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THE LIFE AND TIMES OF THE MODERN LAW OF RESERVATIONS: THE DOCTRINAL GENEALOGY OF GENERAL COMMENT NO. 24

Akbar Rasulov*

Method, then, is distinguished by the fact that it outlives the case for which it was developed. It can become autonomous, so to speak; one can abstract method from the motivating causes as well as formalize and generalize it.

Reinhart Koselleck

[The ideal solution would be] one that would combine practical convenience and reasonable ease and liberality in the matter of making unilateral reservations, with adequate control, a regard for realities, sound legal doctrine, and respect for the rule of law in the international treaty relations of States.

Gerald Fitzmaurice

INTRODUCTION

This article represents the first stage of a larger investigative project. Its principal aim is to prepare the ground for a systematic legal-historical examination of a particular international legal document. The document in question is General Comment No. 24 (52),¹ a non-binding commentary dealing with the subject of multilateral treaty reservations,² issued on 2 November 1994 by the United Nations Human Rights Committee, a treaty-monitoring body established under the International Covenant on Civil and Political Rights.³ The immediate goal behind the exercise is to develop a critically-inflected reading of this document by conceptualising it, firstly, as an international legal *event*, that is to say, as an act of an essentially legal-historical – as opposed to ‘simply’ legal – significance; and, secondly, as a formal representation of a historically symptomatic development in the structure of the contemporary *international legal consciousness*.

Two central assumptions inform the logic of the present inquiry. The first concerns the question of the historical relevance of General Comment No. 24. Put briefly, what I am going to

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¹ Human Rights Committee, *General Comment No. 24 (52)* (1994): ‘General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).

² As traditionally defined, the concept of reservation in international law is understood to describe any unilateral statement, however phrased or named, made by a contracting party at the time of signing, ratifying, accepting, approving or acceding to the treaty in question, whereby that party purports to exclude or modify the legal effects of one or more of that treaty’s provisions in their application to that party. See for further discussion IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 51-4 (2nd edn.; 1984).

³ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966).

propose in these pages is that the publication of this document not only established an extremely important precedent in the development of a certain, very specific mode of international legal governance but also marked one of the most significant turning points in the evolutionary trajectory of the contemporary international legal system. A close, analytically rigorous examination of the principal formative factors that influenced the effectuation of this turning point, follows the argument accordingly, should enable us to obtain a better sense of the essential legal-historical implications of the various epochal transformations that took place in the architecture of the international legal order during this period and thus work out a potentially more insightful understanding of its basic structural limits.

The second assumption concerns what one might call the question of *international legal historiography*. In a nutshell, my main methodological premise in these pages derives from the standard positivist thesis that Law, like every other form of social life, should be essentially considered as a fundamentally self-contained aspect of social reality. Applied to the present context, the most immediate implication of this hypothesis, as I see it, has to be that the ‘*movement*’ of legal history (if one can use that phrase) should be regarded, in principle, as a *process that is entirely immanent in itself*. That is to say, the principal epistemological presumption implied by the positivist theoretical outlook must be that, firstly, the course of legal history unfolds quite independently from that of ‘economic relations’, ‘culture’, and ‘political struggles’; and, secondly, even though it might be over-determined in some exceptional circumstances by the impact of various external forces, the course of legal history is always inscribed *wholly within its own, field-specific, distinctly legal-historical ‘medium’*. Inasmuch as one accepts the general logic of this conclusion, it follows at this point essentially that the two main theoretical questions which must inevitably be confronted by every legal-historical inquiry are: (i) what exactly do legal-historical events consist in as a matter of practical realisation, i.e. what is that specific ‘material’ from which legal history is ‘comprised’?; and (ii) how exactly can the course of legal-historical development be objectively established, i.e. how does one measure ‘movement’ in the field of legal history?

Needless to say, no single answer to these questions would be able to satisfy every legal historian. Nor, in all fairness, would it make any sense to expect otherwise. In the house of legal history, there exist many mansions. There seems to be no reason why all of us should have to stay in the same quarters.

Still, every method, in the end, lives and dies by its capacity for generalisation and formalization. What is the essential formula according to which the concept of international legal historiography has been constructed in these pages? For the purposes of an introductory synopsis, the following five points can be said to provide the answer:

- (1) *Epistemology is not ontology*. It remains a common truism that in most contemporary contexts the word ‘history’ is typically used to describe at one and the same time two entirely different concepts. The first of these concepts has as its primary purported referent the idea of a certain objectively expressed movement-of-things-through-time; the second, the enterprise of recording and measuring the course of this movement as a matter of more or less conscious discursive representation. The distinction between the two concepts, being essentially a product of a particular cultural sensibility, appears in some elementary sense to be fundamentally random. For the purposes of the present inquiry, however, it also seems extremely fortunate inasmuch as its basic semantic implication helps quite effectively to foreground the central theoretical insight of *ontological realism*, viz.: the world as we know it exists more or less independently of our representations of it; this does not mean, however, that we should therefore necessarily be able to tell how the world ‘really is’ or where exactly

in it we ‘belong’, even if we may feel fairly certain about how it ‘is not’ and what we aren’t.⁴

- (a) To distinguish between the two different meanings of ‘history’, the first of them (movement through time) will be henceforth described in these pages as ‘history’ with the small ‘h’; the second (representation), accordingly, as ‘History’ with the capital ‘H’.
- (2) *Directionality: the process of international legal history is irreversible and non-teleological.* The course of legal history has no preordained sense of direction and no inherent tendency towards any form of ‘progressive development’ (the ‘history has no script’ thesis). It is not circular, loopified, or sequentially patterned (‘history is not a process of eternal return’ thesis); nor does it repeat itself in any meaningful sense, especially not in the first-as-a-tragedy-then-as-a-farce mode.⁵ Most importantly, no amount of ‘constructive interpretation’ should be ever allowed to obscure our awareness of that basic incontrovertible truth that as an entirely objective process history *always* moves from an earlier stage to a later stage which grows out of it, but at the same time remains entirely distinct from it, and thus *ad infinitum* (the ‘history is an aspect of objective reality, not a product of History’ thesis).
- (3) *Cognisability: the process of international legal history can only be accessed at an abstract level.* In the most obvious sense, this statement means that the objective reality of international legal history cannot be studied in the context of whatever interactive relations may occur between physical human individuals but only in the context involving a certain, very particular class of abstract ‘collective’ entities. In the more technical sense, it means that even though like all other kinds of history the history of international law is ultimately rooted in ‘natural time’, its ontology is not, as a matter of fact, identical with it – that is to say, its objective procession as an ontologically independent fact cannot be immediately read in the flow of any natural (physical, chemical, biological, etc.) process. Rather, like every other comparable historical process, it can *only* be intellectually recovered at a certain level of analytical abstraction (see point 4 below).

Put differently, the course of international legal history is not directly detectible in any ‘visible’ aspect of the immediate lived experience, even if it can, at times, leave directly observable imprints within it (e.g. by sanctioning the outbreak of military action). Just like the experience of an international legal event can only be had within the phenomenological plane of international law (but not within the plane of physical, chemical, biological, etc. processes), the experience of international legal history can only be had as a function of entering the plane of international legal events.

- (a) How one recognises an international legal event is ultimately a function of how one defines ‘international law’. The concept of international law that is assumed in these pages derives from the classical positivist tradition as articulated, for example, in the works of (among others) Ian Brownlie,⁶ Bruno Simma,⁷ or the *later* Hans Kelsen.⁸ It is not, admittedly, the only conception

⁴ See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 153-7 (1995).

⁵ For further elaboration, see generally LOUIS ALTHUSSER, *PHILOSOPHY OF THE ENCOUNTER* (2006).

⁶ See, e.g., Ian Brownlie, ‘International Law at the Fiftieth Anniversary of the United Nations’, 255 *RCADI* 9 (1995).

⁷ See, e.g., Bruno Simma and Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View*, 93 *AJIL* 302 (1999)

⁸ See, e.g., HANS KELSEN, *THE LAW OF UNITED NATIONS* (1950).

that could be adopted in the present context, but it is one that appears to be the most rewarding to work with.

- (4) *Continuity: the process of international legal history unfolds in a staggered, non-linear fashion.* If the ontology of international legal time differs from that of ‘natural time’, the same it follows should also hold true for the internal rhythm and structure of international legal history. What this is supposed to mean for the purposes of a legal-historical inquiry can be gleaned from the following argument developed by the French Marxist philosopher Louis Althusser (writing in this context about the ‘rules’ of economic-historical investigation):

To go even further, I should say that we cannot restrict ourselves to reflecting the existence of *visible* and measurable times ...; we must, of absolute necessity, pose the question of the mode of existence of *invisible* times, of the invisible rhythms and punctuations concealed beneath the surface of each visible time. Merely reading *Capital* shows that Marx was highly sensitive to this requirement. It shows, for example, that the time of economic production ... is a complex and non-linear time – a time of times, a complex time that cannot be *read* in the continuity of the time of life or clocks, but has to be *constructed* out of the peculiar structures of production. The time of the capitalist economic production that Marx analysed must be *constructed* in its concept. The concept of this time must be constructed out of the reality of the different rhythms which punctuate the different operations of production, circulation and distribution: out of the concepts of these different operations.⁹

The key to developing a theoretically defensible model of international legal History, it is proposed, lies in completing the exact same analytical task as outlined in the excerpted passage. To be sure, one would have to replace first the concepts of ‘production’, ‘circulation’, and ‘distribution’ with similarly positioned legal-theoretical concepts, but the rest of the exercise will then follow the same general logic: the first and the most indispensable theoretical step will be to discard the assumption that international legal history must necessarily unfold at the same speed or according to the same internal rhythm as ‘natural time’; once this theoretical adjustment is made, the next step will be to develop the concept of a multi-layered historical space and, as its logical derivation, the idea of a distinctly *international legal* time. Following that, it will be then only a matter of straight logical deduction to develop the argument that just as ‘history as a whole’ tends to unfold at different speeds in its different ‘sectors’, so too in all probability should international legal history. There exists, in other words, no convincing reason to believe that the evolution of, for instance, *jus ad bellum* or the law of international legal sources ought to proceed at the same speed or according to the same internal rhythm as that of international trade law or the international law of minority rights. Indeed, given the relative independence of all these legal regimes from one another, it would seem, in fact, a lot more reasonable to conclude, as a matter of general presumption, that they must typically follow entirely different historical-developmental trajectories defined by entirely different internal rhythmic structures.

- (5) *Vertical heterogeneity: the process of international legal history unfolds at several different levels, each of which follows its own tempo.* From the idea of a multi-rhythmic structure of international legal history in which the separation of the

⁹ Louis Althusser, ‘The Errors of Classical Economics: An Outline for a Concept of Historical Time’, in LOUIS ALTHUSSER AND ETIENNE BALIBAR, *READING CAPITAL* 100 (trans. by Ben Brewster; 1970).

rhythmic lines is determined by the external differentiation between the respective legal regimes, the most obvious next step theoretically will be to develop the concept of a multi-rhythmic structure in which the taxonomy of the field's mutually autonomous elements (differently accelerating sub-fields) is presumed to follow not so much from the internal patterning of the law's purported objects of regulation (horizontal fragmentation of the international legal regime) but from the experiential differentiation in the transformative processes permeating the international legal system as a whole (vertical fragmentation). The principal point of reference here, in methodological terms, could be found in the standard historiographic distinction between the idea of *history as the immediately recognisable process of transition from one discernible chronological event to another* and the idea of *history as a field of temporal structures* reflecting 'contexts of activity reaching over several human generations',¹⁰ that is to say, 'those temporal aspects of [human] relations [which are] not covered by the strict sequence of experienced events' and 'which do not [therefore] change from one day to the next' the way chronological events do, but which instead represent those very conditions which ontologically make these events possible in the first place.¹¹

- (a) In the field of what one may call self-consciously historiographic scholarship about international law, one finds today three different models for how such long-term temporal structures can be theoretically articulated. The first comes from Wilhelm Grewe's (in)famous attempt to establish the logic of international legal history as one determined by a quasi-Hegelian pattern of linear succession between different 'national ages' (international legal history as a progression through phases of imperial geopolitics).¹² The second comes from Martti Koskenniemi's still on-going attempt to re-describe the course of international law's historical development as a succession of 'intellectual sensibilities' (international legal history as a movement through Foucauldian-style *epistemes*).¹³ The third comes from Antony Anghie's field-redefining account of the mutually constitutive relationship between international law and the (neo)colonial political project (international legal history as a movement through various modes of hegemonic dominance).¹⁴ While one can argue about the relative strengths and weaknesses of each of these approaches, none of them seems sufficiently suitable for the purposes of the present investigative task. Hence the present excursus.

¹⁰ REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* 102 (trans. by Keith Tribe; 2004).

¹¹ *Id.*, 107.

¹² See WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (trans. by Michael Byers; 2001).

¹³ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001) and more recently Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 *U. Toronto L. J.* 1 (2011).

¹⁴ See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

SECTION 1. GENERAL COMMENT NO. 24 IN ITS IMMEDIATE CONTEXT

a. The Riddle of General Comment No. 24

That General Comment No. 24 was going to ‘make history’ was pretty much obvious right from the outset. What was not so obvious was why exactly it ended up happening in the first place. For, indeed, however one looks at it, as an act of international legal practice, it seems safe to say, it has turned out to be a complete and utter failure. Its essential argument seems to have found no support among the member states; the force of the doctrinal opinion for the most part has turned entirely against it; and, having been cited approvingly only once in the nearly two decades that have passed since its adoption (and even that in a case decided by the Committee itself),¹⁵ it seems rather obvious now that no part of its substantive vision has (yet) found its way into international custom.¹⁶

What is more, it seems, any international lawyer worth their professional salt should have been able to foresee all this right from the very beginning. One would not need to know much about the law of treaty reservations to be able to figure out just how much of a backlash a legal reform initiative proposed by a treaty-monitoring body that seeks to remove all powers of appraisal and validation from the member states of that treaty regime *in favour of the treaty-monitoring body itself* was likely going to provoke. Nor would one need to have a particularly extensive grounding in the comparative constitutional law tradition to be able to notice that the essential operative logic of such an initiative seems suspiciously close to that of judicial self-aggrandizement. Even the briefest acquaintance with the basic argument formula deployed in *Marbury v. Madison* would be enough to confirm this conclusion.¹⁷ Considering the undeniable quality of the legal talent on the bench, it seems highly unlikely that none of the members of the Committee involved in the drafting process behind General Comment No. 24 would have been able to spot this. And yet still they went ahead and after all that time that they had to deliberate over it decided nonetheless to press on with this initiative and formulate it in that particular language that they did. Why?

b. Anxieties of a Latent Discourse: What the Structure of the Received Wisdom Reveals

Much has been written on the question of treaty reservations over the last two decades. Scholars from many different traditions and backgrounds have tried to tackle the subject in one way or another. Some have approached it from the perspective of the traditional doctrine of sources.¹⁸

¹⁵ See *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, CCPR/C/67/D/845/1999.

¹⁶ Even those commentators who otherwise seemed to sympathise with the Committee’s vision acknowledged as much. See, e.g., MALCOLM SHAW, *INTERNATIONAL LAW* 923 (6th edn.; 2008); ALAN BOYLE AND CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 156 (2007); ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 76 (2005); SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 807 (2nd edn.; 2004); D. W. Grieg, *Reservations: Equity as a Balancing Factor?*, 16 *Aust. Yb.I.L.* 21, 78 (1995).

¹⁷ Arguably one of the most important cases in the history of US constitutional law, *Marbury v. Madison* (2 L. Ed. 60 (1803)) marks the exact point at which the US Supreme Court began to assert the power of judicial review over the acts of the US Congress. No such power, of course, had been envisaged in the text of the American Constitution. Nevertheless, as the Court famously explained, it would be far too ‘extravagant’ and possibly even ‘immoral’ if the Court were recognized not to possess that kind of power, since otherwise the limits on Congressional powers could be effectively amended through a regular legislative process, and that, of course, would endanger the ideals of democracy and reduce to nothing the idea of a written constitution. For further background on *Marbury v. Madison*, see MARK GRABER AND MICHAEL PERHAC (EDS.), *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* (2002); William van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *Duke L. J.* 1.

¹⁸ See, e.g., BOYLE AND CHINKIN, *supra* n.16.

Others addressed it under the more theoretically adventurous rubric of ‘international legal constitutionalism’.¹⁹ Still others restricted themselves to simply restating whatever black-letter rules they could be vouched for, without going into any bigger questions of political or legal theory.²⁰ Each group clearly believed theirs was the most valuable contribution. And yet not a single page in all of this output addressed the basic legal-historical riddle behind General Comment No. 24: why did this document come to be the way that it turned out?

Or at least that is the initial impression one would typically get from surveying the state of the discourse at its surface. For, indeed, beneath every pattern of silence, there always lies the possibility of a hidden systematicity: the absence of an open discussion, as Michel Foucault has so brilliantly demonstrated on so many different occasions, as often as not can signify the establishment of an area of tact and discretion, and neither tact nor discretion, of course, are the enemies of discursive transmission.²¹

Behind every regime of apparent ignorance as often as not a careful investigation will discover the presence of a fully functional discursive formation, latent and anonymous in its existence, but not for all that any less effective or ambitious. To be sure, this ‘law’, to the extent to which one can call it that, at best is only a projection of a *tendency*. There exists, in other words, no logical guarantee that behind every instance of discursive omission one will always find a ‘hidden’ conversation. But in the present case, for good or ill, this tendency certainly seems to hold true.

Beneath all the apparent silences and elisions, behind all the random asides and fragmentary comments, one can still make out the contours of a common, fairly well-established narrative about General Comment No. 24. Stripped of all its rhetorical complications, taken in its most typical configuration, what this narrative ultimately seeks to propose is that the essential legal-historical meaning of General Comment No. 24 taken as an international legal event was that it was either the product of a monumental failure of judgement or an outcome of a fundamentally corrupted process of decision-making. Either, in other words, it must have been the case that the members of the Committee had somehow failed to anticipate how negatively the member states were going to react to any perceived loss of power, including that allegedly inflicted in the name of furthering the cause of the international human rights protection, or, better still, the only reason why they ended up going on the kind of wild Marburyesque adventure that they did was that they completely lost sight of their professional mandate.

In the first case, the general argument typically tends to proceed along the following lines: of course, it is certainly true that in some ideal sense ‘bodies such as the Human Rights Committee are the best guardians of the treaties whose implementation they supervise’, but the world of international law is the world of *realpolitik*, not ideal situations, and in this world ‘States [will always] resist the seepage of power away from States parties and towards such bodies’.²² The fact that the members of the Committee seem to have forgotten about this obvious fact is deeply puzzling – one would not usually expect such kind of lapses from such an esteemed group of experts – but what happened to their reform initiative as a result of that was, of course, completely unsurprising. States did what states always do. Ruthless struggle for power is the iron law of international politics.

In the second case, the standard argument pattern tends to be a little more complex. What pushed the Committee over the edge in this interpretation of events would not be usually

¹⁹ See, e.g., J. A. Frowein, ‘Reservations and the International *Ordre Public*’, in JERZY MAKARCZYK (ED.), *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 403 (1996).

²⁰ See, e.g., ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 100 et seq. (1999).

²¹ See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 17-18 (trans. by Robert Hurley; 1978).

²² VAUGHAN LOWE, *INTERNATIONAL LAW* 73 (2007).

attributable to the influence of any one single cause but rather the combination of a whole set of fundamentally quite distinct factors: typically, a certain kind of ideological co-optation dynamics (by human rights extremists), an unhealthy dose of personal hubris (on the part of the individual members of the Committee), and the onset of an essentially unforeseeable turn of world-historic events (the end of the Cold War). The following passage from D. W. Grieg provides a highly illustrative example of this kind of argument:

It would appear that [in declaring the vision that it did in General Comment No. 24] the Committee relied primarily on [its mandate under] Article 40(4) of the Covenant. [But] the scope of *Article 40(4)* is *relatively narrow and certainly does not appear to bestow powers on the 'jurisdictional plane'* [which the Committee appears to assert]. Nevertheless, despite a lack of any firm basis in this provision, a *number of members of the Committee have regarded that body as having a quasi-judicial nature based upon its status as guardian of the Covenant*. Although there were also members who represented the alternative, narrower view of the Committee's role and functions, this became an increasingly minority attitude. *With the changes in Eastern Europe diminishing the political significance of the latter, the Committee has been able to assert an essentially pro-human rights ideology less hampered by the demands of supporters of State sovereignty*. It is this shift which prompted the Committee to tackle reservations, clearly a manifestation of that sovereignty, in the way that it did in General Comment No. 24(52).²³

For, indeed, it was only after

April 1992 [that the Committee] adopted the [practice] of issuing 'comments' on every State report it has considered. This is also symptomatic of the move towards a more judgmental role for the Committee. A similar development appears to be taking place with regard to the system of 'general comments' provided for in Article 40(4). In the past they have been notable for their generality [but now that has come to pass].²⁴

Looking from this angle, the conclusion seems rather impossible to avoid:

[it was the p]olitical changes which have produced *changes in personnel and attitudes within the Committee* [that] were *undoubtedly responsible* for the totally different *tone of, and approach* adopted in, General Comment No. 24(52).²⁵

Notice two interesting points about the two argument patterns. Firstly, what appears to start out as a decidedly descriptive historical explanation in both cases quickly turns into a thinly veiled attack on the Committee members' basic sense of professionalism. In the first case, the supporting evidence is found in the alleged failure to take cognizance of the essential logic of *realpolitik*; in the second case, in the perceived inability to resist the temptations of hegemonic adventurism and activist ideologies. The clearly detectable consequence in both contexts is that the resulting narrative pattern automatically slips into what after Martti Koskenniemi one would call a fundamentally apologist mode of reasoning.²⁶

Secondly, rather characteristically, both strands of the narrative also seem to place a rather strongly pronounced emphasis on the idea that the key to the whole episode in legal-

²³ Grieg, *supra* n.16, 94-5 (italics added).

²⁴ *Id.*, 95.

²⁵ *Id.*, 96 (italics added).

²⁶ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

historical terms has to be sought exclusively in the world of politics and never in law. Recall again Grieg's language: it was 'undoubtedly' an accumulation of '*political changes*' that was 'responsible' for the adoption of a 'totally different' 'tone and approach' by the Committee. The actual legal mandate on which the Committee '*appeared*' to rely did not support its argument; the '*changes in Eastern Europe*', however, allowed it to relax its standards of reasoning, which is why the advocates of '*human rights ideology*' had the upper hand over the 'supporters of State sovereignty'. Notice how consistently the implied causal picture behind each argument tends to stress what in the vocabulary of classical liberal theory would be called the pole of 'power and glory', i.e. the logic of subjective desire, impulse, and passion.²⁷ Notice also how glaringly absent in both cases is made the possibility that, who knows, perhaps, what may have motivated the drafters of the Comment was not *only* their ideology or personal politics (or for that matter their mastery of the art of *realpolitik*) but also the objective dynamics of the immediate legal regime they were working with or the impersonal pressures of syllogistic logic.

Notice, finally, also how strange this interpretation suddenly starts to look when one considers all these points. Surely, whatever may have been going through the heads of the Committee's members when they set out to draft the text of the Comment, one of the first things that one would tend to notice about this document as a legal historian would be that, not being an act of international lawmaking, it was first and foremost meant to be received as an artefact of deductive legal reasoning, that is to say, a product of labour created by a group of people who work primarily in the medium of logical argument and whose sole justification for commanding any degree of attention (and thus of having any measure of political agency) derives entirely from their capacity to sustain a sense of professional identity that is specifically rooted in the idea of legal interpretation. Surely, if one sought to find out what could and must have happened to and among such people – people who live and work 'in' and 'with' law and logic – it would not be at all incongruous to presume that a large part of what may have driven their actions had something to do with the way the specific legal problem and the specific legal materials on which they worked lent themselves to objective logical resolution. And yet, the apparent disciplinary consensus quite clearly tends to assume otherwise. What sort of reasoning, inevitably arises the question, could prompt such a peculiar interpretative turn?

The answer, I think, should not be too difficult to guess. Consider once more the most obvious implications of identifying 'ideology', 'personnel changes', and 'geopolitical contingencies' as the main culprits behind an apparent failure of a legal reform initiative. The essential role of the ideology trope in the present context has almost certainly been to evoke a certain sense of bias and partisanship; that of the personnel changes trope, to hint at the possibility of corruption and the abuse of process; that of geopolitical contingency, to bring to mind the idea of a force majeure. The more one thinks about what sort of rhetorical projects would normally be best served by such an arrangement of *topoi* – the more attentively, in other words, one examines the symptomatic implications of what other *topoi* could have been as easily introduced in the present context but for some reason were not – the more obvious it seems to become that in the logic of the common disciplinary narrative the greatest sin committed by the drafters of General Comment No. 24 was not that they managed somehow to overlook the power of *realpolitik* or that they disrespected the principle of state sovereignty or gave in too eagerly to the cause of human rights activism. It was rather that by failing to achieve what they set out to achieve in that document they somehow jeopardised in the eyes of the disciplinary orthodoxy the very project of modern international law itself.²⁸ For, indeed, unless one were actually convinced that the fallout from this whole episode ultimately threatened to damage the prospects of the international rule of law *itself*, why would one ever feel such an intense need to insinuate that

²⁷ See ROBERTO UNGER, KNOWLEDGE AND POLITICS 63 et seq. (1975).

