide Convention Opinion system has a horizontal value larger than the midpoint value because it describes only normative “civilizing” conventions which demand that reservations must be compatible with the object and purpose of the treaty. But because the system of enforcement prescribed by the Court is similar to that of the Pan-American system,¹³⁶ its vertical coordinate corresponds to the point describing pairs of bilateral relations.

The Court depicted in its reservation doctrine a normative, legislative treaty in a world of continuing intense state sovereignty. As the graph suggests, the substantial gap between its political and legal constraints on state sovereignty inspired the two anomalies described above¹³⁷ and made the Genocide Convention Opinion doctrine one of the most unstable of all the twentieth-century reservation doctrines. The subsequent history of the doctrine supports this conclusion.¹³⁸ Most of the later versions of the doctrine de-emphasized the object and purpose test or prescribed a larger degree of state interdependence and, as shown below, thus resulted in more stable legal doctrines.

135. See *supra* note 40.

136. See *supra* text accompanying notes 63-65.

137. See *supra* text accompanying notes 61-66.

138. See *supra* note 131.

D. The International Law Commission's Flexible System

The flexible system described three separate sets of reservation requirements, which are graphed separately.¹³⁹ The horizontal coordinate of the bilateral treaty is the midpoint value, because an object and purpose is said to exist but reservations were not explicitly required to be compatible with that object and purpose to be admissible.¹⁴⁰ The vertical coordinate of the ILC bilateral treaty doctrine is the relatively low value assigned to bilateral relations.

The ILC bilateral treaty doctrine is far from stable because it restricts bilateral treaty-making to treaties which have an object and purpose. It thus denies the existence of purely reciprocal bilateral treaties.¹⁴¹

The ILC's plurilateral treaty doctrine has a horizontal value equal to the midpoint value, because it presumes the existence of an object and purpose but does not demand that reservations be compatible with that object and purpose. Its vertical value is the same as the League system's, because of the demand for unanimous consent of the parties. The doctrine appears to be unstable. It requires unanimous consent to validate the reservation, thus reflecting a certain faithfulness to political state sovereignty, but it also asserts, without further explanation, that the object and purpose of the treaty must play a significant role in the validation as well.

The ILC "multilateral" treaty doctrine has a horizontal coordinate larger than the midpoint value because it is, by definition, a normative document.¹⁴² The horizontal coordinate is not equal to that of the Genocide Convention Opinion, however, because there is no requirement that reservations be compatible with the object and purpose of the treaty. Its vertical value is equal to the Pan-American vertical value, however, because the opposability requirements allow an opposing state by its objection to affect only its own bilateral relations with the reserving state. Thus the relations among pairs of states are relatively independent.

The ILC "multilateral" treaty doctrine lies relatively far from the line of equilibrium. It presupposes an object and purpose and a normative essence but the extreme state political sovereignty inherent in the Pan-American provisions on opposability and effects incorporated by the flexible system can easily destroy any treaty's ability to serve that object and purpose.

139. For the sake of clarity, the ILC provisions on plurilateral and multilateral treaties which are the constituent instruments of international organizations are not graphed. The relative position of doctrines including this type of treaty is represented by the Vienna Convention article 20(3) treaty doctrine.

140. See *supra* text accompanying notes 78-79.

141. See *supra* notes 123 & 125 and accompanying text.

142. See *supra* text accompanying note 74.

E. The Vienna Convention Doctrine

The Vienna Convention also describes three sets of requirements for reservations. Two of these three sets have two representations, depending upon whether the permissibility school's or the opposability school's interpretation of the articles is used.

1. Article 20(4) Treaty Doctrine

The vertical coordinate of both versions of the article 20(4) treaty doctrine is equal to the Pan-American version's vertical value, since acceptance by only one state is required to establish a reservation and the reservation goes into effect against each state which accepts it.¹⁴³ The horizontal coordinate of the opposability school's version of the article 20(4) doctrine is at the midpoint value because the object and purpose of the treaty is assumed, but given minimal importance since there is no requirement that reservations be compatible with that object and purpose.

The permissibility school's version of the article 20(4) treaty doctrine has the same horizontal coordinate as the Genocide Convention Opinion doctrine, since reservations must be generally compatible with that object and purpose.¹⁴⁴

The permissibility school's version of article 20(4) treaty doctrine is less stable than the opposability school's version because of the large rational constraint represented by the dominant object and purpose requirement matched with the subjective Pan-American system of enforcement.

2. Article 20(2) Treaty Doctrine

The opposability school's version of the article 20(2) treaty doctrine is located at the same point as the ILC plurilateral treaty doctrine because of their identical coupling of League requirements on the political axis and minimal object and purpose requirements on the legal axis. The permissibility school's position has the same vertical coordinate as its article 20(4) value; the horizontal coordinate is at the point at which all treaty provisions are required to be compatible with the treaty's object and purpose. Again the opposability school's position is more stable than the permissibility school's version. The considerable purposive element of rational constraint is incongruously

143. Article 20(4) and article 21 together describe a Pan-American kind of system of opposability and effects. *See supra* notes 103 & 111 and text accompanying note 109.

144. *See supra* text accompanying note 94. The compatibility requirement, however, is not absolute, because the treaty may provide for specifically prohibited or permitted reservations, or prohibit reservations altogether.

coupled with the unanimous consent requirement, which allows states to safeguard their sovereign will by vetoing repugnant reservations.¹⁴⁵

3. Article 20(3) Treaty Doctrine

Finally, the permissibility school and opposability school's version of the article 20(3) treaty doctrine falls at the same point because the object and purpose of the treaty is to be the constituent instrument of an international organization. The article 20(3) treaty doctrine has a large horizontal component because it is a constituent instrument of an international organization and thus has considerable normative, legislative influence. Because the existence of an international organization itself represents considerable interdependence among states, the vertical coordinate is also high. The article 20(3) treaty doctrine is on the line of equilibrium because it joins parties who have formed an international organization with a treaty constituting the constituent instrument of that organization. It is stable and the most purposive of all views on reservations. It matches a large degree of state interdependence on the political axis with a large degree of legal organization and rational constraint on the legal axis.

145. Note that both article 20(2) positions are relatively unstable. This conclusion is verified in the intuitive analysis of the article 20(2) treaty doctrine above. *See supra* text accompanying notes 105-6.