²⁸ On the idea of the 'project of modern international law', see further Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 Mod. L. Rev. 1 (2007).

whatever it was that might have come into play behind General Comment No. 24, it quite certainly was completely *extraneous* to anything that had anything to do with law or legal reasoning? Why make such a concerted effort to persuade one's readers that it was not 'just' a case of unconvincing interpretation, but a full-scale abuse of the process?

To attack one's colleagues in such openly aggressive terms, to present the fruits of their labour as either the product of some kind of professional incompetence or the outcome of a fundamental lack of objectivity – this is not just your everyday clash between the progressive and the conservative wings of the international law profession. What we are witnessing here, rather, seems to be much more like an intra-disciplinary equivalent of what in the broader social context would be called the politics of *constitutive expulsion*,²⁹ that is to say, a politics whose animating dynamics is informed by a logic essentially indistinguishable from that whereby in a quasi-Schmittian move the aggressing party reserves for itself the universalising label of 'humanity' so as to be able to relegate its adversary all the more effectively to the position of the universal outcast.³⁰

There was something unsettling about the speed with which this sort of attacks began to break out in the scholarly discourse: Grieg's piece came out the next year after the Comment's publication, a lightning-speed reaction in the world of academic publishing. But the scholars who unleashed their criticism in the pages of the learned publications were certainly not alone in expressing their acute disapproval of the Committee's initiative. Less than a year after the Comment's release, in an entirely unprecedented step in the history of the Covenant regime a group of three states parties to the Covenant proceeded also to issue a series of official national responses to the Comment.³¹ The overarching message in each case was as blunt as it was unambiguous: taken on its merits, the position advocated by the Committee was essentially untenable and indefensible. To adopt it as a matter of law would lead to a complete disregard of the established principles of the modern law of reservations as codified in the 1969 Vienna Convention on the Law of Treaties.³² What is more, in advancing that sort of initiative in that sort of format, the Committee had also flagrantly violated the limits of its institutional mandate. If only because of this, its argument had to be considered void and deserved to be rejected.

The second claim, admittedly, seemed a lot less strained than the first: however one looked at it, it did seem broadly true that the Committee effectively sought to short-circuit the standard treaty amendment procedure in a context where no part of its established mandate could

²⁹ That is to say, a politics grounded in the aspiration to present the opposition between oneself and one's adversary as not only rooted in some formal difference of opinion but as arising out of some kind of ontological incommensurability – a rift that can never be overcome, mediated, or subsumed for the very simple reason that its expression is at one and the same time also the marker of the constituting cause of one's own ontological status. For further elaboration, see CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* 141 et seq. (1993).

³⁰ For further elaboration, see CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (trans. by George Schwab; 1996): 'The [concept of the] political must ... rest on its own ultimate distinctions, to which all action with a specifically political meaning can be traced. ... The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.' (id., 26) 'When a [group] fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular [group] seeks to usurp a universal concept against its military opponents. ... The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified version of Proudhon's: whoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity, and a war can thereby be driven to the most extreme inhumanity.' (id., 54) 'The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity. ... But this allegedly non-political and apparently even antipolitical system serves existing or newly emerging friend-and-enemy groupings and cannot escape the logic of the political.' (id., 79)

³¹ For the texts of these responses formally titled as 'observations', see Appendix II in J. P. GARDNER (ED.), *HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT* 193 (1997).

³² *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331.

be plausibly interpreted in such a way as to support this prerogative. And yet, curiously enough, in each of the three state responses it was primarily the first claim that seemed to carry the greater emphasis. Even more interestingly, the general logic of the argument in each case also seemed to follow the exact same basic formula:

(1) When the Committee declared that the traditional approach to the law of reservations established under the Vienna Convention had proved itself to be fundamentally inadequate in the case of multilateral human rights treaties, it completely misinterpreted the whole situation. Its reasoning proceeded from the assumption that while the Vienna regime was essentially designed to apply only in the framework of horizontal synallagmatic inter-statal relations, the Covenant, being a human rights treaty, did not ultimately operate according to the synallagmatic logic. The silent explosion of dubious reservations which had begun in recent years and which in the Committee's opinion threatened to undermine the Covenant's substantive integrity was meant to be the strongest indication of this disjunction. Lest the Covenant were allowed to collapse under the weight of these illegitimate reservations, it followed, an entirely new regime of rules had to be created, and no international body would be better placed to address this task than the Committee itself.

(2) Unfortunately for the Committee, both its initial assessment of the situation and its resulting prescription were entirely off the mark. In the first place, the Vienna regime was, in fact, perfectly well 'suited to the requirements of *all* treaties, of whatever object or nature'. The regulatory dynamic it created, thus, remained adequate to ensure that 'a satisfactory balance [would be preserved] between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty' in all cases, and this 'appl[ied] equally in the case of reservations to ... treaties in the area of human rights'.³³ No new, Covenant-specific regime, in other words, was required either as a matter of legal fact or as a matter of policy, and the fact that the Committee had concluded otherwise could only be interpreted as an indication of how seriously out of touch with the international legal reality it had become.

(3) Not surprisingly, given the essential fallacy of its starting assumptions, its final conclusion with regard to how this new regime would have to be organised in practice, while interesting in principle, turned out to be equally as incorrect in its legal reasoning as it was in its underlying policy vision.³⁴

c. General Comment No. 24 and the Vienna Regime: a Rejection or a Continuation of the Tradition?

To what extent were these criticisms valid? Looking at the actual text of General Comment No. 24, it seems difficult not to notice that whatever objections the Committee may have had against the Vienna regime, its disapproval of the latter was exclusively focused on its institutional and procedural dimensions and not at all on its substantive component. In fact, if anything, on the latter front, the Committee, as even the briefest glance at the text of the Comment will demonstrate, has actually remained as perfectly orthodox and steadfast in its commitment to the Vienna approach as it gets.

i. The Committee's argument

'The absence of a prohibition on reservations', begins its argument at the start of §6, 'does not mean that any reservation is permitted':

³³ Report of the International Law Commission on the Work of its Forty-Ninth Session, UN Doc. A/52/10 (1997), §157.

³⁴ Observations by the United States of America on General Comment No. 24, *supra* n.31, 199-200.

The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(c) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.³⁵

Put differently, the Committee quite obviously has no intention of challenging the enduring relevance of the so-called compatibility test. Moreover, in interpreting it, it also agrees to take its cue directly from the Vienna Convention itself, the relevant provision of which reads: ‘A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty.’³⁶

This much established, the Committee then immediately proceeds – just as the logic of the Vienna compatibility test would require it to – to investigate the exact content of the Covenant’s essential ‘object and purpose’, which it finds to be

to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify [the Covenant]; and to provide an efficacious supervisory machinery for the obligations undertaken³⁷

– and to deduce from this what types of reservations to the Covenant would most likely have to be considered *ipso facto* inadmissible:

- ‘reservations that offend peremptory norms’ (§8);
- reservations that affect those provisions of the Covenant that ‘represent customary international law’ (§8) as well as, to some extent, those provisions that in the Covenant itself are designated as non-derogable (§10);
- reservations that affect rights listed in Articles 1 and 2 of the Covenant (§9); and
- such reservations as are designed to remove those ‘supportive guarantees’ which ‘provide the necessary framework for securing the rights [listed] in the Covenant’, or, in other words, reservations that are designed to leave the Covenant rights without the corresponding remedial structures (§11-15).

All throughout, the tone of the discussion leaves no room for any kind of doubt: the Committee’s loyalty to the compatibility test theory remains unreserved.

The language pretty much speaks for itself: ‘applying more generally the object and purpose test to the Covenant, the Committee notes that...’ (§9); ‘these guarantees ... are ... essential to its object and purpose’ (§11); ‘while there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation’ (§10).

Even when the discussion reaches the point where the Committee starts to voice its concerns about the Vienna regime, the terms in which that is done still indicate an unflinching commitment to the compatibility test model:

As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee

³⁵ *General Comment No. 24*, supra n.1, §6.

³⁶ *Vienna Convention on the Law of Treaties*, supra n.32, Art. 19.

³⁷ *General Comment No. 24*, supra n.1, §7.

believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations.³⁸

The lack of sufficient response by the appraising States is not, of course, a problem limited only to human rights treaties. The proposition that 'the absence of protest by States cannot imply that a reservation is either compatible or incompatible with the [given] object and purpose'³⁹ in this regard holds true for all types of multilateral treaties. Note, however, the complication created by Article 20(5) of the Vienna Convention: unless the treaty provides otherwise, if a reservation has not been challenged for more than twelve months after it had been notified to the given contracting party, it will be deemed to have been effectively accepted by that party. In the case of those treaties which unlike the Covenant can be reduced to 'webs of inter-State exchanges of mutual obligations', the risk that this procedural setup creates – *viz.* that an otherwise incompatible reservation might 'slip through' and become validated *sub silentio* – will typically be non-existent: if nothing else, the basic dynamics of national self-interest is going to be enough to ensure that any attempts by the reserving State to unduly reduce the level of its treaty commitments vis-à-vis its treaty partners will be appropriately challenged and extinguished by the latter's timely protests. With human rights treaties, however, the situation appears to be completely different. Because of the way in which the legal regimes they create are organized, the standard behavioural dynamics engendered under such treaties will not typically produce sufficient levels of incentivization for their parties to start challenging one another's reservational actions, regardless of how dubious these latter might otherwise appear. If the essential logic of the compatibility test approach is to be preserved for such kind of treaties, it follows, consequently, an entirely *different* institutional-procedural arrangement would have to be created compared to what is otherwise provided under the traditional Vienna model.

It is true, of course, that the Covenant itself has nothing to say about the question of reservations, which means according to the standard rules of treaty interpretation that this matter therefore has to be settled by default, according to the general logic of the Vienna regime. Nevertheless, it seems equally true also that the basic design flaws of this regime identified by the Committee have already allowed an alarming number of substantively very questionable reservations to slip through the safety net of Article 20(5). Clearly, the more of these reservations are allowed to remain in force, the more certainly this will defeat the realization of the Covenant's essential purpose and object, which, as the Committee points out, unquestionably includes the creation of a commonly binding system of minimal standards of treatment. Surely, it would be entirely preposterous to assume that the drafters of the Covenant, having spent so many years working on it, would have intended to allow this sort of scenario to happen. Surely, what all of this means in other words, concludes the Committee, is that unless one decides to ignore *tout court* the whole point of the Covenant's existence, one has to agree that even though on the whole the Vienna regime on reservations must be considered by default to constitute an integral part of the Covenant's legal structure, there has to be made a strong presumption against imparting into the Covenant's fabric those parts of the Vienna regime which would make it incapable of dealing with the aforementioned problem of questionable reservations.

³⁸ *Id.*, §17.

³⁹ *Id.*

Put differently, unless one is ready to make the assumption that the Covenant was essentially designed to fail, one would have to accept as a matter of elementary logic that the operative mechanism for the appraisal and validation of Covenant reservations should be transferred onto a completely different institutional platform to ensure the formation of a decision-making environment that would not depend for its operation on the individual decisions of the contracting parties and would not thus be made vulnerable to the shortcomings of Article 20(5). Given the existing institutional architecture, what better candidate can one find for this job than the Committee itself? As the Covenant's official treaty-monitoring body, it not only has both the required kind of expertise and the necessary measure of political impartiality but in the performance of its other functions it has already had to engage, as a matter of standard routine, in exactly that sort of review and oversight exercises. Why not formalize what already seems to be the established practice anyway?⁴⁰

ii. Analysis

Three points spring to attention at this stage. First, whatever one might think of this line of reasoning, it is certainly nowhere near as fanciful, outlandish, or lacking in precedent as the argument presented by its critics seems to imply. Both the principle of effectiveness argument in treaty interpretation⁴¹ and the implied powers argument in the law of international institutions belong among some of the most common tropes in modern international law discourse.

Second, despite its purported 'rebellion' against the Vienna regime the Committee's actions quite clearly seem to have been inspired by its commitment to the compatibilist logic. Whatever objections the Committee may have had against the general logic behind the modern law of treaties, dissatisfaction with the compatibility test approach was certainly not one of them. Moreover, even its *Marbury*-esque arrogation of powers seems to have been dictated by the need to ensure the realisation of the compatibilist reasoning: 'It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.'⁴²

Thirdly, note now also the way in which this last comment combines with the earlier noted claim that the absence of protest by the contracting parties does not in itself dispose of the issue of reservational compatibility. To suggest that the question of compatibility both *can* and *needs* to be determined independently of the reactions of the contracting parties according to the traditional doctrinal taxonomy adopted in the law of treaties would be typically considered an illustration of the so-called permissibility theory of reservations.

d. Permissibility vs. Opposability: the Story of a 'Doctrinal Quarrel'

The issue in question, it seems, was first identified in the context of the great jurisprudential debates of the mid-1970s, which in the received memory⁴³ have come since to be associated

⁴⁰ *Id.*, §18.

⁴¹ See Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties', in MALCOLM EVANS (ED.), *INTERNATIONAL LAW* 172, 188 (3rd edn.; 2010): 'The principle of effectiveness has two meanings. The first is that all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to express the intended meaning. Thus an interpretation that renders a text ineffective and meaningless is incorrect. The second operates as an aspect of the "object and purposes" test, and it means that the instrument as a whole and each of its provisions must be taken to have been intended to achieve some end, and that an interpretation that would make the text ineffective to achieve that object is also incorrect.'

⁴² *General Comment No. 24*, supra n.1, §18.

⁴³ See Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 *EJIL* 437, 452-3 (2002); Catherine Redgwell, *Universality or Integrity? Some*

primarily with the names of the Cambridge professor Derek Bowett (permissibility school) and the Judge of the International Court of Justice Jose Maria Ruda (opposability school).⁴⁴

As summarized by the International Law Commission, essentially

the adherents of the ‘permissibility’ school consider[ed] that a reservation contrary to the object and purpose of the treaty was in itself void, irrespective of the reactions of the co-contracting States, while those of the ‘opposability’ school, on the other hand, thought that the only test as to the validity of a reservation consisted of the objections of the other States.⁴⁵

Thus, from the perspective of the permissibility school, the nullity of a reservation ‘could be decided “objectively” and in the abstract’⁴⁶ – which meant, *inter alia*, that it could be invoked even by that State which ‘had not itself made any objection to it’⁴⁷ – whereas from the perspective of the opposability school, the matter could only be settled by examining the actual reactions of the other contracting parties, which meant, by implication, that if a State after the passage of a certain period of time had not explicitly objected to the given reservation, it would be estopped from presuming its nullity in any subsequent dispute involving itself and the reserving State. Over time, the permissibility approach went on to form the implicit basis of the official British position on the subject,⁴⁸ as well as coming to be endorsed by many British-based international law scholars,⁴⁹ while the opposability approach came to enjoy greater recognition among continental international lawyers.⁵⁰ The International Law Commission, in typical manner, sought to work out some kind of a middle ground, which in an even more characteristic fashion it found no better way of achieving than by declaring, firstly, that the ‘doctrinal quarrel’ between the two schools was ‘perhaps insoluble’⁵¹ and quite possibly also ‘exaggerated’,⁵² but that, secondly, it could nevertheless be concluded that ‘although the “permissibility” school was probably right in theory, the “opposability” school more accurately described the actual practice of States.’⁵³

It is not immediately clear how much weight one should assign to this sort of comments or what exactly their legal status might be, but at the level of general logical analysis it should not be too difficult to work out the basic theoretical difference between the two approaches.

1. As a matter of its implicit assumptions about how the legal universe works, the permissibility approach appears to be rooted in an essentially pre-modern theoretical

Reflections on Reservations to General Multilateral Treaties, 64 BYIL 245, 263-9 (1993); SINCLAIR, *supra* n.2, 81, fn.78.

⁴⁴ See, respectively, D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BYIL 67 (1976-7) and J. M. Ruda, *Reservations to Treaties*, 146 RCADI 95, 148 (1975-III).

⁴⁵ Report of the International Law Commission on the Work of its Forty-Seventh Session, UN Doc. A/50/10 (1995), §417.

⁴⁶ First Report of the Special Rapporteur, Mr Alain Pellet, on the Law and Practice relating to Reservations to Treaties, ILC Forty-Seventh Session, UN Doc. A/CN.4/470 (1995), §100.

⁴⁷ ILC Report on the Forty-Seventh Session, *supra* n.45, §418.

⁴⁸ See UK Observations, *supra* n.31. See also First Report on the Law and Practice relating to Reservations, *supra* n.46, §98.

⁴⁹ See, e.g., Françoise Hampson, Final Working Paper on Reservations to Human Rights Treaties, Fifty-Sixth Session of the UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2004/42 (2004) *in passim*.

⁵⁰ See, e.g., JEAN COMBACAU, *LE DROIT DES TRAITÉS* 60 (1991); PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 74 (2nd edn.; 1995); K. Zemanek, ‘Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties’, in JERZY MAKARCZYK (ED.), *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS* 323, 331-3 (1984).

⁵¹ ILC Report on the Forty-Ninth Session, *supra* n. 33, §§ 55, 95.

⁵² First Report on the Law and Practice relating to Reservations, *supra* n.46, §105.

⁵³ ILC Report on the Forty-Seventh Session, *supra* n.45, §457.

sensibility. On the epistemological front, it implies a conception of the legal-interpretative process of the kind one would normally expect to see in the writings of some classical natural law theorist but certainly not in the context of a modern-day international legal regime. On the ontological front, rather than recognizing the view that in a legal system built on consent every treaty necessarily has to be regarded as a ‘living document’ whose contents can always be amended by the conduct of its parties after its formal conclusion, it opts for the view that every legal regime should be effectively treated as an artefact frozen in time. Put the two assumptive patterns together and what comes out is essentially a theoretical framework whose operative structure appears to be based as much on old-school Aristotelian essentialism as on eighteenth-century formalism.⁵⁴

2. By contrast, the essential logic of the opposability approach at its root seems to imply a fundamentally post-modern concept of lawmaking. The argument that a reservation that might otherwise be incompatible with the respective treaty’s object and purpose should nevertheless be considered legally valid because it has been so accepted through the acts of other contracting parties⁵⁵ is a quintessential illustration of the proposition that ‘legality is a product of performative practices’⁵⁶ and that ‘treatymaking is a language game’.⁵⁷
3. There exists no theoretically coherent way of reconciling, on the one hand, the essential logic of the permissibility approach and the decentralized institutional mechanism established under the Vienna Convention, and, on the other hand, the essential logic of the opposability approach and the idea of the compatibility test. If one takes seriously the proposition that the validity of a given reservation can be established ‘objectively’ *in se*, there exists no reason to assign the powers of appraisal and validation to every other contracting party. Indeed, if anything, both elementary policy considerations and the dictates of logic pull in the opposite direction: objectivism and cacophony never go well together.

On the other hand, if one chooses to believe that the validity of a given reservation should be considered a function of how the other contracting parties have responded to it, then, all things considered, from the point of view of regime-construction dynamics it would have been a lot more sensible to dispense with the substantive requirement of compatibility altogether. Rather than introducing something as complicated as the compatibility assessment requirement, the test at the heart of Article 19 could have been framed in such a way as to necessitate the conclusion that a proposed reservation would be considered valid if it has not been challenged by, say, more than one-half of the other contracting parties.⁵⁸ Such an approach, while problematic from the point of view of sovereignty theory, would

⁵⁴ For a succinct description of what such a combination would typically entail, see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1-2 (1983).

⁵⁵ Cf. Ruda, *supra* n.44, 190: ‘In the last analysis, under this system, the validity of a 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.’

⁵⁶ On the idea of ontology being a product of performative practices, see, typically, Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *Theatre Journal* 519 (1988).

⁵⁷ On the idea of language games, see, typically, LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (trans. by GEM Anscombe; 1968).

⁵⁸ Indeed, back in the day, Gerald Fitzmaurice identified precisely that as the ‘most ideal’ solution. See G. G. Fitzmaurice, *Reservations to Multilateral Conventions*, 2 *ICLQ* 1, 23-6 (1953).

have had the undoubted virtue of being extremely easy to implement, since it would have given rise to none of those interpretational difficulties typically associated with trying to establish the exact meaning of a document co-written by a whole crowd of authors commonly instructed to keep the terms of any deal they sign up to as general and vague as possible. What is more, it would have also made a lot more sense in terms of its institutional element: decentralisation, like all forms of democracy, always militates in favour of some form of majority vote and thus demands a full acceptance of the principle of subjectivism in decision-making. The proposition that a reservation should be appraised in terms of its inherent compatibility with the object and purpose of a given treaty goes against this principle.

Indeed, one might even say that it is not until the discussion switches back into the permissibility theory mode that the concept of measuring a treaty's object and purpose starts to make any sense. And yet, given the decentralised structure of the Vienna procedure, how can the basic assumption of the permissibility approach be maintained? The idea of objectivism inevitably requires the achievement of some kind of decisional closure. In the absence of an authoritative means of determining whether the given reservation is compatible with the object and purpose of the respective treaty, the right to make that determination, under the logic of Article 20, falls to every contracting State. But if each State is free to make its own determination 'and there is no agreed means of compulsory judicial settlement or collective decision procedure, does not the test of impermissibility lose its practical significance?'⁵⁹

The answer to that, as every proponent of the opposability school would insist, has to be a resounding yes. But then what does one do about the fact that the compatibility test has been given such a pride of place within the overall structure of the Vienna regime? The logic of the opposability approach presumes an unqualified endorsement of the subjective reactions of other contracting parties; the inherent setup of the compatibility test presupposes some sort of objective appraisal. If the subjective decision is both sufficient and necessary, why would the drafters of the Vienna convention bother including in it any objective benchmarks? Judge Ruda's oft-repeated remark that Article 19(c) was only intended as a source of 'guidance to States regarding acceptance of reservations, but no more than that,'⁶⁰ might make some sense logically, but it does not look very convincing given the Convention's actual normative structure and its drafting record, nor indeed the fact that the introduction of the compatibility test into international law long predates the adoption of the Vienna Convention.

A contradiction? Certainly. But how should one go about resolving it?

Consider how this challenge must have looked from the Committee's point of view: on the one side, it was confronted with a need to give force to an explicitly applicable substantive legal standard that was firmly rooted in doctrine, treaty law, and State practice; on the other side, it was faced with an implicitly created regulatory predisposition arising out of an essentially arbitrary set of historically accumulated conditions that as far their legal status was concerned had never been endorsed as part of *lex lata* and indeed seemed to have nothing better going for them than that 'things have always been this way'. Which of the two considerations should be given normative precedence? Considering the unquestionable centrality of the compatibility test to the Vienna regime, it would be utterly unthinkable to reduce it simply to the rank of a discretionary guideline. Considering the historically demonstrated

⁵⁹ LOUIS HENKIN ET AL. (EDS.), INTERNATIONAL LAW: CASES AND MATERIALS 451, n. 4 (3rd edn.; 1993).

⁶⁰ Ruda, *supra* n.44, 190.

malleability of the institutional structure of the international arena, it would seem to be equally unthinkable to give what in effect is a completely *contingent* constellation of *non-juridical events* the status of a self-justifying legal principle.

To be sure, the choice which the Committee made in the end could not be shown to have had the full approval of the Vienna Convention's signatories. But it certainly seemed to be far more consistent with the overall logic of the regime they had created than its alternative. By proposing to discard the decentralized appraisal mechanism in favour of a centralised procedures of quasi-judicial review, the Committee not only did not go against the foundational principles of the Vienna system; it set out an initiative that, if realised in practice, would have led to results that would be far less disruptive of the Vienna regime's basic design than the alternative its critics seemed content to promote.

e. Doctrinal Genealogy

Two basic conclusions seem to suggest themselves at this point:

- (i) Whatever may have been the full historical meaning of General Comment No. 24, it certainly did not mark an attempt to break away from the Vienna tradition. Far from being a paradigm-disruptive endeavour, it should be thus regarded rather as a direct logical continuation of a pre-existing regulatory dynamics.
- (ii) Given that the Vienna tradition itself was the product of a rather protracted history of lawmaking efforts, to grasp the fundamental significance of General Comment No. 24 as a *legal-historical event* it appears to be necessary to determine not only what set of specific differences separates its essential substantive vision from that of the traditional Vienna regime, but also what basic position it occupies in the context of the broader legal-theoretical landscape of ideas that has developed in the course of the historical evolution of the modern law of treaty reservations as a whole. Put differently, any reasonably precise characterization of the fundamental legal-historical meaning of General Comment No. 24 must begin with what in the structuralist-semiotic tradition would be typically called an *intertextualist reconstruction*⁶¹ – or, to use the term in a decidedly non-Foucauldian sense, an attempt to trace out its basic *doctrinal genealogy*.⁶²

⁶¹ On the theory of intertextualist reconstruction, see generally further GRAHAM ALLEN, *INTERTEXTUALITY* (2000); DANIEL CHANDLER, *SEMIOTICS: THE BASICS* 197-8 (2nd edn.; 2007). For an international law illustration, see Akbar Rasulov, *Writing about Empire: Remarks on the Logic of a Discourse*, 23 *LJIL* 449, 460-1 (2010).

⁶² On the Foucauldian concept of genealogy, see MICHEL FOUCAULT, *POWER/KNOWLEDGE* 83-7 (trans. by Colin Gordon et al.; 1980).

SECTION 2. THE HISTORY OF THE MODERN LAW OF RESERVATIONS: THE TRADITIONAL VIEW

Few questions in modern international law seem to be considered as well settled as that of the general trajectory of the contemporary law of reservations. The standard account replicated from one leading source to another invariably rehearses the same basic formula: an unmistakably linear timeline consisting of three relatively clearly delimited stages each of which gave rise to its own distinct philosophy and a corresponding set of preferred doctrinal solutions.⁶³

The first stage, as commonly envisaged, is understood to have started at some point around the turn of the 20th century. Its main doctrinal legacy was the so-called ‘unanimity theory’, or, as it also came to be known in some parts of the literature, the ‘traditional rule’ or the ‘classical view’.⁶⁴ Endorsed formally by the League of Nations in 1927, the unanimity theory approach, as the name suggests, advocated the view that any reservation previously unagreed with one’s treaty partners required their full unanimous consent in order to become valid. Even a single objection would be sufficient to nullify the proposed modification of terms and block the reserving State’s accession attempt.⁶⁵ As commonly assumed by the subsequent generations of scholars, the rise of the unanimity approach marked the ideological zenith of the so-called contractualist theory of treaty-making. Whether or not that is indeed so, the unanimity rule quite certainly continued to remain the central point of reference in every academic discussion of the law of reservations long after it began to fall out of favour in the world of state practice.

The second stage in the history of the modern law of reservations began at the height of the interwar period. The new philosophy that came to exemplify it went on to be known simply as the ‘Pan-American approach’, on account of being championed at first only by the members of the then Pan-American Union (now the Organization of American States).⁶⁶ Compared to the unanimity theory, the Pan-American approach advocated a much more liberal stance with regard to the question of when and how the reserving State could submit a previously unagreed reservation. The essential presumption according to this view of things was that those contracting parties that were not content to accept the proposed reservation could simply refuse to consider the reserving State a co-party for the purposes of their bilateral relations *inter se*, without thereby preventing it from becoming a party to that treaty *tout court*. As the conventional wisdom has it, though at first it remained somewhat unpopular, as time went on the greater practical flexibility offered by the Pan-American approach increasingly came to be recognised even outside the American region, as the needs of the international political intercourse made recourse to open multilateral treaties ever more common.

Following the end of World War II, however, there soon arose an ever more liberal vision. Like the Pan-American approach, it, too, did not receive any special designation in the scholarly literature. Some authors proposed to call it the ‘sovereignty theory’ because it effectively argued that the use of reservations could not be legitimately restricted in any way because doing so would violate the inherent prerogatives of sovereign statehood.⁶⁷ Most commentators, however, simply described as the Soviet approach.⁶⁸ As it was mainly championed by the Soviet Union, the sovereignty theory approach did not find any ideological support in the West. Given furthermore that its essential premise was also seen to contradict the

⁶³ See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 612-3 (7th edn.; 2008); ANTONIO CASSESE, *INTERNATIONAL LAW* 174 (2nd edn.; 2005); SINCLAIR, *supra* n.2, 54-9; LOWE, *supra* n.22, 69-70; Fitzmaurice, *supra* n.41, 190.

⁶⁴ See SINCLAIR, *supra* n.2, 54; LOWE, *supra* n.22, 69; SHAW, *supra* n.17, 918.

⁶⁵ See, e.g., SINCLAIR, *supra* n.2, 54-5; LOWE, *supra* n.22, 69; PETER MALANCZUK (ED.), *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 136 (7th rev. edn.; 1997).

⁶⁶ See Ruda, *supra* n.44, 115-33.

⁶⁷ See Fitzmaurice, *supra* n.58, 9.

⁶⁸ See, e.g., Ruda, *supra* n.44, 137.

then dominant conception of treaty relations – stripped to its basics the Soviet view effectively implied that once a reserving State submitted its reservation a legally binding duty of (re)negotiation was immediately created on all other contracting parties – it never came to be taken seriously in the academic domain either.⁶⁹ Nevertheless, given the obvious power of the political momentum behind it and the easily recognisable continuity between its general logic and that of the Pan-American approach, the sovereignty theory approach did play an important historical role in shaping the evolutionary trajectory of the modern law of reservations, by helping finally bring an end to the doctrinal hegemony of the unanimity theory in academic discourse.

By the late 1940s, as every vestige of the unanimist consensus dissipated, the implosion of the old academic certainties quickly registered in the world of state practice. Confusion set in across every applicable doctrinal debate, ‘widely divergent views’ began to be expressed in every suitable judicial and political forum,⁷⁰ until finally in November 1950 the matters came to a head with the decision of the UN General Assembly to mobilize the newly created UN advisory machinery to help resolve the impending crisis. In response to the recent controversy triggered by the attempt by a number of Eastern bloc States to submit a series of reservations to the 1948 Genocide Convention⁷¹ considered unacceptable by the rest of the convention’s parties, the Assembly decided firstly to request a direct advisory opinion on the matter from the International Court of Justice, while at the same time also instructing the newly established International Law Commission to produce a more general report on the same subject. The implicit assumption behind this dual-track approach seemed to be that the Court, being a judicial institution, would most probably end up delivering its answer *de lege lata*, whereas the Commission, being an institution explicitly charged with the task of helping to develop international law rather than simply restating it, was going to formulate its views *de lege ferenda*.⁷² Ironically enough, in the end everything seemed to turn out in the exact opposite way. The Commission decided to throw its weight behind the old unanimist approach,⁷³ while the Court went on to articulate what to all intents and purposes proved to be a completely new way of thinking about the subject of treaty reservations that had no immediately traceable basis either in the previous doctrinal debates or in the contemporary State practice.⁷⁴ For good or ill, however, as much as the Court’s critics went on to pour vitriol on its apparent abandonment of its duty, over the next decade and a half the new vision it formulated in the *Reservations* case⁷⁵ evolved into the centrepiece of the new doctrinal consensus. At the conceptual core of this new consensus lay the radically unprecedented assumption: the question of whether or not a proposed reservation was legitimate could be resolved far more effectively by simply analysing the objective structure of the respective treaty itself rather than by reference to the subjective rights and privileges of the contracting parties.

Even though at first nobody seemed to find the logic behind the new theory particularly convincing, over time even its initial critics gradually came to accept it as the ‘least

⁶⁹ See Fitzmaurice, *supra* n.58, 10 (‘propounded only to be instantly rejected as untenable’). Compare, however, B. M. KLIMENKO (ED.), *SLOVAR’ MEZHDUNARODNOGO PRAVA* 129 (1982); and more generally V. M. SHURSHALOV, *OSNOVNYE VOPROSY TEORII MEZHDUNARODNOGO DOGOVORA* 171-8 (1959) (developments in international practice and doctrine lend sufficient support to the sovereignty theory model).

⁷⁰ Fitzmaurice, *supra* n.58, 1.

⁷¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277 (1948).

⁷² Shabtai Rosenne, *The Perplexities of Modern International Law*, 291 RCADI 9, 374 (2001); Fitzmaurice, *supra* n.58, 2. For further background, see also SINCLAIR, *supra* n.2, 56-7; Ruda, *supra* n.44, 139-48.

⁷³ SINCLAIR, *supra* n.2, 59; Fitzmaurice, *supra* n.54, 7-8.

⁷⁴ See Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo, *infra* n.75, 42-3.

⁷⁵ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Reports 15.

objectionable' solution compared to its alternatives.⁷⁶ For the States of the Eastern bloc, it was most probably their lack of sufficient political capital that would have been required to secure a greater advancement for the sovereignty theory that ultimately sealed the deal. For the supporters of the unanimity theory, by contrast, it was almost certainly the fact that the new approach advocated a considerably less permissive attitude towards the practice of reservations than either the sovereignty theory or the Pan-American approach that made it seem as the most attractive practical compromise. For the supporters of the latter, on the other hand, the new approach seemed to be so close in its spirit to their own basic model that whatever minor differences existed between them could be easily overlooked.⁷⁷ Obviously, the basic notion behind the compatibility test theory around which the Court articulated its new conceptual framework had no direct parallel in the Pan-American tradition. But, surely, the addition of one new normative element was more than a reasonable price to pay when a regional practice turned into the prototype of the new global consensus. Even the International Law Commission, although it had at first vigorously opposed the Court's new vision, with the appointment of Humphrey Waldock as the new rapporteur on the law of treaties in the early 1960s swiftly reversed its stand on the matter.⁷⁸ By the time the 1969 Vienna conference opened no participating State expressed any support for the unanimity theory.⁷⁹ The 'classical view' no longer met the needs of the time. The page had finally turned. The age of the compatibility test entered its zenith.

One should not, of course, ask too much of any received wisdom. But the quasi-Hegelian sense of teleology which animates this particular narrative – note the implicit pattern of dialectical progression behind the suggested sequence: from the 'thesis' of the unanimity theory to the 'antithesis' of the Pan-American model and the sovereignty theory and thence to the 'synthesis' of the compatibility test approach – certainly seems worthy of critical attention. As do too the obvious quasi-Darwinian overtones behind the implicit projection of a close functional fit between each theoretical model and the respective 'historical stage' in the evolution of international relations. But let us not jump too far ahead of a story whose logic has not yet reached the point of its explicit self-recognition.

⁷⁶ BROWNIE, *supra* n.63, 613.

⁷⁷ Ruda, *supra* n.44, 132-3.

⁷⁸ See SINCLAIR, *supra* n.2, 58-60; Ruda, *supra* n.44, 148-151; BROWNIE, *supra* n.63, 613.

⁷⁹ Ruda, *supra* n.44, 183; Hampson, *supra* n.49, §23.

SECTION 3: THE CLASSICAL AGE: FROM THE WILL THEORY TO MODERNISM

a. The Unanimity Theory vs. the Pan-American Approach: First Impressions

What was the legal-historical meaning of the unanimity theory and the Pan-American approach? At first glance, the only difference between the two models seems to stem from their ‘territorial’ scopes: the Pan-American approach was commonly understood to be nothing more than a regional custom, while the unanimity theory was typically presented as having a (nearly) universal application,⁸⁰ even if in reality it was only a ‘European view’.⁸¹ Beyond this obvious point, however, everything about the two models seemed to be essentially the same. Functionally, both the one and the other were obviously designed to operate as *untailored default rules*. In structural terms, both were also designed on the explicit assumption that they would be applied in the context of a systematically decentralized legal order. The institutional conditions of operability projected behind both regimes, thus, seemed virtually identical, as did also the resulting operative potential: both the unanimity theory and the Pan-American approach lent themselves equally effectively to practical application in the case of open as well as closed multilateral treaties.

Naturally, the immediate contents of the proposed regimes appeared to be quite different: the unanimity theory favoured a highly restrictive use of reservations, whereas the Pan-American approach advocated the opposite. But from the legal-analytical point of view such kind of substantive differences do not actually carry that much significance. What matters far more, instead, are the structural design of the proposed regimes and their broader systemic potentials, and on both of those counts the two models seemed like peas in a pod.

Or, at least, so it would appear at first glance.

b. Default Rules

A default rule is essentially a set of standard assumptions which a third-party adjudicator in a contractual dispute would be expected to resort to, as a matter of law, in order to ‘fill in the blanks’ in an incompletely specified contract when the resolution of the particular dispute come to turn on the meaning of the respective ‘blanks’.

A different way of putting this would be that a default rule is basically a presumptive contractual provision which the contracting parties can always contract around by simply including the respective set of clauses in the text of their contract; if they do not do this, the provision will apply as though it had been included into that contract ‘by default’. Hence the name. One can think of this mechanism as contract law’s variation on the idea of the normative safety net. One can also think of it, from a slightly different angle, as a special case of opt-out clauses. Unlike a standard opt-out clause, a default rule is incorporated into the fabric of the respective contractual relationship as the result of a public legal order dynamics. Neither the parties, nor the adjudicator, in other words, have the choice *not* to apply the default rule when the respective circumstances arise. Nevertheless, if the contracting parties adopt a different legal regime *ex ante*, the default rule will have no place in their contractual relationship.

⁸⁰ See H. W. Malkin, *Reservations to Multilateral Conventions*, 7 BYIL 141 (1926); Marjorie Owen, *Reservations to Multilateral Treaties*, 38 Yale L. J. 1086 (1929).

⁸¹ Rosenne, *supra* n.72, 374.

The fact that the contracting parties can thus escape the reach of the default rule suggests that, in principle, such rules could be described as the ‘soft’ type of public law obligations. Their application is made systemically compulsory, but the dynamics of compulsion is flexible and leaves quite a bit of room for manoeuvre. Seen from this angle, a typical example of a ‘hard’ public law obligation, by comparison, would be the prohibition of murder under criminal law or the general obligation to pay taxes. What makes default rules different from both of these types of obligations is that the latter in theory are designed to be non-negotiable and immutable in their operation.⁸² Or at least that is how they are usually conceived.⁸³

Given that the ground norm in the modern law of treaties is supposed to be the principle of consent, one will not, as a general matter, encounter that many ‘immutable rules’ in this area of international law. The vast majority of all substantive rules in the law of treaties are, thus, structured in the shape of default rules. A classic example can be seen in the case of the principle of *pacta tertiis*: although the general rule holds that a treaty concluded between two States will not create legal rights for a third State, if the parties to the treaty so decide, they are free to change this arrangement, so long as they expressly confirm their intentions to that end.⁸⁴

c. The Peculiar Case of Tailored Defaults: A Concept as a Chimera

According to the received wisdom, there exist two main types of default rules: tailored and untailored defaults. The tailored default approach, as the name suggests, requires the adjudicator to ‘tailor’ his choice of the legal regime to the particular facts of the case, or, in other words, to fill the gaps in each given contract in such a way as would most accurately reflect what the contracting parties themselves would have bargained for in the first place. By contrast, the untailored default approach requires the adjudicator to impose the same standard solution in all situations, regardless of how the individual parties in question may have been inclined originally to structure their deal.⁸⁵ At first glance, between the two, the former would seem to be a lot more attractive. Its attitude towards the parties’ position in the dispute seems a lot more liberal and progressive. It recognises the need for every contractual situation to be treated on its merits. Its starting premise enables the adjudicator to recognise every nuance which modern business life will present him with and accommodate it accordingly. Its ideological underpinnings fit much more readily with the idea of contract as a mechanism for private ordering and the notion of the freedom of contract.

But one only needs to look at it a little more closely to see that in reality all of this is just an illusion. In reality, the concept of a tailored default is a completely false concept – not in the plain everyday sense that it ‘lies’ about something, but in the more abstract analytical sense that it embodies what could be called a *juristic chimera*: ‘something hoped for but illusory or impossible to achieve’.⁸⁶

Consider the basic theory behind the idea of tailored defaults.

The vast majority of scholars who have supported the use of tailored defaults in the last thirty years have come from the background of classical (Coasean) law-and-economics. For

⁸² Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L. J.* 87, 87 (1989).

⁸³ In practice, as the cost of contracting around the given default rule rises its operation begins to resemble that of an immutable rule. Thus, even though on the face of it, the question of its application retains its discretionary nature, in the reality of the actual legal intercourse it is experienced as unavoidable. For further elaboration, see *id.*, 121.

⁸⁴ See *Vienna Convention on the Law of Treaties*, *supra* n.32, Articles 34 and 36. See also *Free Zones of Upper Savoy and the District of Gex*, PCIJ Series A/B (1932), No. 46, 96, at 147-8.

⁸⁵ Ayres and Gertner, *supra* n.82, 91.

⁸⁶ CONCISE OXFORD DICTIONARY (10th rev. edn.; 2001).

them, the proposition that the default rule should always be ‘tailored’ flows directly from the foundational assumptions of the Coasean concept of transaction costs. From the perspective of the Coasean theory, a contract will only ever be left uncompleted when the costs of explicitly addressing all the various contingencies that may arise in the course of its practical lifetime outweigh the benefits its parties will draw from negotiating the relevant clauses. Ideally, this state of affairs should only happen when the probability of these contingencies ever materialising will not be deemed to be that great or when the magnitude of whatever damage would be brought on in the case they do materialise will not be considered sufficiently high.⁸⁷ In practice, however, many contracts tend to go uncompleted even where it would be objectively for the best if the relevant clauses were fully specified in advance. The reason this happens, goes the argument, is because of the transaction costs.

Note the emphasis on the word ‘Coasean’ in the previous paragraph. Not every strand of modern law-and-economics lends the same degree of intellectual respectability to the idea of tailored defaults. What sets the Coasean strand apart from, say, institutional law-and-economics is its rather peculiar combination of epistemological and ontological assumptions about the nature of contractual negotiations. The root of all these assumptions, of course, lies in the famous ‘Coase theorem’.⁸⁸ As with every other grand argument, there exist many possible formulations of the Coase theorem. The one that speaks most directly to the present discussion is this: where the level of transaction costs rises above zero, the legal rule which most effectively minimizes the impact of these transaction costs will lead necessarily to the achievement of the most *efficient allocation* of the respective set of resources.⁸⁹ The language may seem a little opaque, but in the Coasean law-and-economics tradition the notion of ‘efficient allocation’ operates, in effect, as the byword for the ‘most optimal state of affairs’. Translated into the normal language, thus, the basic meaning of the Coase theorem is that the more effectively the given legal regime helps to neutralise the impact of transaction costs in the given case, the easier it will become for the respective set of private parties in the course of their interactions with one another to achieve the most optimal state of affairs conceivably.

Now, the key to understanding why the concept of tailored defaults is essentially a false concept lies precisely in the logic by which this last conclusion is generated.

Look closely: when the effect of the transaction costs is brought down to zero, under the Coasean assumptions it will be *expected* that the interacting parties will choose *freely to negotiate* with one another until such point where the party that is most interested in the acquisition of the particular resource will acquire/retain it in the exact required measure. Once that point is reached the most efficient allocation of the respective set of resources will be achieved and so will therefore the most optimal state of affairs. So far, so good, but note now the reason why the contracting parties are expected to act in this particular way. Under the Coasean assumptions, a typical legal subject is presumed to be simultaneously *perfectly rational* in the course of his decision-making as well as fully informed about the ‘real worth’ of all contested resources and other parties’ valuations of it. Furthermore, he is also assumed to be inherently peaceful, risk-neutral, and fundamentally uninterested in resorting to any form of strategic behaviour (lies, threats, etc.). Put differently, the parties are expected to negotiate with one another until the point where the party that is most interested in the acquisition of the particular resource will acquire/retain it in the exact required measure because these parties are assumed to be perfectly mathematical in all aspects of their decision-making as well as perfectly assured that everyone else’s decision-making is perfectly mathematical too.

If the argument starts to seem a little circular by this stage, that is because it actually is. What the Coasean formula states, in effect, is that the perfect equilibrium will be achieved when

⁸⁷ Ayres and Gertner, *supra* n.82, 92-3.

⁸⁸ For the original source, see Ronald Coase, *The Problem of Social Cost*, 3 J. L & Econ. 1 (1960).

⁸⁹ See in a similar vein A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 12 (2nd edn.; 1989).

everyone involved is presumed to want to act in the only way in which the perfect equilibrium would be achievable and when there are going to be no interfering factors that would frustrate their intentions. When the proof is always-already made part of the starting assumptions, one can be pretty much guaranteed one will not fail to arrive at it.

Now, as a general matter, the proposition that a typical contracting agent will possess all these remarkable qualities which the Coasean formula so curiously seems to take for granted will probably strike an outside observer as a little odd. But that is not where the rub of the matter lies. Note again that the two principal preconditions at the heart of the Coase theorem are ‘transaction costs’ and ‘free negotiations’. In the more traditional usage, the former idea essentially translates as ‘whatever prevents the agreement from being achieved’ and the latter as ‘protecting the exercise of the freedom of contract’. Apply these translations to the earlier formulation, and what eventually comes out is the conclusion that whenever in any given contractual setting the level of the associated transaction costs begins to rise above zero, the achievement of the most efficient allocation of resources will be impaired precisely to the extent to which these transaction costs will frustrate the realization of the contracting parties’ freedom of contract in such a way as to prevent them from concluding the respective agreement. Put more straightforwardly, if you have high transaction costs but you still want to achieve ‘the most optimal state of affairs’, do everything you can to protect the freedom of contract and the rest will automatically follow.

It should be clear by now where this argument is going. One only needs to add this last ‘discovery’ into the context of the general theory of default rules to see how the concept of tailored defaults inexorably starts to take shape. The more profoundly one internalizes the Coasean assumptions, the more evident it becomes that whenever the adjudicator in a contractual dispute confronts an incompletely specified contract, he should strive to fill every gap in that contract in such a way as to give force to whatever he thinks the contracting parties in question would have bargained for (for, indeed, that would be the only way to restore the magic perfection-creating dynamics of free negotiations upset by the prohibitively high transaction costs).

Now, one could make, of course, any number of observations about this line of reasoning.⁹⁰ But only two seem to be immediately relevant.

First, there clearly exists a direct and very strong logical link between showing preference for advocating tailor defaults, holding completely unrealistic assumptions about the general psychological, intellectual, etc. qualities of a typical contracting agent, and believing in the thesis that protecting the freedom of contract will *necessarily* lead to the achievement of the most optimal state of affairs.

Second, the expectations raised of the aforementioned third-party adjudicator under the tailored default approach are at the very least completely indefensible. In the practical reality of contractual relations, even the immediate participants of the original negotiating process themselves will not, as a general matter, ever be able to reconstruct a reliable sense of ‘what they would have bargained for’. One can list any number of reasons for why this would be the case, but the following seven should suffice: (i) people usually tend to forget things in an oddly self-serving way; (ii) contrary to the Coasean formula, people are never fully informed about each other’s intentions; (iii) there is such a thing as the ‘endowment effect’;⁹¹ (iv) ‘[many] people are

⁹⁰ For a few good starting points, see Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of “Law and Economics”*, 33 J. Leg. Educ. 274 (1983); Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 Va. L. Rev. 451 (1974); J. M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 Col. L. Rev. 1447 (1987). Or one could go back a little more and start, say, with Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 Am. Econ. Rev. 309 (1919); Wesley C. Mitchell, *The Rationality of Economic Activity*, 18 J. Pol. Econ. 97 (1910); and 18 J. Pol. Econ. 197 (1910).

⁹¹ See Christopher Curran, ‘The Endowment Effect’, in BOUDEWIJN BOUCKAERT AND GERRIT DE GEEST (EDS.), *ENCYCLOPEDIA OF LAW AND ECONOMICS*, VOL. 1, 819 (2000).

idiots’;⁹² (v) there is such a thing as ‘false consciousness’;⁹³ (vi) there is such a thing as ‘strategic dishonesty’; (vii) when one deals with an unspecified contract, it follows by definition that the contracting parties did *not* actually negotiate anything for the given contingency, so whatever they may say now about how they would have settled this question is really just a series of unverifiable speculations.

Even if we overlook all the other arguments, this last point seems quite incontrovertible. Once we accept it, however, there only remains a very small step to the inevitable conclusion that every ‘reconstruction’ is really just an indirect form of ‘imposition’, that is to say, even the most conscientious attempt at working out a tailored default in the end *always* collapses into some form of untailored default. Naturally, one may still consider it a good idea to retain the concept of tailored defaults as a convenient legal fiction – if only in order to give the judges a general sense of ethical duty towards the contracting parties – but from the analytical point of view it represents a complete impossibility. All default rules are untailored. The only question is: untailored to what degree?

d. Penalty Defaults

A particular subclass of untailored defaults deserves special mention at this point: the so-called ‘penalty default rules’. These are those rules which on the one hand serve the same general function of filling-in-the-blanks in incomplete contracts but on the other hand also seem to be aimed to discourage the contracting parties from actually relying on them. The basic idea behind a penalty default, in other words, is ‘to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they would prefer.’⁹⁴

A good example of a penalty default rule in contemporary international law is the so-called Most-Favoured Nation clause in Article I of the GATT. According to this rule if a WTO member State decides to award preferential treatment to any product originating in or destined for any other State, whether or not the latter itself should be a member of the WTO, is required immediately and unconditionally to extend the same preferential treatment to all like products originating in or destined for the territories of all other WTO members.⁹⁵ The penalty element here consists in the fact that if the WTO member in question goes to the trouble of concluding a separate customs union or a regional free trade area with the privileged State and the overall level of duties established as a result of this union does not exceed the ‘general incidence’ of such duties prior to the union’s formation, under Article XXIV the requirement to extend the same favours to everyone else would not have applied.⁹⁶ Put differently, the implicit message behind the GATT MFN clause is that if the member State wants its trade relations to continue to be governed by Article I, it is more than welcome to do so, but it would be considerably better off if it contracted out of it under Article XXIV.⁹⁷

⁹² See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Maryland L. Rev. 563, 633 (1982).

⁹³ See GEORG LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* 46-54 (trans. by Rodney Livingstone; 1971).

⁹⁴ Ayres and Gertner, *supra* n.82, 91.

⁹⁵ See *General Agreement on Tariffs and Trade*, 55 U.N.T.S. 194 (1947), Article 1.

⁹⁶ See further PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 699-709 (2nd edn.; 2008).

⁹⁷ ‘[T]he proliferation of customs unions, free trade agreements and other preferential arrangements in the last fifteen years has led to a situation in which much of world trade is not conducted in accordance with the MFN treatment obligation. As noted on the WTO website: “By July 2005, only one WTO Member – Mongolia – was not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By

Typically, penalty defaults are introduced in two different categories of cases: (i) those where in the opinion of the lawmaker it would seem to be more appropriate to compel one of the parties to invest in negotiating a certain set of terms *ex ante* rather than leaving the matter to be resolved *ex post* through the respective dispute settlement procedure; and (ii) those where in the opinion of the lawmaker, if the penalty default had not been adopted, the ‘penalised’ party would have obtained an undesirable measure of strategic advantage over other parties thanks to some form of fundamental informational asymmetries, i.e. would effectively engage in an undesirable form of *rent-seeking behaviour*.⁹⁸ In the former case, the general rationale for the use of the penalty default would be that this will lower the costs of *ex post* dispute resolution or even prevent the need for it altogether. In the latter case, the rationale would be that the use of the penalty default will redress the informational asymmetry among the involved parties by compelling the more informed party to disclose the strategically useful information it has to the less informed parties through announcing how/that it would like to contract around the given default rule.

As with all other regulatory instruments, penalty defaults are certainly not a perfect instrument. One side’s penalty can easily become the other side’s ‘windfall’. Thus, an excessive use of penalty defaults may create its own set of rent-seeking incentives and lead to an undesirable degree of opportunism.⁹⁹ Put differently, there is no magic answer to the question of whether or not the lawmaker should use a penalty default in any particular scenario, since the real dilemma is never whether or not there should be *any* rent-seeking/opportunism as such, but rather *which* particular kind of rent-seeking/opportunism should be tolerated and which should be penalised.

And that is precisely the point where the inherent structural differences between the unanimity theory and the Pan-American approach finally begin to reveal themselves.

e. The Unanimity Theory: A General Characterisation

The basic proposition at the heart of the unanimity theory states that if the multilateral treaty in question itself does not specify otherwise, ‘a party to [that treaty] is only entitled to make such reservations as the other parties are content that it should make.’¹⁰⁰

Viewed from this angle, reservations would

only [be] permissible if the convention itself provided for them, or if the drafting conference had discussed and agreed to them. Subsequent reservations could be proposed unilaterally, ... but to be admissible they must be generally assented to, either expressly or *sub silentio*. If objected to by any [party] entitled to object, the reservation must be withdrawn, or the reserving [party] could not be regarded as a party to the Convention.¹⁰¹

What was the essential rationale for the unanimity theory? Looking at the related scholarly discussions, it seems that the typical argument in favour of this approach would usually consist of the following four claims:

July 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT). Of these, 206 were notified after the WTO was created in January 1995.” (Id., 323.)

⁹⁸ Ayres and Gertner, *supra* n.82, 93-4.

⁹⁹ Id., 98.

¹⁰⁰ Malkin, *supra* n.80, 142.

¹⁰¹ Fitzmaurice, *supra* n.58, 1-2.

- (i) unanimity theory protects the integrity of the treaty commitment by increasing the likelihood that every contracting party will be bound by the same set of obligations and thus limits the scope for regime fragmentation;
- (ii) if each State were allowed at its discretion to cherry-pick those elements of a multilateral convention which it liked and exclude all the rest, the other signatories would not be getting ‘what they bargained for’ and so the essential balance behind the agreement would be ‘impaired and even destroyed’;¹⁰²
- (iii) by limiting the use of reservations, the unanimity model prevents the proliferation of ‘false agreements’: ‘where nobody is prepared to make concessions, it is idle to talk of agreement. It is not the least of the disadvantages of reservations that they serve to hide this unfortunate fact’;¹⁰³
- (iv) in cases where the treaty’s entry into force is predicated on the achievement of a determinate number of ratifications, any other solution would lead to a much greater degree of uncertainty as to the treaty’s status and timeline.

The fourth claim is the least persuasive of all: if the contracting parties should indeed care about this kind of scenario, it would be far more reasonable for them simply to specify what type of ratifications will count under which circumstances and to give the treaty’s depositary the requisite instructions than to introduce what in effect amounts to a blanket prohibition on the use of reservations as a matter of customary international law. Seen against the background of the other three claims, the fourth claim, furthermore, appears to be the last one to have been added to the common repertoire, considering that the only circumstances under which it would make any sense to try to articulate this argument would be when the substantive benefits of the unanimity theory required defending against the challenge coming from a more reservations-permissive model, which, of course, did not happen until after the Pan-American approach started gaining support. Last but not least, insofar as it appears also to be a bit more of a contextual speculation about the comparative advantages of the unanimity model than a ‘standalone’ statement detailing its inherent virtues, it could also be argued that the fourth claim should generally be discounted for the purposes of any attempt to explain the ‘original theory’ behind the unanimity approach.

The other three claims, however, suggest an entirely different story. First, despite the initial appearances, what we are looking at here is not, in truth, a combination of three separate claims but rather three different versions of *one and the same claim*. Note the repeated references to the notions of ‘bargain’, ‘true agreement’, and ‘the integrity of the agreement’. What each of these tropes signals is the presence of the same two fundamental premises that underpin each of the three arguments: (i) the ‘truth’ of the treaty regime lies in the actual bargain achieved between its parties which this treaty formally expresses in the material form; (ii) the local ground norm in the law of reservations is to preserve ‘what the parties had bargained for’.

Neither idea at first sight will seem immediately noteworthy – nor should it, really, if one considers it only from the point of view the general tradition of the law of treaties scholarship. However, if one adopts a slightly broader analytical perspective, a close examination of the underlying structure of legal-theoretic assumptions will begin to reveal a number of rather interesting features. The most obvious among them, as any attentive student of legal history will immediately recognise, should be the fact that in terms of its operative reasoning protocol this pattern of argument appears to reproduce the exact same analytical formula which in the broader legal-historical context has been commonly associated with the so-called ‘will theory’ approach

¹⁰² Malkin, *supra* n.80, 142.

¹⁰³ Owen, *supra* n.80, 1087-8.

to the law of contractual transactions, that is to say, a way of thinking and talking about the law of contracts that had been typically characteristic of the 19th century Classical Legal Thought.¹⁰⁴

Briefly, the main assumption at the heart of the will theory approach was that ‘the law of contract [existed to] protect the wills of the contracting parties’.¹⁰⁵ To use the classic formula, to a 19th-century lawyer a contract was essentially the meeting of its parties’ minds and the basic guiding principle of the law of contract was the idea of the sanctity of the freedom of contract. So long as each contracting party entered the given contractual engagement freely and their wills could thus be said to converge into a single psychological whole, the legal system had to respect their decision: whatever bargain the parties might have thus achieved between them, with the exception of those few cases where this would jeopardise the peace of the realm or threaten the *ordre public*, deserved the unqualified protection of the law. The concept of the ‘meeting of the minds’, on this view of things, became both the ultimate *raison d’être* and the main limiting principle of the law of contract: the law of contract existed in order to help enforce private agreements between parties, but such agreements deserved to be enforced only inasmuch as they represented the free communion of their parties’ rightfully expressed wills; when push came to shove, thus, the first thing every legal decision-maker would be expected to do was determine what exactly the parties in question had *willed* to happen between themselves before proceeding thence to deduce the most ‘freedom-compatible’ resolution. Put differently, without the freedom of contract, there was no point in ‘having’ a law of contract, or – which is essentially the same thing – without linking enforcement to the wills of the parties, no part of the system had any legitimacy.

The parallels between the theoretical logic informing the will theory approach and the implicit assumptional matrix underlying the unanimity model should become rather obvious at this point – except, of course, that, the operative mechanics of the will theory approach presumes that the law of contract can only ever use perfectly tailored default rules, since anything else would be effectively tantamount to disregarding the contracting parties’ ‘meeting of the minds’. The unanimity model, on the other hand, quite evidently, advocates the use of an untailed default solution. How can one explain this paradox?

f. The Rise and Fall of the Will Theory of Contract

As commonly presented in modern legal historiography, the will theory of contract first took off at some point in the earlier half of the nineteenth-century, went through a period of seemingly unstoppable expansion in the mid to late 1800s, endured a quarter century or so of acute ideological crisis around the turn of the century, and then finally fell from grace sometime after the end of World War I.¹⁰⁶ From the point of view of the general character of the transformations

¹⁰⁴ For a general overview of what Classical Legal Thought stood for, see further DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006) [1975]; MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 9-31 (1992).

¹⁰⁵ Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”*, 100 Col. L. Rev. 94, 115 (2000).

¹⁰⁶ My understanding of the history of the will theory of contract derives primarily from GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); Morton Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917 (1974); Kennedy, *supra* n.105; and P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); and FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* (trans. by Tony Weir; 1995). In thinking about the logical implication of the will theory more generally, I have also been influenced by Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553 (1933); KENNEDY, *supra* n.104; Betty Mensch, *Freedom of Contract as Ideology*, 33 Stan. L. Rev. 753 (1981).

which took place in its operative premises over this time, one can distinguish, broadly speaking, three principal stages in its evolution: subjectivism, objectivism, and modernism.

Subjectivism. In its earliest stage, the will theory approach, one might say, was practised in its most immediately recognisable form. Every contract was conceived, literally, as the material manifestation of its parties' underlying communion of the wills.¹⁰⁷ A legally binding contractual obligation, it was thus understood, could only be created where there had been established a full 'convergence of individual desires',¹⁰⁸ which meant, in effect, that for any private agreement to become legally enforceable in practice it had to be first conclusively proven as a question of *fact* that the wills of its parties had previously converged into a single psychological entity called the 'meeting of the minds'. In the absence of such a proof, any attempt at enforcement would have to be considered fundamentally illegitimate and inappropriate.

A classic example traditionally cited in the literature to illustrate the subjectivist approach is the English case of *Raffles v. Wichelhaus*.¹⁰⁹ The defendant agreed to buy from the plaintiff a consignment of cotton to be shipped from Bombay to Liverpool on a merchant ship named *Peerless*. As it later turned out, there had been, in fact, two different ships called *Peerless* which sailed from Bombay to Liverpool that year. One sailed in October, the other in December. The plaintiff apparently had it in mind that the consignment would be sent by the latter, while the defendant believed that it would be sent by the former. When the shipment arrived, the defendant refused to pay, citing the absence of a valid legally enforceable contract between himself and the plaintiff. The court, having examined the facts of the case, upheld the defendant's argument on the ground that there had been no actual 'consensus *ad idem*', which meant that the minds of the parties could not have possibly met, and so no legally binding contract could exist between them.

As outlandish as this reasoning might seem to the modern eye, in the mid-1800s it appears to have been perfectly common: and not just in England or the Anglo-Saxon world more generally, but also in continental Europe. (Indeed, as various contract law historians have pointed out, most of the leading ideologues of the subjectivist theory were French and German jurists, especially those of them working in the Historical School tradition.)¹¹⁰

Objectivism. The subjectivist stage did not last very long. Already by the last quarter of the 19th century the general conception of the nature of contracts – how they came into being, and under what conditions they deserved to be enforced – underwent a radical change. Partly under the influence of what the critics of this innovation later saw as a 'misapplication of the principle of estoppel',¹¹¹ partly as a reaction against the notion that to think of minds 'meeting' one another was ultimately in truth a rather silly idea,¹¹² but mainly, it seems, due to the rapid spread of the solidarist philosophy among the juristic intelligentsia in continental Europe,¹¹³ the practice of contract-making in the Western legal tradition increasingly came to be understood

¹⁰⁷ ATIYAH, *supra* n.106, 407.

¹⁰⁸ Horwitz, *supra* n.106, 923.

¹⁰⁹ *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864).

¹¹⁰ See Roscoe Pound, *The Role of Will in Law*, 68 Harv L. Rev. 1, 4-5 (1954); Cohen, *supra* n.106, 575; and ATIYAH, *supra* n.106, 407 (all explicitly identifying Savigny as the key figure in this regard). See also, more generally, Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968*, 36 Suffolk L. Rev. 631, 638-9 (2003).

¹¹¹ KENNEDY, *supra* n.104, 212 (quoting Clark Whittier).

¹¹² For a typical (if also rather polite) expression of this sentiment, see Cohen, *supra* n.102, 575: 'The metaphysical difficulties of this view have often been pointed out. Minds or wills are not in themselves existing things that we can look at and recognize. We are restricted in our earthly experience to the observation of the changes or actions of more or less animated bodies in time and space; and disembodied minds or wills are beyond the scope and reach of earthly law.' For a somewhat more forceful version of the same argument, see, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809 (1935).

¹¹³ The connecting figure in this regard was the French private law theorist Rene Démogue. For background, see Kennedy, *supra* n.105, 109-13, 115-9, esp. n.75 on 117.

less and less in terms of the *subjectivist* concepts of ‘wills’ and ‘minds’ and increasingly in terms of the sociologically established *objective* patterns of ‘what people normally do when they do contracts’.¹¹⁴

To be sure, the old language of ‘wills’, ‘intentions’, and ‘meetings of the minds’ to a large extent still remained in use, but the analytical emphasis now consistently shifted from proving the ‘internal facts’ about the parties’ intentions to establishing the presence of a legislatively defined list of what were taken to be the standard outwardly observable signs of ‘what people normally do’. As a transitional measure, the first step in the development of the doctrine was that the presence of these external signs established a rebuttable presumption that the internal meeting of the minds indeed took place. Very soon, however, even this fiction was discarded. The concept of intent was reduced to the observance of a certain ‘verbal formula’¹¹⁵ and the workings of the will were reconceptualised as a simple behavioural act.¹¹⁶

Starting from around 1900, the general sense that one had to keep at least some place for the thesis of the communion of the wills quickly began to dissipate. In the earlier stages of the objectivist period, the standard argument would still presume that the move from the subjectivist to the objectivist theory of contract was necessitated because, as Oliver Wendell Holmes famously proposed, in practice ‘the law [should] take[] no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men’ because ‘the standards of the law are [meant to be] standards of general application’. Given this fact, continued the logic, it followed inevitably that the question of legal enforcement had to be resolved solely in terms of those ‘external phenomena, manifest acts and omissions’ which the enforcing organ could verify with any degree of certainty, since not only was it entirely appropriate that the law should remain ‘wholly indifferent to the internal phenomena of conscience’, but it was also exceedingly obvious that, wherever required, one could always substitute the latter with the aforementioned external acts, on the presumption that when it came to deciding which of these acts precisely should be equated with which specific ‘phenomena of conscience’ the law would only have to consider ‘what would be blameworthy in the average man, the man of ordinary intelligence and prudence’, never really bothering about the particular individual in question.¹¹⁷

By the time the next generation of scholars took the centre-stage, the argument sequence became much more telegraphic. ‘A contract’, declared Judge Learned Hand in 1911, ‘has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.’¹¹⁸ Note the assured terseness of Hand’s formulation and the absence of any perceived need to justify the switch from the subjectivist to the objectivist approaches. ‘Parties’, wrote Arthur Corbin six years later, ‘are [only] bound by the reasonable meaning of what they said and not by what they thought.’ ‘The operative act creating an obligation is the *expression* of intention and not the thought process.’¹¹⁹ Note how much further the analytical shift goes in Corbin’s restatement of the objectivist principle: where Hand’s formulation still seeks to address the point that the ‘external acts’ are the juridical stand-in for the ‘individual intent of the parties’ because of the force of ordinary practice, Corbin’s definition is already free of any attempt to rationalise the substitution of the

¹¹⁴ On the metaphysical foundations of libertarian legalism, see Cohen, *supra* n.106, 558-68.

¹¹⁵ ATIYAH, *supra* n.106, 407.

¹¹⁶ Cohen, *supra* n.106, 577.

¹¹⁷ OLIVER WENDELL HOLMES, *THE COMMON LAW* 108-10 (1881).

¹¹⁸ *Hotchkiss v. National City Bank of New York*, 200 Fed. 287, 293 (SDNY 1911).

¹¹⁹ Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 Yale L. J. 169, 205 (1917).

one for the other. It is the reasonable meaning of what the parties said that creates a contract, nothing less, nothing more.

Fast forward another two years, and Samuel Williston's articulation comes out even more forcefully: 'At the present time courts of law ... have expressly or by implication asserted that the words and acts of the parties are themselves the basis of contractual liability, and not merely evidence of a mental attitude required by the law.'¹²⁰ From being ostensibly 'only' a more appropriate probative factor, Holmes's 'external phenomena' and 'manifest acts' turn now into the only legally valid basis for recognising the existence of a contract.

Modernism. The third stage began as the direct continuation of the same pattern. Where the main defining feature of the objectivist mindset was to show no concern for the 'internal phenomena of conscience', the main defining trait of the modernist paradigm was to extend also the same attitude to those 'external words and acts' on which the objectivist scholars pinned their theories. The central focus of the inquiry, on this view of things, no longer lay with any form of empirical factual investigation. For the modernist mind, the answer to the question of legal enforceability rather began directly at the point of consulting the applicable legal materials.

Any social transaction, however informal or incomplete, it was understood now, could qualify as a contract so long as the specific set of legislatively determined conditions was verified to have taken place. Sometimes the conditions in question would be defined in a very specific manner; at other times, however, it would be enough that they could be simply 'reasonably implied'. All that mattered, in the end, was just how much formality the law required to demonstrate in each given case. If the law allowed a private transaction to be enforced as a contract even where the 'external words and acts' that would typically be expected of a 'man of ordinary intelligence and prudence' were never performed or initiated, then so be it.¹²¹ For the modernist mind, a contract was a contract because and whenever the law said so.

Naturally, *some* notion of consensuality was still included in the supporting doctrinal architecture. But the implicit conception of what consensuality meant at this stage was now no longer modelled on the kind of state-of-the-art, bespoke instruments drafted between the two traders in *Raffles v. Wichelhaus*. The principal point of reference from this time on was rather found more in the standard-form everyday transactions 'created by such acts as boarding a bus, or ordering a meal in a restaurant'.¹²² Doubtless, even with respect to this type of deformalized standard-form operations it still remained true that the parties' intentions had to play *some* kind of a role:

Companies do not run buses by accident, and passengers do not board buses in their sleep. But it [did] not follow [from that] that the classical model of contract which [saw] such relationships as involving 'mutual promises' [still had] any real validity to it. It is true that the bus company and the passenger have rights and liabilities which arise out of their relationship, and it is also true that in the great majority of cases, both parties have some notion, however hazy it may be on one side, of what those rights and duties are. But even then it does not follow that it is their consent, their joint act of will, which creates the rights and duties. It is surely more realistic to recognize that it is their actions which create the relationship, and the law which creates the rights and liabilities as a

¹²⁰ Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 Ill. L. R. 85, 87 (1919-20).

¹²¹ See as a typical illustration Joel Levin and Banks McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 McGill L. J. 24, 27 (1983): 'What is important ... is the element of obligation. Obligation is not meant to be a substitute for promise, nor do we wish to convey the impression that contracts are made by individuals who intentionally obligate themselves so as to be put under contractual duties. [O]ne need not make express promises, believe, or even realize that contractual duties have arisen. ... The subjective state of mind of an obligor who fails to understand the consequences of his act is irrelevant. Our definition [of contract] supposes [merely] that one engages voluntarily in an act that objectively imposes an obligation.'

¹²² ATIYAH, supra n.106, 734.

result of those actions. The ‘implied promises’ are often largely fictitious, and it would not matter a whit if they were proved to be non-existent.¹²³

And thus the circle closed. In less than one century, the objectivist revolution, having started as nothing more than a well-intentioned attempt to upgrade the slightly more dubious elements of the will theory approach, inevitably led to its full and comprehensive demise. With the benefit of hindsight, it seems obvious that this sort of result was only to be expected. As soon as the first generation of objectivist scholars put forth the suggestion that it was the ‘external acts’ and not the ‘internal phenomena of conscience’ that created a contract in the eyes of the law, the turn to modernism became only a matter of time. For indeed, if it was really true that a contract did not ultimately express the wills of its parties, then whenever the law did enforce any given instrument this would have to be so not because the legal system cared about protecting the integrity of the parties’ bargain, but because of some other, completely independent considerations. What sort of considerations? The answer to this question can already be found in Corbin:

it is said sometimes that the law will create that relation which the parties would have intended had they foreseen. [Be that as it may.] The fact is, however, that the [enforcement] decision will [always] depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious [but not for all that any less important].¹²⁴

As soon as the matter was formulated in such terms, the question inevitably came to the surface: if the decision to enforce was effectively only a question of *public policy*, why not just state this fact ‘in the open’? Put differently, if it was true that whatever it was that the law of contracts upheld was not in actual fact supposed to be a reflection of what the contracting parties had originally had in their minds, why bother at all with all this ‘meeting of the minds’ talk? What difference would it make if one simply discarded all these buzzwords outright? The answer, as it quickly turned out, was: a very significant one. The moment the meeting-of-the-minds doctrine began to be removed from the operative conceptual apparatus of contract law the rest of this framework inexorably began to fall apart as well.

If the law of contract was not, in fact, derived from the idea of protecting the wills of the parties, how could one justify retaining all those rules, doctrines, and principles which were developed over the years on the explicit assumption that it was? What could be the reason, for instance, for retaining the traditional doctrine of privity or the doctrine of duress in those exact configurations into which they historically evolved? By what logic could one justify preserving those particular rules on unconscionable contracts and contracts of adhesion that had developed by the mid-1920s?

Once the genie of doubt left the bottle, there was no stopping. Given the centrality of the will theory paradigm to Classical Legal Thought, it was only a question of time before the challenge originally developed in the field of contract law began to spread to every other area of the legal system. Why does the law refuse to enforce collective bargaining agreements against non-consenting union members? Why should there be liability only when there is fault? Why should the law take for granted the landowners’ freedom to do whatever they want on their property regardless of any social consequences of their acts?¹²⁵ All these long-standing rules and presumptions flowed in one way or another from the deductive ‘interpretation’ of what the French jurist Rene Démogue called the principle of the autonomy of the will (*autonomie de la*

¹²³ Id., 734-5. See in the same vein (and using very similar example) Cohen, *supra* n.106, 568-70.

¹²⁴ Corbin, *supra* n.119, 206.

¹²⁵ Kennedy, *supra* n.105, 116; KENNEDY, *supra* n.104, 225-8.

volonté'),¹²⁶ a proto-theoretical concept which in the context of the law of delict, for instance, took the form of the doctrine of fault-based liability, in the law of property the doctrine of *animus occupandi*,¹²⁷ and in the law of contract the doctrine of the meeting of the minds. Once the contract lawyers declared their branch of *autonomie de la volonté* both practically and theoretically bankrupt, the rest of the edifice could no longer be saved. The rot set in.

When the attack on the premises of freedom of contract began in earnest ..., it became immediately clear that an objective theory of contract had already sown the seeds of its own destruction. The established principles of contract, the critics maintained, could no longer be defended as simple reflections of the will of the parties or of a 'meeting of the minds'. Objectivism could not be reconciled with individual autonomy or voluntary agreement. In fact, it demonstrated that the existing law of contract had regularly subordinated individual freedom to collective determinations based on policy or justice. [This] prepared the way for those who wished to argue that the goals of intervention and regulation were already deeply embedded in the existing law and that the individualistic world of autonomous wills had long since passed from the scene.¹²⁸

What had started at first as a well-meaning attempt to objectivise the subjective by replacing the investigation of the real intent of the actual parties with the deductive reconstruction of the typical intent of the reasonable man, in the space of three generations brought on a wholesale revision of the way the entire legal system was conceptualised and experienced by its participants. The whole of private law as it had been traditionally understood increasingly began to look as nothing more than an emanation of public law.¹²⁹ Out of the Procrustean strictures of Classical Legal Thought with its neat definitions and unbending binarisms, the modernist legal consciousness broke out into the brave new world of flexible conceptual categories, fluid pragmatism, and ever-deepening analytical confusion.

g. Homologies and Divergences

One can think of the century-long career of the will theory of contract as a metaphoric variation on the age-old narrative of the 'Fall of Man': the search for knowledge (rationalisation of the will theory) leads to the loss of innocence and the eventual fall from grace.¹³⁰ Or, one can view it, as

¹²⁶ This was a central conceptual category in Classical Legal Thought. Broadly speaking, the adherents of Classical Legal Thought conceived of law as a system for the enforcements of autonomous wills each of which was imagined to be absolutely privileged within its designated sphere and void outside it. The field of all legal action, thus, was essentially presented as a complex multi-layered structure of mutually non-overlapping packages of competences (spheres). Within the limits of his package each respective subject enjoyed a full liberty of conduct and thus was the uncontested master of his fate. The role of the law on this view of things was to police the boundaries between the packages and thus, where necessary, decide which of the respective competence holders' will should be given effect. Thence came the belief that governments should not interfere with private rights, that private interests should yield in the face of the eminent domain, that the federal government should not interfere with the competences of federal subjects, etc. In public international law, the Classical Legal Thought manifested itself through such principles as *pacta tertiis* and *res inter alios acta* in the law of treaties, the doctrine of 'vested rights' in the law of State succession, the principle of territorial sovereignty in the law of shared resources, the concept of *domaine reserve* and the concomitant doctrine of dualism more generally. For further discussion of the operative logic of the Classical Legal Thought, see KENNEDY, supra n.104, x-xiii.

¹²⁷ Pound, supra n.110, 9: 'Thus in acquisition of *res communes* by occupation, taking possession with the will to make the thing taken one's own is decisive.'

¹²⁸ HORWITZ, supra n.104, 35-6.

¹²⁹ The *locus classicus* here, of course, is Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923) (property rights, contractual payments, wages, interest, rent, and profit are all functions of public law-style coercive acts). See also, in a similar vein, Morris Cohen, *Property and Sovereignty*, 13 Cornell L. Q. 8 (1927) (both property and contract law are subsidiary branches of public law).

¹³⁰ See CHRISTOPHER BOOKER, *THE SEVEN BASIC PLOTS* 546 (2004).

shown below, as a kind of metaphoric pre-figuring of the Baudrillardian story of the rise of simulacra.¹³¹ Or, one can read it in terms of a Hegelian-style dialectical *aufhebung*. The opportunities are virtually limitless, but what is relevant for the purposes of the present discussion is the following three ideas.

First, it would be tempting to project the evolutionary trajectory summarized above onto the historical past of the modern law of treaties, or at least to start looking for a parallel pattern in it on the implicit assumption that whatever happens in the law of contract most probably should also happen in the law of treaties. Tempting and by no means entirely unjustifiable, but also, it needs to be said, completely wrong. The will theory logic, broadly speaking, has never ‘gone away’ in international law. What is more, nothing suggests that it is about to any time soon. One only needs to recall how much emphasis the critics’ response to General Comment No. 24 placed on the principle of sovereign consent and the argument that parties should retain control over the meaning of the treaty, to see how deeply entrenched the *legal-libertarian sensibility* of *autonomie de la volonté* continues to remain in the contemporary international legal psyche.

Second, the very idea that a pattern of such kind as described in the previous subsection should be expected to resurface in an entirely different legal order, as a general matter, has to be regarded with the utmost theoretical suspicion. Not only does it suggest, in the first instance, the deployment of what amounts to a deeply mystified and ideologically reactionary conception of history – something that one might typically expect from a medieval theologian bent on proving that the meaning of history lies beyond this world and therefore nothing of importance can ever be achieved by human action, so it would be better simply to resign to the way ‘things unfold themselves’¹³² – but also, on some very fundamental level, it seems to be premised on a *categorical repudiation* of the very project of the legal-historical inquiry as such. Taken to its logical conclusion, it effectively proposes that in order to understand the meaning of any changes taking place in any field of law one ultimately only needs to grasp the abstract logic of formal connections occurring between some kind of trans-legal meta-systemic factors (that are deemed to be always-already present within the law’s ‘material body’ like some sort of hidden seeds, genes, or dormant spirit) and the rest of the understanding will follow deductively. The general vision of history which this sort of hypothesis projects presents history essentially as a process whose endpoint is thus somehow always-already contained within its origin, a movement, in other words, that is always-already completed even as it may still be continuing/yet to begin.

It would be difficult to imagine how one could write a meaningful legal-historical account starting from this sort of assumptions. One of the primary charges traditionally raised against the Marxist legal tradition was that it brutally reduced the plane of legal history to an epiphenomenal reflection of economic history. Given the richness of the Marxist tradition, that argument seems difficult on the whole to take seriously, but even in its most vulgar reductionist mode Marxist economism at least left the legal domain capable of experiencing *some* form of historical change.

But then – and this is my third point – the ultimate theoretical value of any Historical account does not have to be sought in the discovery of trans-historical patterns directly transferable from one domain of historical experience to another. The story of the century-long demise of the will theory of contract is relevant to our present inquiry not inasmuch as it invites us to presume that it is also a story of the historical evolution of the modern law of treaties, but

¹³¹ See JEAN BAURDRILLARD, *SIMULACRA AND SIMULATION* 1-6 (trans. by Sheila Faria Glaser; 1994).

¹³² For, indeed, if history can be shown to be a kind of a clockwork, then, naturally, that clockwork must have had some kind of a designer who built it, or at least be itself the expression of some sort of a trans-historical principle of causality. And where one has trans-historical causal patterns, how pointless and hubristic would it be to stand in their way? See in this vein further LOUIS ALTHUSSER, *FOR MARX* 204 (trans. by Ben Brewster; 1969) (a Hegelianized conception of history precludes the formulation of any kind of political strategy: there has never been and cannot be ‘a Hegelian politics’).

inasmuch as it provides us with a certain set of theoretically useful reference points, *viz.*, a sequence of model answers to the question ‘what makes a treaty’ and a basic sense of how each of these model answers ‘hangs together’.

h. Divergences and Homologies

Unsurprisingly, for a decentralized legal order whose ideological coherence is so directly premised on the ideology of the multiplicity of sovereignties, international law never found it possible to afford a formal overthrow of the Démogouean ‘*autonomie de la volonté*’.¹³³ Indeed, even as a matter of abstract academic writing, it was not until well into the 1990s that mainstream international law scholarship threw up what could be regarded as a rather tentative exploration of what a post-objectivist way of thinking about treaty-making practice might look like.¹³⁴ Even then, the ball that was put into play was then dropped almost at once, with no further notable breakthroughs having been made on the mainstream doctrinal front since.¹³⁵

Absent any bold doctrinal advancements or a general systemic trend spilling over from other fields, the law of treaties never acquired the right momentum to be able to develop anything approximating an openly modernist sensibility. But it has certainly had more than enough space to experiment with its version of the objectivist theory of contract, and the great classical opposition between the unanimity theory and the Pan-American approach and its subsequent supercession, in modern times, by the compatibility test serve as a very fitting testament to that fact.

i. The Pan-American Approach: A General Characterisation

Like the unanimity theory, the Pan-American approach offers a classic example of an untailed default rule. In its standard formulation, it held that where the multilateral treaty in question did not provide otherwise, the reserving State could become a party to that treaty irrespective of however many objections the other parties might raise to its reservation, on the condition that ‘the convention would not [then enter] in force as between the reserving and the objecting States.’¹³⁶ Put differently, in a mirror reversal of the unanimity theory’s presumption against reservations, the Pan-American approach advocated that *any* contracting State could make *any* reservation to *any* multilateral treaty subject to the condition that it would then become a party to it with the benefit of that reservation only with regard to those States that did not object against the reservation.¹³⁷ With regard to the rest of the parties, the matter would have to be sorted on a case-by-case basis, but the general presumption would be that the objecting State was free not to recognise the reserving State as its treaty partner.

¹³³ One may argue that the impossibility in this case was more ‘analytical’ than it was ‘ideological’, but, of course, it is not, strictly speaking, true that the global legal order *needs* to be organized on the basis of a decentralised political structure and the principle of multiple sovereignties. That it is so organized is a reflection of some sort of political dynamics coming into play. Any theoretical interpretation which however indirectly seeks to preserve and naturalize a state of affairs created and sustained by politics, by definition, constitutes an ideology. For further discussion, see SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS* 8-15 (2000).

¹³⁴ See ABRAM CHAYES AND ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995).

¹³⁵ For a partial and very cautious exception, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L. J.* 2599 (1997).

¹³⁶ SINCLAIR, *supra* n.2, 57.

¹³⁷ Fitzmaurice, *supra* n.58, 13.

The result of such a switch between what in Hohfeldian terms would be called a no-right and a privilege¹³⁸ at first glance seemed to lead to the achievement of a considerably more equitable balance between the bargaining positions of the reserving and the objecting States.¹³⁹ Nevertheless, the closer one looked at its entitlement distribution dynamics, the more apparent it became that in reality the Pan-American system was quite heavily tilted in favour of the former and strongly disfavoured the latter. Whereas the reserving State under the Pan-American approach acquired the same freedom with regard to its participation in a multilateral treaty as it would normally have with regard to its bilateral treaty relations, '[t]he only tool [that was left] in the hands of the objecting State [was] its ability to deny the entry into force of the treaty between itself and the reserving State', which, presumably, would be the exact opposite of what it normally should be interested in, i.e. 'ratification without the offending reservation.'¹⁴⁰

Looking at things from this angle, one may observe at this point that the most obvious structural difference between the Pan-American approach and the unanimity theory as model solutions to the question of background defaults to be adopted as part of the general law of reservations was the divergence in their vectors of *default penalisation*. Clearly, both models were designed to operate as penalty defaults. However, where the Pan-American approach created a 'penalty' for the objecting State, the unanimity theory penalised the reserving State. One does not need to go too deep into distributive impact theory to realise that such kind of structural divergence could not have come free of far-reaching implications, and indeed it did not.

As indicated earlier, the use of penalty defaults not only reflects the lawmakers' implicit understanding as to which contracting party is better placed to negotiate for a particular contingency *ex ante* but also their more systemic assumptions as to which types of informational asymmetries are less acceptable as a matter of public policy (and thus which types of rent-seeking behaviour are more undesirable from the systemic point of view and ought, therefore, to be discouraged). By analysing the law's distribution of penalty defaults through this prism it becomes possible to deduce not only how the proponents of the two models differed in their assessment of what made a cost-efficient dynamics in treaty-making, but also how they differed in their conceptions of how the treaty-making process was generally meant to work in terms of fairness, i.e. which actors were expected to act more opportunistically than others, what sort of decisional bottlenecks were supposed to have a more deleterious effect on international legal life, and so on and so forth. Seen in this light, the difference in the distribution of penalties between the unanimity theory and the Pan-American approach could be interpreted, broadly speaking, as an indication that whereas in the League practice it was the reserving State that was usually expected to abuse the multilateral process in ways that in the larger scheme of things were deemed fundamentally undesirable, in the Pan-American practice it was the objecting State that was not trusted to 'play fair' or act in a communally beneficial way.

Thus, in the former case, the undesirable rent-seeking behaviour that the lawmakers would aim to prevent would have been something like 'joining a treaty regime while only intending to accept a portion of its obligations'. The normal time delay which occurs between signing and ratifying the treaty, of course, opened the space for exactly this kind of strategic manoeuvring. And, of course, no other party with the exception of the reserving State would usually be privy to its intentions to exploit that possibility. Structuring the default rule on reservations in the way in which the unanimity theory proposed allowed under these circumstances to force the reserving State to 'reveal its hand' right from the outset (and thus eliminate the possibility for any undeserved gains it could extract) by compelling it either to

¹³⁸ See W. N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1919).

¹³⁹ Fitzmaurice, *supra* n.58, 15.

¹⁴⁰ Hampson, *supra* n.49, §26.

insist on inserting in the respective treaty a differently structured reservations rule or to disclose its intentions not to accept the full package while everyone was still at the negotiating table.

By contrast, in the case of the Pan-American rule, the basic impression created by the penalty's structure suggests that the undesirable behaviour which the lawmakers sought to prevent was the objecting State's blockage of the reserving State's intention to join a multilateral regime on grounds that objectively would have nothing to do with the regime itself. Given that the objecting State would be able to withhold its consent to a reservation for no reason other than it so desired, the reserving State would have no way of knowing whether or not its reservation would be blocked until the moment when this happened. From a practical point of view, what this meant was that the reserving State would then be placed at the mercy of the objecting State, which obviously went against the principle of sovereign equality. As the arbitral tribunal in the *Jesse Lewis* case observed, 'the fundamental principle of the juridical equality of States', whose principal thrust was to preclude 'placing one State under the jurisdiction of another State', 'opposed to the subjection of one State to an interpretation of a Treaty asserted by another State.'¹⁴¹

By awarding the reserving State the Hohfeldian privilege to join the treaty if it so wished with whatever reservations it might desire to make so long as whichever other contracting parties that did not object to that reservation were ready to enter into treaty relations with it, the Pan-American approach removed the objecting State's capacity to veto the reservation at the last moment, thus forcing it either to push for the adoption of a different treaty-specific reservations regime right from the start, or to have to lobby all its treaty partners one by one to convince them to reject the proposed reservation. In either scenario, whatever informational advantage the objecting State might have with regard to its knowledge of its intentions would be cancelled out.

A model that distrusts reservations versus a model that distrusts responses to them – it may be tempting to start speculating which of the two would be better-suited to the realities of international life, and indeed numerous commentators had done exactly that, but for our present purposes going down the same route would miss the most important point about the classical law of reservations. Whether one thinks of this in terms of 'legal consciousness', 'professional sensibility', or a *Weltanschauung*, the doctrinal-theoretical foundations behind the classical law of reservations by the end of the interwar period had clearly grown sufficiently sophisticated in structural terms to be able not only to accommodate directly opposing policy visions but also to lend both of them considerable ideological support when they came into open conflict with one another. The observation may not seem particularly riveting at first, but what it signals is actually rather striking. Rhetorical flexibility leading on to theoretical eclecticism, agnostic pragmatism verging on ideological disorientation, unmistakable crystallization of the *langue/parole* divide¹⁴² – one would be hard-pressed to find a more telling sign of the implicit onset of the modernist stage in the evolution of the law of reservations.

¹⁴¹ *The Jesse Lewis claim (United States v. United Kingdom)*, 6 UNRIAA 85 (1921).

¹⁴² The idea of the *langue/parole* distinction comes originally from the work of the Swiss linguist Ferdinand de Saussure. In the legal-analytical context, its adoption was pioneered by Duncan Kennedy. In the specifically international legal context, its most famous use came, of course, in Martti Koskenniemi's *From Apology to Utopia* (supra n.26). For a general overview of the theory, see, e.g., DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS 200-1* (2008): 'This is a very specific adaptation of the Saussurian distinction. The valid norm, or the proposed valid norm, is like a sentence – a unit of legal speech. Thus a jurisdiction's rule that the contract by correspondence is valid on the mailing of the acceptance is a normative utterance; in the same legal langue, the jurisdiction might have "said" instead that it was valid only on receipt. [T]here are an infinite number of "grammatically" correct norms, legal arguments and conceptual orderings available to be "spoken" in the legal langue, just as there are an infinite number of possible grammatically correct sentences in an ordinary language.' See also in a similar vein Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 355 (1999).

j. The Evolution of the Will Theory Reconsidered: the Rise of Simulacra and the Symptomatology of Modernism

The history of signification, noted Baudrillard famously, has essentially been the history of the movement from the logic of *representation* to the logic of *simulation*. The former ‘stems from the principle of the equivalence of the sign and the real (even if this equivalence is utopia, it is a fundamental axiom).’ The latter, on the other hand, ‘stems from the utopia of the principle of equivalence, *from the radical negation of sign as value*.’¹⁴³

Once again, there appears to be no need to presume any kind of direct transferability for this theoretical model in the context of legal historiography to see its basic heuristic relevance. Undoubtedly, it would make things a lot more entertaining if one did ‘discover’ such a transferability, but even without projecting any supra-historical homologies between the two planes of events it seems to be possible to extrapolate a whole series of highly useful insights into the basic internal rhythm governing the century-long rise and fall of the will theory of contract by studying the implicit structures underpinning Baudrillard’s account.

The operative logic of representation, so viewed, one might say, could be considered a metaphoric equivalent for the subjectivist theory of contract. Under representation, the dominant conception of semantics revolved around the belief that the meaning of every sign was external to its apparent form, that is to say, it was determined by the objective condition of whatever element of the outside reality it purported to describe. In a similar vein, in the age of *Raffles v. Wichelhaus*, the basic assumption behind the will theory of contract held that the meaning of every contract was external to its immediate material manifestation, since it was governed by the substantive content of the contracting parties’ meeting of the minds. The fact that the role of the outside reality in this context was assigned to what is a quintessentially *ideal* phenomenon does not, of course, undo the force of the analogy, but only highlights the highly peculiar structurally inverted character of the subjectivist mindset. Like the logic of representation, the logic of the subjectivist theory rested on the assumption of an ontologically dualist structure of existence between the two parts of which it posited a relationship of equivalence and external subordination. The only difference was that in the case of representation one would go on to objectify what appears to be some form of sensual reality, while in the case of the subjectivist theory the object of objectification was a deductively inferred set of ‘psychological facts’.

In the same way, the logic of simulation could also be seen as a metaphoric equivalent of the modernist demise of the will theory of contract. By the time the evolution of the contract law doctrine reaches the stage to Atiyah’s ‘boarding of the bus’ contracts, every trace of that old assumption of direct equivalence between the contract and the underlying meeting of the minds is erased. The legal operability of the contract is conceptualised on the basis of a fuzzily monist ontological structure: what makes a contract is decided now solely within the same plane of legal reality in which the contract itself exists.

Like signs which under the logic of simulation only refer to other signs, the concept of contract under modernism refers to a legal phenomenon whose realisation represents nothing more than the effect of the formal interaction between other legal phenomena. Put differently, just like the logic of simulation stems from the vision of a perfectly autopoietic semantic process governed exclusively by its own immanent laws, so too the ontological foundations behind the modernist theory of contract indicate the field’s progressive collapse into the dynamics of pure immanent difference and solipsism.

One can continue tracing the similarities, but pause for a second now and reflect instead on this. From the traditional Marxist perspective, the transition from the semiotics of

¹⁴³ BAUDRILLARD, *supra* n.131, 6.

representation to the semiotics of simulation would usually be regarded as a field-specific illustration of the more general historical process of the rise of commodity fetishism and the resultant spread of the all-encompassing logic of reification.¹⁴⁴ But for Baudrillard the main essence of the noted trajectory should be sought much less in the fact that it might be somehow connected to the evolution of capitalism but rather in the fact that it represents an ineluctable process of disintegration. What is more, looking from this angle, how exactly one conceptualises the ultimate object of disintegration would seem to be not nearly as important as the actual syntagma of the suggested movement, which, as Baudrillard notes, appears at first sight to be unproblematically linear, but in reality is actually neither unproblematic nor linear, nor indeed directionally stable. Depending on which end of the trajectory one looks from, in other words, not only does the length of this movement of disintegration seem to differ but also its basic shape and structure. The reason behind this, as Baudrillard implies, lies most probably in the fact that the implied process does not actually unfold in empty time: both the earlier stage and the later stage to a very considerable degree overlap; both also seek to 'rewrite' the sequence of transition between them. In the first case, the intended effect appears to be to roll history back, in the second case, to extend the revolutionary shift progressively further into the past.

Faced with what they see as a debilitating bastardisation of semantics, observes Baudrillard, the supporters of the representation mode angrily strike out against all forms of simulation. Thus, in effect, 'representation attempts to absorb simulation by interpreting it as a false representation'.¹⁴⁵

Faced with what they saw as a nihilist attempt to destroy the law of private obligations, conservative contract law theorists from the 1950s onwards have sought to bring back not only the classical 19th-century doctrines but the Démogean '*autonomie de la volonté*' itself. The advent of the modernist stage in contract law did not just bring the 'death of contract' thesis¹⁴⁶ or the birth of the 'relational theory of contract'.¹⁴⁷ A whole swathe of works penned by conservative scholars were rushed to the printers,¹⁴⁸ partly in the hope of resuscitating the subjectivist mythology, partly in the hope of reversing every objectivist and modernist advance since Holmes.¹⁴⁹ Pushed to its logical conclusion, this impulse sought not only to imbue the demise of the will theory with a heavy moralising tone but also to undo its historical facticity as such. It was as though because the demise of the will theory had led to the loss of moral rectitude/rise of nihilism, the argument went that it was necessary therefore that it had never actually happened: what took place instead had to be seen as only a temporary digression.

Like with most conservative projects, the element of denial no doubt played a very important ideological role in that situation. But, as Baudrillard's remark suggests again, this is not the only fact that was genuinely noteworthy about this particular conservative project. To regard representation's attempt to denounce simulation as an act of self-serving ideologisation may serve a valid critical purpose, but in the present context it also helps to distract the attention from the essential character of the implicit historiographic vision hidden behind this attempt. Note once more Baudrillard's choice of language: representation seeks to *absorb* simulation, to convert it from a stage of history to a digression, to replace a diachronic supersession with a synchronic variation. The general sense of historical time that Baudrillard seems to try to evoke here appears to be strongly reminiscent of the essentially quasi-theological concept of non-

¹⁴⁴ See LUKACS, *supra* n.89, 83ff.

¹⁴⁵ BAUDRILLARD, *supra* n.131, 6.

¹⁴⁶ See GILMORE, *supra* n.106.

¹⁴⁷ See, typically, IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980).

¹⁴⁸ See, most famously, CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

¹⁴⁹ For a withering commentary on the conservative scholars' tendency to paint all modernist contract theories with the same brush of indiscriminate denunciation, see, e.g., Ian Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. Rev. 340, 383-4 (1983).

directional history of the kind that at one time underpinned the constitutional-theoretical discourse in ancient Greece.

As Koselleck notes, what today one would call the constitutional law tradition in ancient Greece developed, strictly speaking, without any explicit theory of history. Nevertheless, through their discussions of the immanent patterns of constitutional evolution, various figures in that tradition projected over the years a rather striking conception of historical motion. The work of Darius, in particular, seems to have played a central role:

While the protagonists of aristocracy and democracy each sought to highlight their own constitutions by proving the injuriousness of the others, Darius proceeded differently: he showed the immanent process by which each democracy and aristocracy was eventually led by its own internal disorders to monarchy. From this he concluded that monarchy should be introduced immediately, since it not only was the best constitutional form but would in any case prevail over time.¹⁵⁰

The immediate logic of the move may not seem particularly relevant, but what appears at first to have been only a political argument, remarks Koselleck, on closer inspection turns out also to have been an implicit projection of a ‘specifically historical’ vision, one in which the central business of politics becomes to evade the threat of the natural decline of society by the ‘skilful management’ of mixed constitutional forms.¹⁵¹ Note what sort of presuppositions the assumption of such a vision involves about the ontological character of the historical process. Darius’s suggestion that the ‘unavoidable’ future form should be brought into existence already today reflects in its bare logic the same belief in the power of the political will to remould the course of history that tacitly underpins the conservative contract law theorists’ attempt to bring back the subjectivist model of the will theory of contract. It is the belief in history as a kind of a cassette-player. For Darius, the primary goal was to convince his audience that the course of historical events could be sped up and fast-forwarded; for the conservative contract law theorists, that it could be reversed and rewinded. The vector of the movement is different, but the structure of the logical operation is essentially the same, as are, inevitably, the corresponding metaphysical implications: wherever one finds the belief in the rewind function, one also finds the belief in the Great Rewinder, the He who is both at the beginning and at the end, the transcendental subject that stands outside and above the stream of time, the eternal mover that cannot be moved himself – God.

In the same way in which representation seeks to deny the historical facticity of the rise of simulation, simulation seeks to downplay the essential ‘reality’ of the representational mode. The ultimate aim behind the exercise, as Baudrillard puts it, is to ‘envelop[] the whole edifice of representation *itself* as a simulacrum’.¹⁵²

The distinguishing feature of the modernist version of historical revisionism, as compared to that favoured by the conservative camp, is that it aims to recast the whole history of the transition from representation to simulation *either* as part of the internal history of simulation itself or, better still, as a simulationist construct *par excellence*: an ‘invented tradition’, a lie, a memory of a past that never was. The pattern, though not always obvious, can be easily traced in the works of modernist legal historiographers.

If one looks at the history of 20th century contract law historiography, one of the main distinctions between the histories of the field that were written in the objectivist period and those that were developed during the modernist age, one of the first things that jumps to one’s attention as one sets out to compare the two discursive traditions, is that the latter, by and large, always

¹⁵⁰ KOSELLECK, *supra* n.10, 97.

¹⁵¹ *Id.*, 98.

¹⁵² BAUDRILLARD, *supra* n.131, 6.

seek to demonstrate that the subjectivist age, firstly, did not last quite as long as the writers of the objectivist period would have you believe, that even at the time of its alleged supremacy the meeting-of-the-minds doctrine had not, in fact, been taken nearly as seriously as was traditionally assumed; and that, secondly, the very idea of there ever being a subjectivist period is itself open to doubt. For all we know, it may well have been nothing more than a *scholarly invention* concocted by the late-objectivist period historians whose ultimate meaning can only be grasped in the context of the internal politics of the late-objectivist historiography but not, in any meaningful sense, in the context of the ‘objective’ historical development of contract law practices as such.¹⁵³

Unsurprisingly, the more convincing this argument begins to sound, the more the underlying sense of the background historical timeline starts to collapse into an essentially anti-historicist concept of history. To be sure, compared to the conservative example, the dominant accent in this case has a completely different inflexion: the ruling model for the modernist revisionist exercise is not Darius but the (in)famous ‘linguistic turn’ (‘everything is just a discourse’; ‘there is no outside of text’). But the implicit ontology is still the same: history as an objective process is an impossibility. When everything turns into a language game, notes Baudrillard, reality itself becomes theoretically unthinkable. Once you cannot tell what sets ‘fiction’ apart from ‘truth’, to ‘isolate the process of the real’ turns into an epistemic impossibility.¹⁵⁴ The circle closes: simulation envelops everything as itself a form of a simulacrum.

And yet, one has to note, such is the logic of the process only *when it is perceived ‘experientially’*, i.e. from inside the historiographic process itself. If, on the other hand, it should be approached ‘from the outside’, if, in other words, one should treat Baudrillard’s hypothesis as a source of theoretical insights that could potentially be converted into useful analytical instruments but not as a truth-fiction account that must either be accepted as such or rejected, the situation appears to be completely different. Looking at things from this angle, what then comes out, in fact, is the following quadripartite structure of ‘ideal types’ of onto-theoretical modes, or as Baudrillard calls them,

the successive phases of the image:

- it is the reflection of a profound reality;
- it masks and denatures a profound reality;
- it masks the absence of a profound reality;
- it has no relation to any reality whatsoever: it is its own pure simulacrum.

In the first case, the image is a good appearance – representation is of the sacramental order. In the second, it is an evil appearance – it is of the order of maleficence. In the third, it plays at being an appearance – it is of the order of sorcery. In the fourth, it is no longer of the order of appearances, but of simulacrum.¹⁵⁵

The first formula closely resembles the subjectivist version of the will theory. *Raffles v. Wichelhaus*: a contract is a representation of the invisible ‘meeting of the minds’ which acts as its profound reality and the exclusive source of its ‘truth’. The second formula parallels the Holmesian revision of the doctrine: ‘The law has nothing to do with the actual state of the

¹⁵³ See, e.g., KENNEDY, *supra* n.104, 214 (challenging the reliability of the narrative suggested by objectivist theorists as an ‘invented tradition’) and 220-1 (identifying the presence of the objectivist mindset already in the work of Christopher Columbus Langdell). See also MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 197-8 (1977) (tracing the beginning of objectivist sensibility even further back, to the work of Theophilus Parsons in 1850s).

¹⁵⁴ BAUDRILLARD, *supra* n.131, 21.

¹⁵⁵ *Id.*, 6.

parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.¹⁵⁶ Retain the language of the subjectivist approach, but use instead a completely different theory of contract-making practice, denature the concept of the communion of the wills by replacing the real intentions of the actual parties with the external formalities conveying the apparent intentions of an 'average man of ordinary intelligence and prudence'.

The third formula is the post-Holmesean rationalism of Corbin and Williston: the external formalities are not just an evidence of some mystical thought process, they are themselves the relevant operative acts; the use of the language of voluntary transactions is retained to mask the fact that no voluntarism is really required anymore for a contract to be created in the eyes of the law. The fourth formula, finally, is an expression of Atiyah's modernist disintegration: even as a matter of official hypocrisy, one does not anymore assume that behind the legal reality of the contract there should be anything even remotely approximating the communion of free contracting wills. Indeed, by this stage, it would not 'matter a whit' if this were actually admitted in the open.

So far, so good, but note also another important insight hidden behind all these parallelisms. An abstract deduction it is, nothing more, to be sure, but what it signals, nevertheless, is a potentially very powerful insight into how the demise of the will theory might have actually been sequenced *in logical terms*, an insight that, if deployed comparatively, could be used to get around the earlier noted epistemic obstacle raised by international law's seeming inability to admit the end of the Démogoean '*autonomie de la volonté*'. Here is that insight: the 'decisive turning point' in the dialectical movement from representations to simulacra, notes Baudrillard, does not take place between the third and the fourth stages. Rather, it comes between the second and the third: 'the transition from signs that dissimulate something to signs that dissimulate that there is nothing' is the real start of the logic of simulation.¹⁵⁷

Could it be that the real shift from the 'rise' to the 'fall' stages in the history of the will theory came somewhere between Holmes and Corbin? The brief overview sketched out above certainly seems to support this view. If that is so, however, then what it appears to tell us about the general *symptomatology of the onset of modernism* – Corbin's main difference from Holmes was his lack of interest in proving why it was appropriate to link external acts to internal intentions and his endorsement of the idea that the general shape of contract law in practice is defined by considerations of public policy – should carry some rather far-reaching implications for the genealogical study of the modern law of treaties.

k. What the Logic of the Will Theory Reveals about the Hidden Contradictions of the Unanimity Theory

The divergence in the choice of penalized parties was not the only noteworthy difference between the unanimity theory and the Pan-American approach. No less significant was also the difference in their underlying conceptions of the fundamental operative logic of treaties as legal regimes. A good starting point in demonstrating how this difference played out in practice is to analyse the way in which the unanimity theory conceived the relationship between the objective regime of the treaty and its apparent foundation in the subjective bargain between the contracting parties encoded into its continuous insistence on protecting the 'integrity' of the alleged treaty commitment.

Characteristically, most of the discussion so far has focused on exploring the implications of the relative restrictiveness of the unanimity theory vis-à-vis the Pan-American approach. And

¹⁵⁶ HOLMES, *supra* n.117, 309.

¹⁵⁷ BAUDRILLARD, *supra* n.131, 6.

yet, if we think about this carefully, the very fact that the unanimity theory allows for the possibility of reservations in the first place should be certainly considered a no less revealing feature of this model. For, indeed, in a theoretical tradition that is meant to be so closely wedded to the notion of protecting the integrity of the original bargain, the proposition that reservations may be admissible *at all* is not, in fact, self-evident.

Consider the argument: the official theory behind the unanimity model holds that the principal reason why reservations require the unanimous consent of all other contracting parties comes down, in the end, to the need to ensure that the parties get ‘what they bargained for’ since otherwise the rationale behind having such multilateral treaties would be ‘impaired’ and maybe even ‘destroyed’.¹⁵⁸ The reasoning sequence that leads up to this conclusion runs more or less along the following lines: every multilateral treaty represents ‘a balanced, integrated whole’;¹⁵⁹ once it has been drawn up it becomes like a package deal – any attempt to remove any element of the package risks frustrating the object of the deal; in order so that this does not happen, whenever a reservation that has not been factored into the original agreement is proposed, the law must require that it be examined by all the contracting parties and receive their unanimous assent.

Now, the idea of protecting the bargain is, of course, a quintessential subjectivist trope: the notion that there exists behind the surface reality of a treaty some kind of ontologically separate entity (the ‘package deal’) whose integrity the law is meant to protect presupposes as its operative premises precisely the kind of metaphysical conception of contract-making which characterised the *Raffles v. Wichelhaus* approach. And yet, an indispensable precondition of adopting such a conception of treaty law would also have to be the idea that the constitution of every treaty not only comprises an essentially indivisible act¹⁶⁰ but is at the same time a perfectly singular event:¹⁶¹ once the minds of the contracting parties have met, the prerequisite ‘consensus *ad idem*’ is achieved, and at this precise point – and only at this point – the treaty as a legal fact comes into existence and no subsequent evolution is now conceivable. Any amendment would have to obtain its own ‘meeting of the minds’ foundation, i.e. its own foundational bargain and thus, technically speaking, give rise to its own, separate treaty arrangement.

It seems instructive at this point to recall that the argument in defence of the unanimity theory’s approach to the issue of reservations has also sometimes been made by way of drawing an analogy with post-negotiations accessions. If a party that did not take part in the original negotiations decided to accede to a multilateral treaty (the new arrival scenario), it would obviously have to take it exactly as it is or negotiate a completely new treaty altogether. Given that the only situation where the question of reservations can arise is when the original negotiations are over and the reserving State still decides to reopen the deal, why not use the same approach for reservations? An eminently reasonable argument, it would seem. But pause for a moment now and think through its reasoning again. If one really takes the theory of the ‘consensus *ad idem*’ seriously, one should be able to contemplate the possibility of any new arrivals at all. Whatever the original parties’ meeting of the minds would have covered, it certainly was a meeting only between their minds. The agreement that was thus concluded, therefore, can only exist between these original parties. Allowing for any new arrivals to be added to the treaty in question, under these circumstances would effectively be tantamount to an

¹⁵⁸ Malkin, *supra* n.80, 142.

¹⁵⁹ Fitzmaurice, *supra* n.58, 1.

¹⁶⁰ The idea that under the subjectivist view every contract should be considered a monolith block so that ‘the breach of any part was therefore a breach of the whole’ has long been highlighted as one of the more dubious doctrinal implications of the will theory. See Horwitz, *supra* n.106, 953.

¹⁶¹ HORWITZ, *supra* n.153, 201.

invitation for a new meeting of the minds to take place, that is to say for a new *treaty* to be brought into existence.¹⁶²

Given this logic, however, given, that is, the idea that every attempt to propose a reservation that was not negotiated at the drafting stage is effectively similar to a request for a post-negotiations accession and every request for a post-negotiations accession is effectively tantamount to an invitation for a new ‘meeting of the minds’, there seems to be no actual reason to insist on any form of unanimity requirement. Why should the new ‘meeting of the minds’ proposed by way of an attempt to attach a reservation not be allowed to include fewer than all of the original parties? If reservations belong in the same category as offers to conclude a new treaty, there exists no legitimate reason to give the parties to the ‘old treaty’ any say over who can join the ‘new treaty’. Put differently, there exists no reason to allow any reservations at all, since any acceptance of a reservation would automatically trigger a new ‘meeting of the minds’ and a new ‘meeting of the minds’ has to find its ‘own’ treaty document through which to be formally expressed instead of piggy-backing onto another meeting’s treaty.

To put the matter more formally, looking at its operative logic, it appears that either the unanimity model, contrary to what its official theory holds, did not actually care that much about preserving the ‘integrity of the bargain’ behind the treaty (i.e. it consistently ‘lied’ about its intentions) or it was just very bad at doing what it set out to do (i.e. it was deeply mistaken about the nature of its strategic task). Or, which seems much more likely, there exists, in fact, no other way to justify the unanimity requirement than on the grounds of Corbinesque ‘considerations of public policy’, which, of course, can only mean that in terms of its practical operation the unanimity model firmly belongs in the objectivist tradition of the will theory; and, given that its basic repertoire of justificatory tropes seems nevertheless to be lifted from the subjectivist tradition, it, again, must have either consistently ‘lied’ or was deeply mistaken about its self-image. In either case, as a piece of legal-regime-modelling it was obviously riddled with a fundamental design contradiction, or, to use a somewhat catchier term, a Great Structural Rift.

1. The Pan-American Approach as a Formal Expression of the Objectivist Sensibility

The contrast could not have been starker in the case of the Pan-American approach. Positing a default rule whose substantive contents directly challenged the operative assumptions of subjectivism, the Pan-American model projected a conception of treaty ontology that indicated a no less decisive break with the subjectivist sensibility.

Consider once more the general implications that flow from the idea of treaties as ‘package deals’. As soon as one accepts as a given the proposition that every treaty agreement is a ‘balanced and integrated whole’, the most ‘obvious’ next move is to reify the underlying phenomenon of the contractual bargain so as to separate for the purposes of the practical analysis the ‘external’ reality of the treaty from the ‘internal’ reality of the agreement. Once this move is completed, it only becomes a matter of a very small step before one arrives at the notion of privileging the latter over the former on the grounds that the internal represents the true and the

¹⁶² Even if it were possible to show conclusively that the original parties at the time of concluding their agreement indeed had it in their minds that the agreement would be later joined by that particular State which now approaches them as the ‘new arrival’, this would not be enough to resolve this problem inasmuch as it would still remain true that the new arrival’s mind did not at that point meet with the minds of the original parties which means that there was no requisite convergence of the wills (and hence the new arrival cannot be considered a party to the original agreement/treaty).

external, only the apparent. Nietzsche wrote about this;¹⁶³ so did Morris Cohen.¹⁶⁴ The moment the external reality of the treaty becomes normatively subordinated to the internal reality of the ‘underpinning’ bargain, one arrives into the world of theological reasoning. Enter natural law and everything else that flows from it.

Contrast this pattern now with that adopted in the Pan-American approach. As soon as one discards the package-deal mentality, the most obvious analytical progression becomes to move towards a thorough re-conceptualisation of the whole treaty-making process along broadly functionalist lines. From the idea of treaties as reflections of ‘things’ (deals, bargains, ‘meetings of the minds’), the implicit understanding gradually shifts towards the idea of treaties as foundations of positive legal regimes constructed by the assortment of such bundles of rights and duties as have been specified in the texts of the treaties themselves. Put differently, one gradually comes to regard treaties as conduct-shaping frameworks of behavioural incentives. Taken as objective phenomena, treaties then come to be experienced and perceived both by their participants and by external observers no longer as reified solid entities but as relatively flexible open-format structures: *enabling contexts* or *platforms* for the development of dynamic interactive environments between their respective parties.

As soon as this conceptual transition starts, the theoretical foundations of treaty law ineluctably begin to shift regardless of how much faith one may still have (as a matter of one’s explicitly articulated theoretical beliefs) in the doctrine of the ‘meeting of the minds’. In its subjectivist dimension the theoretical conception evolves in the following way: if every multilateral treaty is effectively now perceived as a conduct-shaping framework in the context of which each participating State, if it so sees fit, can choose to build any number of different regimes of legal relations between itself and its contracting partners, there remains no good reason to prevent the conclusion that if it should decide to achieve this goal by submitting, accepting, challenging, or negotiating reservations, then so be it. In the objectivist dimension the evolution proceeds thusly: if treaties, as a matter of fact, are not treated as direct representations of their parties’ actual intentions, but every treaty, on the other hand, does at the same time constitute a bundle of legally enforceable rights and duties, then the question of which rights and duties will be enforceable in the context of any given treaty is, in the final analysis, always a function of what the broader regime of international law ‘has to say’ on that subject, as a matter of public policy considerations. If this should be the case, however, then insofar as the question of reservations must also be part of that bundle, it ought to be true then also that if the broader regime of international law should choose to privilege some other policy consideration over the idea that the contracting parties are the supreme masters of their treaty, then the default rule on reservations could also, perfectly legitimately, be formulated with a view to the enactment of that other policy. Since, as a matter of fact, it so happens that the broader regime of international law has become concerned with encouraging ever-broader participation in multilateral treaty regimes as well as preventing ‘the subjection of one State to an interpretation of a Treaty asserted by another State’, it can be safely deduced that the most appropriate way to organise the default regime on reservations would be to increase the reserving State’s scope of freedom and remove the objecting State’s power of veto over its accession.

The sense of progression – and rupture – is unmistakable: between the unanimity approach with its inherent sense of contradictoriness and its Great Structural Rift and the Pan-American model whose whole structure exudes objectivist sensibility on its every level lie not just a few years but a whole paradigmatic shift. In Hegelian terms, one could say this is equivalent to the difference between the murky dawn of reason and its brightest noon, between

¹⁶³ See FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* 45-9 (trans. by R. J. Hollingdale; 2003).

¹⁶⁴ See Cohen, *supra* n.106, 558-9, 571-5.

Thought that is still struggling against its own self-estrangement and Thought that has become fully one with itself, between contradiction and self-becoming.

Or one could simply say this is equivalent to Baudrillard's 'decisive turning point'.

SECTION 4. THE MODERN LAW OF RESERVATIONS: THE EMPTY HOPES AND THE IRRESOLVABLE ANTINOMIES OF THE COMPATIBILITY TEST APPROACH

a. The Rise of the Compatibility Test Approach

Few cases have acquired such an iconic status in the history of modern international law as the Reservations case. The background story behind it has been told numerous times.¹⁶⁵ At some point following the adoption of the Genocide Convention, one group of States expressed the intention to join the Convention while making a reservation to its Article IX. Another group of States protested against this. The dispute went to the General Assembly, under the auspices of which the Genocide Convention was originally adopted. The Assembly decided it could not resolve the matter on its own and, after a short hesitation, referred the dispute to the International Court of Justice under the guise of a request for an advisory opinion.

The terms of the referral read as follows:

in the event of a State ratifying or acceding to the Convention subject to a reservation ... can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others? If [yes], what is the effect of the reservation as between the reserving State and: (a) the parties which object to the reservation? (b) those which accept it?¹⁶⁶

Half a year after receiving the request, the Court delivered its decision. On the first question, the answer was unequivocally in the affirmative. On the second question, the Court took the position that whereas between the accepting State and the reserving State the treaty would have to operate subject to the proposed reservation, the effect of the reservation as between the reserving State and the objecting State depended essentially on the latter's decision. If the objecting State so desired it was at liberty to consider that the treaty did not enter into force between itself and the reserving State. A rather straightforward endorsement of the Pan-American model it would seem at first glance, but, as has so often been the case with the Court's decisions, on closer inspection things turned out to be nowhere near as simple.

Let us return briefly to the actual text of the Court's decision.

Certainly, begins the operative part of the *ratio*, it seems to be a very well-established principle of international law that no State can be bound in its treaty relations without its express consent, and so no reservation, therefore, can be made 'effective against any State without its agreement thereto.'¹⁶⁷ Equally, as a result of the same argument it follows that when it came to multilateral conventions 'none of the contracting parties [should be] entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention'. After all, such a convention 'is the result of an agreement freely concluded upon its clauses'.¹⁶⁸ If a given State chose to accede to a multilateral convention, it would have to abide by every one of its provisions. For, otherwise, why did it decide to join that convention in the first place? Nobody forces it to accept what it did not agree to.

So far, so rather predictable: composed primarily of old-school international lawyers, the Court, rather unsurprisingly, seems to side with the supporters of the old-school approach. The

¹⁶⁵ See, e.g., Fitzmaurice, *supra* n.58, 2-6; Ruda, *supra* n.44, 139-48; KOSKENNIEMI, *supra* n.26, 368-71.

¹⁶⁶ *Reservations to the Genocide Convention*, *supra* n.75, 16.

¹⁶⁷ *Id.*, 21.

¹⁶⁸ *Id.*

presence of the package-deal metaphor, the repeated allusion to the principle of consent, the implicit reduction of the operative logic of treaty-making to the single thesis of the freedom of contract all act as something of a barometer. The movement of the argument seems unmistakable – but only for a few lines. Already at the start of the next paragraph, the Court makes a sudden U-turn: the unanimity approach, it declares, is rooted in the view that all treaties by their nature are like contracts, whereas the immediate circumstances of the Genocide Convention quite clearly indicate that this is not at all the case in the present context.

Firstly, unlike most treaties, the Court remarks, the Genocide Convention was concluded under the auspices of an international organisation that has ‘a clearly universal character’.¹⁶⁹ From its very design it seems obvious that it was thus meant to attract a ‘very wide degree of participation’.¹⁷⁰ Secondly, an ‘extensive participation in conventions of this type has already given rise to [a great deal of] flexibility in the international practice’.¹⁷¹ In particular, a completely new pattern of State practice seem to have arisen in recent years ‘which go[es] so far as to admit that the author of reservations which have been rejected by certain contracting parties [can] nevertheless ... be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations.’¹⁷²

Thirdly, because the text of the Convention was adopted in the General Assembly by a series of majority votes, it seems reasonable to assume that the traditional unanimist view that the text of the treaty as adopted represents exactly what its parties agreed on should no longer be accepted as accurate. If both the principle of consent *and* the operative logic of the actual procedure by which the Convention was brought into existence are to be taken seriously, it would seem to follow that those States which in different rounds of voting had found themselves on the wrong side of the majority vote should be allowed at least some kind of leeway when it comes to accepting those parts of the Convention to which they did not, in fact, agree, which the unanimity theory, quite evidently, would not support.¹⁷³

Fourthly, it also bears reminding that the Convention was not actually designed in the form of a typical contract. Its principal object is to ‘safeguard the very existence of certain human groups and ... to confirm and endorse the most elementary principles of morality’. It has nothing to say about the immediate relations between its signatory parties *per se*, since in conventions of such kind ‘the contracting States do not have any interests of their own’. This means that one cannot really speak in this case of any kind of reciprocational dynamics, that is to say, it would be entirely specious to look at this type of conventions from the position of trying to maintain ‘a perfect contractual balance between rights and duties.’¹⁷⁴

Add all of this together and it seems to be beyond doubt, concludes the Court, that everything about the Genocide Convention requires that as many States as possible should be allowed to participate in it and the Convention itself should not be used to preclude this. Adopting the unanimity approach would almost certainly prejudice the achievement of this objective. If only on that ground alone the unanimity theory, therefore, has to be decisively rejected:

The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id., 21-22.

¹⁷³ Id., 22.

¹⁷⁴ Id., 23.

contracting parties readily contemplated that an objection to a minor reservation should produce such a result.¹⁷⁵

Once again, the movement of the argument appears pretty obvious. Having dismissed the unanimity model because of its excessive rigidity and simplicity of its theoretical assumptions, the Court goes on first to explain the unique character of the Genocide Convention, then pointedly acknowledges the emergence of anti-unanimist patterns in customary international law, before explaining how complex the process of multilateral negotiations has become in modern practice and developing on that basis a policy argument that unmistakably seems to point towards the endorsement of the Pan-American approach. But then, once more, comes the abrupt U-turn.

In the sentence immediately following the last quoted passage, just after the point where it notes how inconceivable it would be that the drafters of the Genocide Convention readily contemplated that an aspiring party could be turned away on the sole basis that one of the other parties did not like its reservation, the Court curiously adds: ‘But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.’¹⁷⁶

Like the unanimity theory, it turns out the Pan-American approach is also far too ‘contractualist’ in its attitude for the Court’s liking. Luckily for the Assembly, however, the Court may just have the perfect solution for that flaw.

The key, as it hinted in an earlier passage, is to recall the unique ‘object and purpose’ of the Genocide Convention. Every reservation proposed to this treaty should be assessed in the light of its potential impact on these ‘object and purpose’.

It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.¹⁷⁷

And that was that. What followed afterwards should not have been that difficult to foresee. Most old-school international lawyers found the new compatibility test approach deeply unsatisfactory. Some of them sought to curtail the judgment’s precedent-creating effect by arguing that the Court’s reasoning had no real foundation either in the text of the Convention itself (good point) or in the broader patterns of state practice (another good point); others proposed that the new model was only meant to apply in the case of the Genocide Convention (possibly true) and so did not necessarily extend to other treaties (totally unconvincing).¹⁷⁸ Both strategies had their strengths and their weaknesses. In the long run, neither of them seems to have worked. The first argument proved entirely ineffective for the simple age-old reason that between a scholarly argument and a judicial decision, the latter always has a far stronger ‘sticking potential’.¹⁷⁹ The second argument fared only marginally better, leaving a faint rhetorical trace that managed to survive in some rarefied academic contexts¹⁸⁰ but has been otherwise completely ignored in State practice.

¹⁷⁵ *Id.*, 24.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., Clive Parry, ‘The Law of Treaties’, in MAX SORENSEN (ED.), *MANUAL OF PUBLIC INTERNATIONAL LAW* 175, 195 (1968).

¹⁷⁹ See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 28-9 (1999).

¹⁸⁰ See, e.g., Fitzmaurice, *supra* n.41, 190.

Within the space of the next several years, the compatibility test approach took off not just in the context of the Genocide Convention but for all other multilateral treaties too. The UN Secretariat adopted it into its practice. The International Law Commission incorporated it into the draft of the future Vienna Convention. By the end of the following decade, there was nothing its critics could do about it anymore.

Not that this meant any of its substantive flaws had somehow been cured – quite on the contrary.

b. The First Antinomy of the Compatibility Test Approach

Earlier it has been noted how closely the internal logic of the compatibility test depends on the operative assumptions of the permissibility theory. Looking at the manner in which the Court built its argument in the *Reservations* opinion, one can immediately notice now that these assumptions were, in fact, *all* that separated the compatibility test approach from the Pan-American approach. Indeed, as many Latin American lawyers noticed, the compatibility test model differed from the Pan-American model only inasmuch as it presumed that the question of every given reservation's validity could be answered by consulting the respective treaty itself rather than the opinions of its contracting parties.¹⁸¹ This shift in assumptions, of course, is precisely what separates the permissibility school from the opposability school. Given what has been said earlier about the latent logic of the permissibility view – that it relies on an essentially natural-legalistic concept of legal interpretation and that it does not sit very well with the idea of a decentralized legal process – it should not be difficult to work out what sort of epistemological and ontological implications the move to the compatibility model triggered in the doctrinal fabric of the law of reservations.

Consider, first, the *epistemological* implications. Under the Pan-American approach, the question of whether or not a given reservation was valid was essentially treated as a question of fact: the inquiry started and ended with taking note of other contracting parties' reactions, objections, and acquiescences. Under the compatibility test model, by contrast, the evaluative process on the whole is structured decidedly in the shape of a deductive-style logical operation. Firstly, in order to verify which reservations are admissible and which are not, the model requires the legal decision-maker to look 'inwards', into the ideational landscape of treaty law, rather than 'outwards', into the sociological domain of diplomatic acts. Secondly, in order to establish what precise content this ideational landscape has in each particular case, it requires the decision-maker again rather than turning outwards, into the domain of State practice, to extrapolate the answer from the underlying aims and objectives of the respective *legal-ideational framework*, be it the combination of the 'moral and humanitarian principles' on which the respective treaty is based or the presumed goal of broadening Statal participation in the particular category of treaties.

Note the rather conspicuous parallels between the implicit operative premises of the compatibility test approach and the Baudrillardian logic of simulation. When the practice of signification shifts from the logic of representation to that of simulation, the truth of the sign is no longer determined by its correspondence to any external phenomena but is decided solely within the plane of signification itself. When the establishment of admissibility shifts from the opposability approach (Pan-American model) to the permissibility approach (compatibility test), the question of a reservation's validity is no longer determined by the acts of diplomatic practice, but is decided instead solely within the conceptual horizon of the given treaty arrangement itself.

¹⁸¹ See Ruda, *supra* n.44, 132-3.

Note also the even more conspicuous parallels that connect the compatibility test approach at this point with the late-objectivist version of the will theory of contract. As mentioned earlier, if one had to isolate one central defining feature of late objectivism it was certainly the transition from the empiricist concept of contract to an essentially theoreticist one. Where previously the question of ‘what made a contract’ had been experienced and conceptualised primarily as a question of fact, with Corbin and Williston the general trend becomes to think of it strictly as a question of law. And if that were not enough, what counts as ‘law’ in this context is quite obviously made a function of public policy considerations (welfare, justice, right and wrong), rather than anything which the contracting parties themselves might have any direct say over.

The legalist turn, the inward-looking solipsism, the obvious readiness to equate law with public policy rather than private choices – the onset of the modernist sensibility behind the compatibility test model seems to be as unmistakable as it is striking.

But note now also what sort of *ontological* implications follow from the adoption of the permissibility view. Whether or not a given reservation should be allowed to stand, under the permissibility theory is understood to be a question which one has to answer not by consulting what the other contracting parties think about this matter in the here and now, but by carefully analysing some nebulous latent core that is assumed to lie at the heart of the treaty. What is more, at no point is it admitted that this latent core must have necessarily left some kind of immediately identifiable traces on the actual surface of the treaty. And yet it is still understood to have a real enough existence to be treated not only as an object deserving of study and verification but also as an object deserving of a much greater degree of protection than the rest of the treaty put together.

The closer one looks at this reasoning pattern, the more difficult it becomes not to notice that, essentially, the ontological foundations of the compatibility test approach mirror the metaphysical premises of the subjectivist version of the will theory of contract. Just like with subjectivism, under the compatibility test model the Court explicitly presumes the presence of a radical ontological split between the ‘external’ reality of the treaty and the ‘internal’ reality of the object and purpose package which, in the final analysis, has to be protected at all costs. Just like with subjectivism, it also takes for granted the idea ‘that the will of the parties, as expressed in the treaty, remains constant’,¹⁸² for, indeed, how could otherwise one ever conceptualise the treaty’s ‘object and purpose’ in an objective enough form for it to become usable as the practical yardstick for evaluating the validity of reservations many of which could well be submitted *years* after the adoption of the treaty’s original text?

The argument could be extended further, but it should already be obvious where it is leading. The implicit theoretical structure underpinning its operative logic places the compatibility test model both *much further away* and *much closer* to the subjectivist theory of contract than either the Pan-American approach or the unanimity model. In terms of the evolutionary trajectory of the will theory of contract, this could be read then as some form of a schizophrenic split or a dialectical implosion. In a sense, of course, one can think of this as the result of compatibility test’s inheriting of unanimity theory’s subjectivist ontological structure: along with the latter’s preoccupation with protecting the bargain came the same contradiction-creating dynamics which triggered the Great Structural Rift. But the reality is that the vector of the structural contradiction running through the theoretical grid of the compatibility test model lies in a completely different dimension.

Besides, where the unanimity theory despite retaining a subjectivist onto-theoretical foundation favoured in practice the untailed default approach, the compatibility test model essentially turns away from the Procrustean style of the untailed solution. Admittedly, the way

¹⁸² Bowett, *supra* n.44, 84.

in which this is done does not automatically bring back the tailored default approach in its pure form: the default rule under the compatibility model is still couched in terms of a standard, off-the-rack solution. But the substance of that solution, if one looks at it closely, requires that the legal decision-maker should always decide by investigating the ‘original’ content of the individual treaty in question, deducing the answers by divining how at the point of the conclusion of the bargain the object and purpose of the treaty had been defined. The chimera of the tailored default does not raise its head in full view, but one only needs to turn the corner to see it.

An epistemological leap into the proto-modernist sensibility of legalist self-referentiality offset by an onto-theoretical involution to a kind of metaphysical obscurantism that even the unanimity theory in its highest form never came close to – it would be difficult to find a more powerful brew to stimulate a sense of unrelievable doctrinal anxiety. It would be equally difficult, however, to find a better recipe for the structural implosion of administrability.

c. The Second Antinomy of the Compatibility Test Approach

However much the unanimity theory may have failed in its operative design, the one thing it clearly had going for it was its exceptionally high degree of *administrability*,¹⁸³ that is to say, it lent itself very easily to straightforward ‘mechanic’ application, both its initial hypothesis and its dispositive element being clearly demarcated and unambiguous.¹⁸⁴

Not so with the compatibility test approach. Nothing in the *Reservations* opinion itself or in the text of the Vienna Convention gives the legal decision-maker any meaningful clue as to how one should determine the ‘object and purpose’ of a multilateral treaty. Whatever indications can be found in the Court’s reasoning are all so inconclusive as to be of no practical use. At first, the Court seems to suggest that contents of the Genocide Convention’s object and purpose can be deduced from the alleged motives and intentions of the General Assembly and the original contracting parties.¹⁸⁵ Several lines later it goes on to point out that the Convention also has

¹⁸³ To my knowledge, the concept of administrability, or as it is also known ‘formal realizability’, comes originally from Rudolph von Ihering’s seminal *DER GEIST DES ROMISCHEN RECHT* 50-5 (1883). The basic idea behind it is that legal rules can either be designed in such a way that whoever implements them has to assess in the course of their implementation a whole range of complex factual and normative conditions which have to be balanced against one another before a clear sense of ‘what the law requires’ in the present case can be developed; or they can be designed in such a way as to come into operation automatically, as soon as a predetermined factual scenario is verifiably established. In the former case, one speaks of a low degree of administrability, in the latter case, of a high degree of administrability. For further commentary, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1687-8 (1976): ‘The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way. Ihering used the determination of legal capacity by sole reference to age as a prime example of a formally realizable definition of liability; on the remedial side, he used the fixing of money fines of definite amounts as a tariff of damages for particular offenses.’

¹⁸⁴ Both of these concepts derive from the Soviet/post-Soviet tradition of normativist legal theory. Generally speaking, a rule’s *hypothesis* describes those conditions which have to be satisfied before the rule can be applied, while its *disposition* describes what exactly has to be done to discharge the rule’s normative requirement. Put differently, the hypothesis describes the ‘when, who, and where’ of the rule and the disposition describes the ‘what and how’. See further S. S. ALEKSEEV, *OBSHCHAIJA TEORIJA PRAVA*, VOL. 1 (1981).

¹⁸⁵ *Reservations to the Genocide Convention*, supra n.75, 23: ‘The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties.’

‘manifest’ purposes that are listed in its preamble.¹⁸⁶ In the paragraph immediately after that it moves to suggest that the determination can also be driven in large measure by the Convention’s non-synallagmatic nature,¹⁸⁷ which inevitably implies either some kind of analytical-jurisprudential analysis or some form of teleological reasoning. In short, if one looks at the entire argument sequence as a whole, what the Court essentially seems to be doing is casting the question of object and purpose determination as though it were a standard question of treaty interpretation, and there are, of course, very few areas in international law which can be as hopelessly contradictory in terms of their dispositive element as the law of treaty interpretation.¹⁸⁸ Add to this the fact that the Court obviously chooses to draw on all three main schools of treaty interpretation (‘intentions of the parties’, ‘textualist’, and ‘teleological’),¹⁸⁹ and the situation does not become any easier.

The story gets even bleaker when one turns to the institutional-procedural aspect of the compatibility test. The very nature of the test’s complexity, its open-endedness, and vagueness seem to make it unavoidable that in order to achieve any kind of interpretative certainty the question of admissibility has to be resolved in an organized centralized manner, preferably through some form of judicial decision-making process. No such provision, however, is envisaged at any point in the *Reservations* opinion. Nor has it been created since under customary international law. What is more, the drafters of the Vienna Convention quite unambiguously seem to have decided to refrain from introducing it.¹⁹⁰

In the absence of a centralized appraisal and validation procedure, the application of the test by default should fall to the contracting parties themselves. An immediate consequence of that, however, would be the radical expansion in the scope of interpretative divergence and, thus, even greater confusion. When every contracting party acquires the authority to voice its own opinion as to what exactly the object and purpose of the given multilateral treaty require in each given case, to say that this opens the room for subjective distortion and abuse of process is perhaps a mild understatement.¹⁹¹ A much more fitting conclusion would be that whatever differences may have existed between the compatibility model and the Pan-American approach at this point become effectively erased.¹⁹²

To complicate the matters even further, it seems the Court in the *Reservations* decision had been perfectly conscious of this possibility: ‘as no State can be bound by a reservation to which it has not consented’, it necessarily falls to each contracting party to assess the submitted reservation ‘on the basis of *its individual appraisal*’ of the treaty’s object and purpose. The ‘disadvantages’ which can result from such a setup, of course, are undeniable: the ‘possible divergence of views’ between the parties is bound to be all the more considerable the greater the number of the parties. But, take heart, that is not at all recipe for interpretive chaos. What will

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*: ‘In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, 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.’

¹⁸⁸ See BROWNIE, *supra* n.63, 631-6.

¹⁸⁹ See Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BYIL 1 (1951): ‘There are today three main schools of thought on the subject, which could conveniently be called the “intentions of the parties” or “founding fathers” school; the “textual” or “ordinary meaning of the words” school; and the “teleological” or “aims and objects” school.’

¹⁹⁰ Certainly, one might still imagine the possibility that where a dispute concerning a questionable reservation arises the matter could be referred by a special agreement of the parties to an arbitral tribunal or even the Court itself. But both the dictates of logic and general experience suggest that it would be rather unrealistic to expect this course of events, and even if it were to materialize at some point, it is obvious that it would result in a rather considerable delay. The wheels of international litigation may grind fine, but they do also grind very slowly.

¹⁹¹ Karl Zemanek, *The Legal Foundations of the International System*, 266 RCADI 9, 180-1 (1997).

¹⁹² BROWNIE, *supra* n.63, 614.

prevent this hugely unappetizing prospect from materializing then? The answer, as the Court presents, in effect is: large doses of positive thinking. ‘It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention’, for ‘should this desire be absent, it is quite clear that the Convention ... would be impaired both in its principle and in its application.’¹⁹³ A more elegant abdication of advisory responsibility could hardly be imagined.

Put the two sides of the story together and what emerges in the end is a picture of an international legal regime whose institutional-procedural structure seems to have been designed in such a peculiar way that it could never facilitate the practical application of that very normative standard in the name of which it was introduced.

At which point the question arises: so what exactly was this regime actually fit to facilitate then?

d. The Third Antinomy of the Compatibility Test Approach

Having proceeded up to this point in a predominantly analytical-jurisprudential register, let us shift the inquiry now towards the investigation of a somewhat different theoretical problematic. In the intellectual tradition which has made the exploration of this problematic its principal calling card the exercise that will be pursued over the next few pages would be called something like a *positive* investigation of the structural design of a legal regime from the point of view of *economic theory*, by which would be understood a descriptive-diagnostic examination of the way in which the internal juridical structure of the given legal regime tends to affect the conduct of its principal target audience and the society at large in terms of structuring their *opportunity sets*. The underlying idea is that legal rules tend to affect people’s behaviour by changing their individual *incentive structures*¹⁹⁴ and thus affecting the make-up of their *opportunity sets*.¹⁹⁵ One can think of this, as many economists do, in terms of the pricing metaphor in the sense that legal rules put prices on different types of conduct.¹⁹⁶ Or one can use the slightly more archaic idiom of ‘social engineering’.¹⁹⁷ The ultimate argument in both cases is the same: how a legal regime is arranged – what sort of substantive and procedural duties and entitlements it includes, what type of institutional mechanisms it relies on for its enforcement, etc. – tends to have a strong causal impact on how the respective category of legal subjects perceive they ought to behave in different situations (what incentives they receive); when the totality of these perceptions is correlated with the totality of what courses of action are otherwise objectively available to them, the resulting set of potential scenarios which the given subjects may consider joining (his set of opportunities) becomes possible to rank in, say, descending order from the more realistic to the less realistic;¹⁹⁸ given that legal regimes do not exist for their own sake, this fact is certainly something to bear in mind whenever one sets out to assess and appraise them.¹⁹⁹

¹⁹³ *Reservations to the Genocide Convention*, supra n.75, 26-7.

¹⁹⁴ For a standard elaboration of this idea, see NICHOLAS MERCURO AND STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 21-3 (1997).

¹⁹⁵ *Id.*, 115-8

¹⁹⁶ *Id.*, 58-9.

¹⁹⁷ See, e.g., Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. Pub. L. 292 (1954).

¹⁹⁸ A. ALLAN SCHMID, *PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS* 6-7 (2nd edn.; 1987): ‘Rights define potential opportunities. An *opportunity set* is defined as the available lines of action open to an individual. ... An individual’s opportunity set is composed of physical and emotional capacities plus legal or customary understandings of potential options that are conditioned by the actual choice of others. ... Thus the opportunity set of an individual is composed of alternative lines of action that are open because of the relative structure of rights as well as the relative capacity of the person to make use of the rights. ... The opportunity sets of individuals interact and condition the outcome of human transactions.’

¹⁹⁹ For various elaborations of this idea, see Richard Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757, 761-4 (1975); Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View*

Against this starting background, imagine now an open multilateral treaty with, say, twenty five existing parties. Suppose it has already entered into force and a twenty-sixth State now expresses an intention to accede to it, albeit subject to the possibility of attaching a minor reservation. How will the legal design of the compatibility test approach affect its opportunity set in this endeavour and how will the dynamics of its interaction with its potential treaty partners most likely unfold?

By way of comparison, consider first how this situation would play out under the unanimity theory. Since all reservations under the unanimity model have to be first accepted by the existing parties, the most obvious course of conduct for the existing parties would be to engage in some form of rent-seeking behaviour, or, to put it more crudely, to try to extort the twenty-sixth State by demanding some kind of additional concessions in return for granting their permissions. Depending on how badly the twenty-sixth State wants to join the treaty, the next stage would then typically consist of either some kind of massive capitulation on its part, an irresolvable stalemate, or a complete termination of its accession process. Better still, because an informed player would easily be able to recognise the high likelihood of this scenario, there is a good chance that neither the first stage nor the second stage will happen at all: a large proportion of such 'twenty-sixth States', put off by the prospects of impending extortions, will feel discouraged to initiate their accession proceedings in the first place. Conclusion: a legal regime that systemically induces a chilling effect resulting in a completely unnecessary decrease in treaty participation.

How exactly does this argument work? Suppose that by a certain point in its accession proceedings the twenty-sixth State has managed to secure consent for its proposed reservation from twenty four of the twenty five original parties. As it arrives at the 'doorstep' of the twenty-fifth State, what sort of behavioural dynamics is most likely going to unfold between them? From the point of view of what would be 'objectively' desirable, it seems that the twenty-fifth State, inasmuch as it is meant at this point to act as an institutional organ representing the interests of the treaty's participant community, should feel strongly inclined to accept the proposed reservation. After all, every one of its twenty four treaty partners has already consented to it. The achievement of such a degree of agreement is not something to be taken lightly. To reject the twenty-sixth State's reservation at this stage would mean not only going against the expressed wishes of every one of the other twenty four States, it would also mean disregarding the communal opinion and, thus, undermining the very objective of a multilateral process.

And yet, inasmuch as the general premise of modern international relations holds true, the most likely scenario that is going to take place under these circumstances is that the twenty-fifth State will enthusiastically refuse the proposed reservation and thus block the twenty-sixth State's accession. Why?

In most strands of modern-day international relations scholarship, it is typically assumed that almost all States almost all of the time tend to act in pursuit of their national interests. Naturally, this does not make it impossible, as various contributors from the institutionalist and constructivist schools have demonstrated time and time again, that in *some* specific cases *some* States may come to form their foreign policy decisions under the influence of other decisional factors. But in the vast majority of situations it still seems to remain true that, on the whole, States *do* act in a fundamentally self-interested way, even if the basic concept of self-interestedness in this context may generally be broader than what one would normally

of the Cathedral, 85 Harv. L. Rev. 1089, 1089-1115 (1972); Warren Samuels, *Commentary: An Economic Perspective on the Compensation Problem*, 21 Wayne L. Rev. 113, 118-29 (1974). See also, more generally, Hale, *supra* n.129, and JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924).

understand by it in classical economics.²⁰⁰ Seen against this backdrop, the fact that every one of its treaty partners has already granted their assent to the proposed reservation puts the twenty-fifth State in the position of a unilateral veto-holder. All that remains for the twenty-sixth State before it can join the given treaty is to collect one last 'yes'. The ownership of this 'yes' at the moment, however, belongs to the twenty-fifth State. Considering how much the acquisition of this 'yes' matters now to the twenty-sixth State, why should the twenty-fifth State not exploit the opportunity and 'raise the price' by, say, requesting from the twenty-sixth State the dispensing of some special favour – privileges or concessions that it otherwise would not have been able to obtain or would have had to obtain at a much more considerable cost?

In classical economic theory, the term that is used to describe the twenty-fifth State's behaviour is holdout.²⁰¹ As classically defined, a holdout represents a mixture of blackmail and rent-seeking activity. From the point of view of the objective social interest (the interests of the treaty's participant community as a whole), the possibility of the twenty-fifth State's 'holding out' against the twenty-sixth State's accession unquestionably constitutes a structural design problem. The hypothetical offered presumes that the reservation proposed by the twenty-sixth State would be minor and of no direct consequence to the positions of the existing parties. However, even *if* the twenty-fifth State stood something to lose from the twenty-sixth State's reservation, from the communitarian perspective the benefit of adding a twenty-sixth treaty partner would still very likely outweigh any costs that would be incurred by the twenty-fifth State. Because, however, the twenty-fifth State holds an absolute property right over its 'yes', and because it is much more likely than not going to formulate its decision on the basis of its direct national interest, that scenario is not actually going to happen.

Note two important points. First, the only reason why the twenty-fifth State can resort to this kind of political blackmail is because the legal structure imposed under the unanimity theory would allow it to do so. It is the way in which the legal regime advocated by the unanimity approach distributes legal entitlements, duties, and powers among the participant players that enables the 'last party' to demand extortionate rent payments in return for its consent to the proposed reservation. Second, given that the twenty-fifth State is going to be able to recognise this fact, there is a good chance that that so also would the first twenty four States. If the law puts the twenty-fifth State into such an attractive position, why not try to 'become' the twenty-fifth State? All it takes to 'get there' is some procrastination with making up one's mind, so that the twenty-four other States can speak their mind first. Or, indeed, if you think about, why wait until the twenty-fifth 'stage' at all? If the twenty-fifth State can blackmail the new arrival, why could not the twenty-fourth State do the same? Or the twenty-third State? In fact, given how this logic plays out, why not start extorting the twenty-sixth State from the very beginning?

Taken to its logical conclusion, every legal regime allowing for a holdout eventually results either in a deeply undesirable redistribution of political resources (typically from the victims to the blackmailers, but not necessarily: the twenty-fifth State can extort any one of the other twenty four States too, if it sees that it has developed a particularly acute interest in the twenty-sixth State's accession) or in an irresolvable behavioural stalemate leading to a complete breakdown of social cooperation. What is more, because the prospect of a potential holding out reduces the expected rate of return for the potential victim, it becomes highly possible that the moment the victim recognises the structure of the respective legal regime for what it is, it will pre-emptively abandon at least *some* part of its initiative, which also would negatively affect the

²⁰⁰ Compare in this context Thomas Ulen, 'Rational Choice Theory in Law and Economics', in BOUCKAERT AND DE GEEST, *supra* n.87, 790 and ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (rev. edn.; 2005), esp. Chapters 5-7.

²⁰¹ For further elaboration of the theory of holdout, see, e.g., Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J. L. & Econ. 553 (1993); Lloyd Cohen, *Holdouts and Free Riders*, 20 J. Leg. Stud. 351 (1991).

prospects of social cooperation inasmuch as it would lead to a certain degree of under-participation on the part of all self-perceived potential victims.

Both the Pan-American approach and the compatibility test model allow the treaty community to counteract the holdout problem on the part of the twenty-fifth State. The way in which this is achieved in the former case is by transferring the absolute property right from the objecting State to the reserving State; in the latter case – that is to say, under the permissibility theory version of the compatibility model – by doing essentially the same but adding also a further duty applicable to the reserving State to observe the integrity of the treaty's object and purpose and offsetting this duty with a remedial right on the part of the objecting State to prevent the treaty's entry into force between itself and the reserving State.²⁰²

So far, so good, but every solution sooner or later creates its own set of problems. Already as far back as 1953 Gerald Fitzmaurice noted the problems the application of the Pan-American approach creates in the case of the so-called 'normative' multilateral treaties. When it came to those 'Conventions the essence and *operation* of which involve the grant by each of the parties to each of the others of a number of reciprocal rights, benefits or privileges', the Pan-American model doubtless proved itself rather 'capable'. But then there were also those treaties, such as the Genocide Convention, where the regime of obligations imposed was 'both general and absolute' and thus 'neither depending on the participation of other countries by virtue of operating in relation to them, nor, as to the scope of its application by any one party [,] limited merely to the nationals or interests of such other countries as are also parties.'²⁰³ And there the utility of the Pan-American model was significantly more problematic.

It is this peculiarity of 'normative' Conventions, namely that they operate in, so to speak, the absolute, and not relatively to the other parties – i.e. they operate *for* each party *per se*, and not between the parties *inter se* – coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* States, that gives these Conventions their special juridical character, and makes the application to them of the Pan-American system of reservations inappropriate, and indeed undesirable.²⁰⁴

The Court in its discussion of the special character of the Genocide Convention, of course, fully recognised the existence of this peculiar category of multilateral treaties. But its response to its special features, implies Fitzmaurice, clearly suggested the presence of a fundamental analytical failure. In institutional-procedural terms, the compatibility test model as envisaged by the Court was indistinguishable from the Pan-American approach. 'It can readily be seen', however, notes Fitzmaurice,

that ... the application of the [Pan-American] system to the normative type of Convention must involve that all or nearly all the advantage is with the reserving State, while all the disadvantages accrue to the objecting State, whose objections are for all practical purposes rendered ineffective. The objecting State, despite its objection, is still itself obliged to apply the Convention in full, and is not relieved from any part of its obligation; while to say that it is relieved from having to apply it 'towards' the reserving State, or 'as between' it and that State, means nothing, for the

²⁰² Technically, the 'absolute property right' in question is not really a right in the narrow sense of the term, but a privilege. The reserving State, under the compatibility test approach, thus acquires a relative (because it is limited) privilege to join the treaty which is constrained by its duty to ensure that the submitted reservation complies with the treaty's object and purpose; which duty simultaneously translates into a right (properly so-called) held by the objecting State, the essential nature of which is that it acts as a remedy/sanction rather than a 'substantive right'. Further on the logic behind this argument, see COMMONS, *supra* n.199, 93-9.

²⁰³ Fitzmaurice, *supra* n.58, 14.

²⁰⁴ *Id.*, 15.

obligations of the Convention are not of that kind. The reserving State, on the other hand, only has to carry out the Convention subject to reservations which may relieve it from some important part of the burden. There is thus created a situation of pure privilege for the reserving State, which it can establish for itself at will, and in which the normal sanction or deterrent against the use of reservations, namely the withholding of the corresponding advantages, breaks down, because there are no advantages to withhold.²⁰⁵

Now, from the internal point of view of the Pan-American approach, none of this, strictly speaking, constitutes a problem. The possibility of an unstoppable evisceration of the ‘treaty commitment’ cannot in any way be considered a threat if treaties by definition are conceived as *enabling contexts* and *non-substantive frameworks*. But if one shifts the focal point of analysis and reconsiders the situation in terms of the practical effect this setup creates in the context of normative conventions themselves, the problem Fitzmaurice identifies certainly seems very real. In the language of modern law-and-economics, it would be described normally in terms of *enforcement deficit* problem, but since there would actually be no enforcement issues involved from the point of view of the Pan-American approach itself, a more fitting characterisation would probably have to be formulated in the language of *negative externalities* suffered by the non-reserving parties at the behest of the reserving party.

As traditionally defined, negative externalities arise wherever a given subject’s actions result in the imposition of costs on others which the subject then does not in any way pay for. The reserving State’s opportunity under the Pan-American approach to become a party to a treaty while relieving itself of a substantial part of its burden offers a typical illustration. If the reserving State takes advantage of this opportunity, it would leave the other parties to the treaty (which will still be obliged to carry out the treaty’s obligations in full) *relatively worse off* in the same way in which the non-payment of taxes by a ‘tax exile’ who is physically resident in the jurisdiction leaves other citizens who do pay their taxes worse off. Like the reserving State, they too will still be able to enjoy the same benefits (e.g. the symbolic boost to national reputation attendant on being recognised as a party to a convention promoting a progressive or noble cause).²⁰⁶ Unlike the reserving State, they will go on to pay a considerably heavier price for the possibility of enjoying this benefit. At the micro-level, one could say, the reserving State will thus undercut the non-reserving States. At the macro-level, because the reserving State is not going to be the only bright kid on the block, the inherent dynamics of the situation can be expected to pressure every non-reserving State to adopt the same pattern of behaviour too. What this will lead to should not be difficult to predict. A race to the bottom resulting in a field-

²⁰⁵ Id., 15-6. Instructively, the argument then continues: ‘Very little reflection shows that, when applied to Conventions of the non-reciprocally operating type, the Pan-American system is in fact merely a variant of the absolute sovereignty theory, which it reintroduces by the back door, so to speak, producing effects that are in practice indistinguishable from those entailed by that theory. As applied to this type of Convention, both involve (a) that a State can make any reservation it pleases, however far-reaching; (b) that it has an absolute right to become a party to the Convention with the benefit of that reservations, even if other parties object; and (c) that the other parties are nevertheless obliged to carry out the Convention in full, though the reserving State does not.’ (Id., 16.)

²⁰⁶ On the logic of such reputation-enhancing dynamics engendered by participation in treaties membership that otherwise, as Fitzmaurice notes, render no immediately identifiable advantages to their members, see generally CHAYES AND CHAYES, *supra* n.134 (participation in such treaties serves as the vindication of the state’s status in the international community); ERIC W. SIEVERS, *THE POST-SOVIET DECLINE OF CENTRAL ASIA* 129-30 (2003). For an economic explanation of this dynamics, see also ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (social actors of all kinds tend to observe rules which they otherwise draw no benefit from in order to signal to potential future partners that they can be reliable collaborators in cooperative endeavours) and THORSTEIN VEBLEN, *THEORY OF THE LEISURE CLASS* (1899) (many behavioural regularities, such as consumption and leisure, can be explained in terms of those activities’ capacity to serve as ‘a mark ... of the superior status of those who are able to afford the indulgence’).

specific version of the *tragedy of commons*: a gradual hollowing-out of the treaty's legal regime that (absent conspiracy theory) in the long run serves none of the parties that drafted it any good, but is nevertheless inexorably achieved as every contracting party, having first agreed at the time of negotiations to adopt a robustly phrased text, at the time of ratification slips in an accession instrument saddled with any number of far-reaching reservations that greatly reduce the robustness of the treaty's legal effect. Since none of the other parties will stand anything to gain from objecting to such reservations, and considering how expensive in political terms the business of upsetting one's treaty partners by challenging their corner-cutting initiatives that do not actually harm one's own interests may turn out to be, each of the reserving States can be assured of a 'free passage' on this front, and yet from the systemic point of view what good would creating this sort of regime serve?²⁰⁷

To give it its due, though, the operative design of the Pan-American approach never did indicate any promise to protect the integrity of some substantive core at the heart of the treaty, a fact which, however, cannot also be claimed on behalf of the compatibility test approach.

Does the regime established under the compatibility test model suffer from an enforcement deficit dynamics? Undeniably. The analogy with the tax exile in the earlier example and the reference to the tragedy of the commons potentiality suggest a crucial insight into the operative logic of this dynamics. Both in the ordinary usage and in the economic vernacular, a tax exile who, while physically residing in a jurisdiction, does not contribute to the tax revenues would normally be described as a *free rider*. The incorporation into the compatibility test model of the Pan-American approach's decentralised institutional setup replicates in its formal structure the same opportunity set-formative dynamics as one would witness under the typical free rider scenario.

Writes Vilfredo Pareto:

If all individuals refrained from doing A, every individual as a member of the community would derive a certain advantage. But now if all individuals less one continue refraining from doing A, the community loss is very slight, whereas the one individual doing A makes a personal gain far greater than the loss that he incurs as a member of the community.²⁰⁸

To put the matter in a slightly more formal way, the enabling conditions for the emergence of the free-rider dynamics include, firstly, the structural unavoidability of *positive externalities*; secondly, *non-exclusivity of the enjoyment of benefits*; and, thirdly, *propensity for rational behaviour*. When the non-refraining individual in Pareto's example proceeds to withhold his participation in communal action, he can still enjoy the benefits created by it. Because he will not anymore have to contribute towards the costs of maintaining that action, however, he will also be able now to make an additional saving equal to the size of those costs. Presuming the presence of both the intention and the capacity for rational behaviour, the moment this realisation hits home the most likely next step for him would be to do exactly that.

Note the logical structure behind this scenario. For the free rider problem to come into existence, the communal action in question has to result in the creation of benefits that can be enjoyed as easily by the non-contributors as by the contributors. The 'good' created as the result of the communal action, in other words, must be inherently non-excludable. In the economic

²⁰⁷ A secondary consequence, as Fitzmaurice remarks, may also be a kind of 'normative inflationism' and the corrosion of administrability: 'The admission of a recognised and quasi-unrestricted right to make unilateral reservations ... will make it less important to confine the scope of Conventions to what is practicable, or to draft them as precisely as possible, since reservations can always be made to clauses that appear defective or too onerous. There will be a greater temptation to draw up what looks well on paper, without adequate regard to its practical implications.' (Fitzmaurice, *supra* n.58, 19.)

²⁰⁸ VILFREDO PARETO, *THE MIND AND SOCIETY*, v. 3, 946-7 (1935).

vernacular, this type of ‘goods’ are usually described as ‘public goods’ or ‘collective goods’. A classic example offered in the literature is the operation of a lighthouse: every shipmaster benefits from the light emitted by the lighthouse, regardless of whether or not they paid anything towards its construction and maintenance. Another oft-cited example would be the cleaning of communal areas or the restoration of public order by means of a citizen’s arrest.

The *positive externalities* aspect in all of these situations comes out in the fact that once the public good is delivered, there will exist no way for the contributors to charge the non-contributors their share of the costs. If the contributors could force the non-contributors to cough up their share, the latter’s ride would not be free anymore. The same holds true if the enjoyment of the ‘good’ can be kept exclusive to the contributors. Thus, subject to the assumption of rational behaviour, the two principal preconditions for the formation of a free-rider dynamics are the opening of the scope for positive externalities and the non-exclusivity of benefit enjoyment. (A third precondition that is commonly identified in the literature – the absence of an effective mechanism of coercion that could be used against the non-contributors – follows on from the logical combination of the first two.)

As soon as both of these conditions are brought together, unless there exists some reason to assume a propensity for irrational behaviour, what is going to follow inevitably will be a poisonous mix of (i) a system-wide culture of compulsive ‘cheating’; (ii) radical under-production and under-delivery of public goods; and (iii) an unavoidable sense of paranoia in the face of every instance where the public goods in question have actually been produced and delivered at the ‘appropriate’ level.

How does this reasoning work? In its most basic form, the causal dynamics behind the free-rider scenario was first documented by Mancur Olson. The reasoning chain began with the following observation:

In any group in which participation is voluntary, the member or members whose shares of the marginal cost exceed their shares of the additional benefits will stop contributing to the achievement of the collective good before the group optimum has been reached.²⁰⁹

Absent any mechanism of behavioural coercion, every member of any given collective project, inasmuch as his behaviour is driven by rational thinking, will tend to restrict the size of his contributions to the project’s upkeep in the light of his evaluation of his individual trade-offs, rather than in the light of the actual ‘objective’ needs of the project. So long as the project in question results in the production of a good which remains enjoyable only by the project’s participants, there will obtain, consequently, a pattern of relative under-investment. As soon, however, as the enjoyment of the good becomes non-exclusive, the risk immediately arises that at some point the level of investment will plummet to zero. The production of the good will cease and, amidst a ‘universal’ culture of free-riding, a systemic breakdown in the economy of that good will eventually ensue.

The larger the scale of the voluntary collective project, the larger, in other words, the size of the group, the more likely, observes Olson, that this sort of scenario is going to occur. In smaller groups, because of the corrective effect created by the dynamics of spontaneous mutual monitoring typically arising in such contexts, the dominant tendency will, thus, be towards a merely ‘suboptimal provision of collective goods’; in larger groups, because the greater number

²⁰⁹ MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 31 (rev. edn.; 1971).

of players involved increases the scope of free-riding going unnoticed, the dominant tendency will lean closer and closer towards a total non-provision *tout court*.²¹⁰

And yet even in the larger-scale groups the combination of positive externalities and non-exclusivity of benefit enjoyment does not necessarily guarantee a complete cessation in the provision of public goods. The reason for this comes from the fact that under certain conditions the dynamics of voluntary interaction within the group may result in the emergence of what could be called the *rational over-spender*.

Where the members of the group are not necessarily equal to one another in terms of their stature, degree of interest in the public good, or investment capacity, remarks Olson, it is not at all inconceivable that a 'single member' may emerge who will be able to secure 'such a significant proportion of the total benefit from the collective good that he will gain from seeing that the good is provided, even if he has to pay all of the cost himself.'²¹¹ One can think of the example of a shipping company that sends so many of its ships through a particular stretch of water that it becomes rational for it to invest in the construction of a lighthouse even if it will not be able to charge any other shipping company their share of the costs, or a neighbour whose particularly high level of personal intolerance for dirty communal areas causes him to clean those areas voluntarily. In both situations the decision to invest in the provision of the public goods will seem to the 'single member' in question perfectly rational.

But note two important caveats. Firstly, because their assessment of what is rational will be determined by their individual trade-offs, the level of the public good provision is still going to remain at the systemically suboptimal level. The shipping company will build a lighthouse only over that stretch of water through which it sends its ships. The grime-intolerant neighbour will clean only those parts of the communal areas which he tends to visit himself. The rational over-spender will over-spend, but only to the extent to which it still makes sense in terms of his private cost-benefit function. Anything above and beyond that would be philanthropy and compulsive charity. Neither the one nor the other, of course, is in itself a categorical impossibility, but in the context in which it is recognised as an obvious empirical fact that none of the players involved is a philanthropist or a charitable organisation, the first and the most pressing question that will arise as soon as one witnesses a pattern of private provision of public goods that does not seem to make obvious rational sense is: what sort of additional motives may have been overlooked? Why did this high-spending 'single member' develop such a keen interest in the provision of the public good beyond what would be evidently rational for him? Could there be some other, as yet unrecognised benefits that he is expecting to draw in this case? Could these benefits be in any way unsavoury or objectionable? The second caveat that has to be added to the theory of the rational over-spender, in other words, is that no matter how attractive the idea of the private provision of public goods may seem, it will always bring with itself a powerful sense of paranoia.

The world of inter-statal relations is not known for its regular demonstrations of philanthropy or charitable action. States do not typically act in the interests of the 'world community' unless they are moved by some kind of ulterior motives. How should one then interpret against this background a situation where one of the parties to a 'normative convention' decides to enforce the compatibility test against a reserving State, given that the operative logic of such type of convention, by definition, can confer no direct benefit on any of its parties *qua* States?

The behavioural dynamics induced by the decentralized institutional setup envisaged under the Pan-American approach and inherited by the Vienna regime, as should already be

²¹⁰ Id., 28. On the logic of how under the traditional assumptions of rationality such kind of spontaneous monitoring is meant to arise in smaller groups, see, famously, Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623 (1986).

²¹¹ OLSON, *supra* n.209, 34.

clear, is indistinguishable from the behavioural dynamics of voluntary collective projects described by Pareto and Olson. So long as the treaty in question follows some kind of synallagmatic logic, the objecting State will see no reason to withdraw its participation in the enforcement of the compatibility test. There will be no temptation to simply sit back and do nothing. The quantity of total enforcement, in other words, will thus tend to remain adequate and generally balanced.

But in the case of non-synallagmatic treaty regimes, the incentive structures are going to look completely different. Where the non-synallagmaticity of the regime consists in the fact that it creates a web of what has been termed *integral legal obligations*, that is to say, obligations the faithful performance of which by every treaty participant constitutes an indispensable precondition for the rational compliance by every other participant (a typical example here would be a disarmament treaty), the non-reserving States will still, obviously, retain a very healthy level of enforcement incentives.²¹² However, not all non-synallagmatic regimes give rise to integral legal obligations. What Fitzmaurice calls ‘normative conventions’ in general, and multilateral human rights treaties in particular, offer a glaring example of non-integral non-synallagmatic treaty regimes. How does the decentralized institutional procedure of the Pan-American approach affect the operation of the compatibility test in their case? Unavoidably, it creates the conditions for the emergence of the free-rider dynamics.

Given the structural setup of the enforcement procedure, any enforcement action will entail considerable private costs for the enforcing State that it will not be able to pass on to the other non-reserving States. Whatever good might be produced by the enforcement action will all be non-exclusive in the same way in which cleaning the communal areas or the restoration of the public order is. Unlike in the clean-up scenario, ‘saving’ the human rights cause from the nefarious designs of the illiberal reserver will entail costs going far beyond the immediate costs of the action itself. First, like in the citizen’s arrest scenario, the enforcing State will acquire the somewhat dubious reputation of a self-appointed vigilante. Second, it will much more likely than not also attract the immediate ire of the reserving State, which, unlike in the citizen’s arrest scenario, stands no chance of getting locked up or being prevented from resorting to retaliation by the subsequent intervention of the police force. Add to this the fact that States, by definition, cannot be among the immediate beneficiaries of the human rights cause, and it becomes painfully obvious that under such circumstances no non-reserving State will find it rational to object to any reservations made by its treaty partners.

In the case of the smaller-scale treaties, over time this pattern is going to lead to a systemic deterioration of the regime’s integrity, that is to say, many reservations that are incompatible with the treaty’s immediate ‘object and purpose’ will be admitted and allowed to stand. In the case of the larger-scale treaties – and admittedly it is not entirely clear where the ‘smaller-scale’ ends and the ‘larger-scale’ begins, but the point, nonetheless, still seems to hold – the inevitable risk will become that at some point there is going to be practically no enforcement of the compatibility test at all.

What is more, whenever any enforcement action will take place, the immediate suspicion will be that the enforcing State is not probably acting out of ‘honest intentions’. Could it be that it is seeking some form of self-aggrandizement by positing itself as the world’s policeman? Or is it just trying to get at the reserving State for something the latter had done in the past? Could it be that the enforcing State is using the law of reservations to intervene in the internal affairs of the reserved State or to settle some political scores that have nothing to do with the particular treaty in question? If that is so, what are the chances it has deliberately misinterpreted the compatibility test? And let us not forget also the fact that some types of ‘normative conventions’

²¹² For further elaboration, see Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EJIL 1127, 1134 (2002).

tend to be highly ideologically charged, which opens the space for all kinds of hegemonic temptations especially when set against the background of a relationship between a former colony and its colonial master. Could the compatibility test become a site for a ‘civilising mission’?

A report prepared in 2004 for the UN Sub-Commission on the Promotion and Protection of Human Rights observed that the overwhelming majority of objections made with regard to reservations submitted under human rights treaties tend to come from States traditionally listed as part of ‘Western European and Others Group’. Outside of that group, the only regular objectors appear to be Saudi Arabia and Mexico.²¹³ Doubtless one should build a whole castle of suspicions on one fact. The same report notes also that most of the objections made by the members of the Western Group were made against the reservations that also came from the members of the Western Group.²¹⁴ But the implicit geopolitics of such patterns is certainly not insignificant.

Like the holdout problem, the free-rider problem is essentially the product of a flawed institutional design, or, in other words, an ill thought-out arrangement of the background legal regime. Between the two, however, it is undeniably the latter that results in a much more pernicious social dynamics, since, on the whole, everyone can become a free rider. It does not take that much skill or strategic acumen. The holdout, to be successful, must demonstrate ‘a high degree of negotiating, bargaining, and bluffing skills’. All that the free rider has to do is simply sit back and wait.²¹⁵

Does this mean that the switch from the unanimity model to the Pan-American approach effected by the Court in the *Reservations* decision represented in some intangible political sense a step back? The answer depends on one’s starting ideological assumptions. One of the principal challenges confronting every lawmaker, from the law-and-economics point of view, is which of these two species of collective action to give more attention to. ‘The essential dilemma’, as Richard Epstein points out, ‘is that often the effort to counteract one problem will only aggravate the other, for where both are present, they stand in an inverse relationship with each other.’²¹⁶ To preference the need to counteract the free rider dynamics in the law of reservations is to discount the threat of the holdout: a view one would typically associate with the utopian communitarian position. To accept the risk of the free rider as an acceptable price to pay for the escape from the holdout is to show a fundamental distrust towards the international community’s capacity to be either effective or benevolent: a view one would typically associate with sovereigntism or international legal nationalism. The International Court of Justice in the *Reservations* opinion, the drafters of the Vienna Convention, and the International Law Commission in its berating of the Human Rights Committee’s assessment of the Vienna regime’s institutional and procedural shortcomings in General Comment No. 24 all unequivocally threw their weight behind the latter option, thus nailing their Démogean (sovereigntist, pro-will theory, pro-freedom of contract) colours to the mast. And yet, was there really any other alternative?

²¹³ Hampson, *supra* n.49, §30.

²¹⁴ *Id.*, §31.

²¹⁵ Cohen, *supra* n.201, 359.

²¹⁶ Epstein, *supra* n.201, 557.

SECTION 5. THE DOCTRINAL MEANING OF GENERAL COMMENT NO. 24

a. The Traditional View

What was the basic intertextuality of the doctrinal field at the time of the adoption of General Comment No. 24? What was the basic makeup, in other words, of that historically constituted archive of ideas, doctrines, assumptions, and thinking habits against the background of which the Human Rights Committee presented its reform initiative for the Covenant? There exist several different ways to describe the general structure of the legal-theoretical landscape in which the Committee found itself as it tried to navigate its way towards whatever it was it chose as its ultimate goal.

In the traditional understanding (see Section 2), this structure would be typically presented first as having two radically different points of origin, the unanimity theory and the Pan-American approach, which arranged vis-à-vis one another in a pattern of quasi-Hegelian dialectical contradiction. The eventual outcome of this contradiction both chronologically and genealogically then would be found in the compatibility test model in reference to which – and it alone – the Committee’s initiative would have to be assessed. Before the assessment could start, however, another important dimension of the received wisdom would come into play. As typically projected, the quasi-Hegelian model in the received narrative would constantly contend for theoretical dominance with another similarly teleologist representation whose origins also, curiously enough, can be traced to a great 19th-century tradition. This second representation has a strong sense of Darwinian overcoding. Its influence on the formation of the traditional understanding of the history of the law of reservations comes out in the projection of the act of the initial emergence of both classical approaches as an expression of international law’s functional response (adaptation) to differently constructed politico-institutional environments; their subsequent conflict in the early post-World War II period as the metaphoric equivalent of the great evolutionary struggle; the eventual rise of the compatibility test approach as the explicit vindication of the quasi-Hobbesean thesis of natural selection (survival of the fittest).

Seen against the background of such a thoroughly organicist²¹⁷ emplotment²¹⁸ pattern, the question of the doctrinal meaning of General Comment No. 24, quite unsurprisingly, invites itself to be *thought* and *modelled*, even if not necessarily also openly articulated, in terms of some kind of a quasi-evolutionary teleologist metaphor. Thus, either what the Committee sought to do in the No. 24 marked a remarkable evolutionary breakthrough, or it marked an unfortunate slip into an evolutionary side branch that led into a dead end. In the latter case, the Committee’s vision would then be implicitly compared to the proverbial Neanderthal man, the vehement response to it led by the Commission and the contracting parties representing the triumph of the much better environmentally adapted *Homo Sapiens* of the Vienna regime. In the former case, the Neanderthal man would have been the Committee’s critics, who in a tragically farcical reversal of the classical account of evolution managed to ambush and bludgeon to death the unsuspecting *Homo Sapiens* of the Comment which, if only history played out fairly, would have been certainly much better adapted to the environmental pressures of the human rights treatymaking process than the Vienna regime.

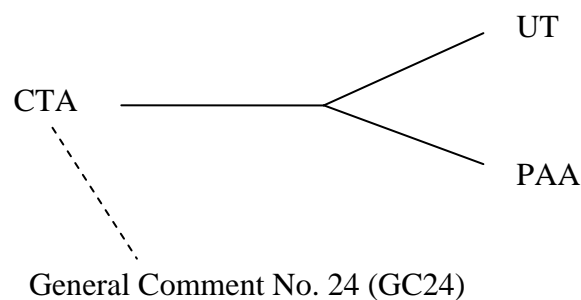
One can continue this ‘archaeological’ reconstruction of the traditional view, but there seems to be little justification for that. The presentation of international lawmaking as an adaptive response to the needs of the time, the assumption of some kind of monistic

²¹⁷ For an overview of the principal feature of the organicist mode of socio-theoretical and legal-theoretical discourses, see further Duncan Kennedy, *A Semiotics of Critique*, 22 *Cardozo L. Rev.* 1147, 1149-57 (2001).

²¹⁸ For the concept of historical emplotment, see See HAYDEN WHITE, *TROPICS OF DISCOURSE* 83-91 (1978).

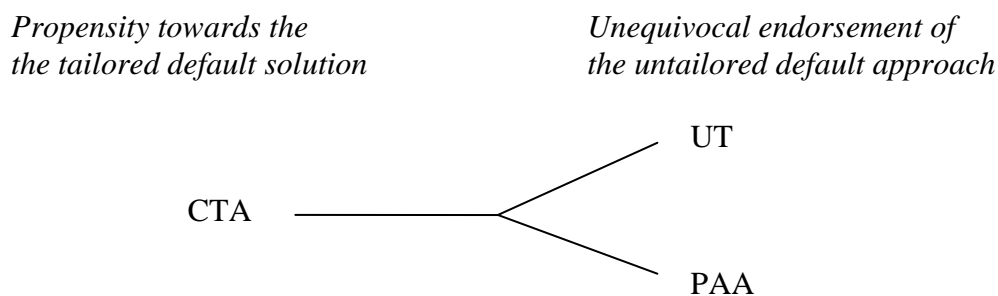
theory, which made the administration of that substantive element in practice even more problematic (see Section 4c). The partial overturning of the Vienna regime proposed by the Committee entailed the introduction of a different institutional-procedural arrangement effected by the monopolisation of appraisal and validation functions by the Committee itself, but it still presumed an unqualified retention of the same substantive element (see Section 1c). The resulting transformation of the regime structure thus involved a relatively notable reduction of the administrability deficit achieved in part by the radical contraction of the scope for interpretive chaos, but in part also by the elimination of the structural contradiction between the substantive (permissibility) and the institutional (opposability) elements of the Vienna regime. Inasmuch as the opaquely defined hypothesis remained an integral part of the overall vision, however, the reduction remained only partial.

Thus, the intertextual doctrinal linkages of the General Comment No. 24 vision in this dimension of analysis can be schematically represented as follows:



2. *Tailored vs. Untailored Default Approach.* As noted earlier, one of the crucial differences between the compatibility test approach and the two classical models lies in the fact that the former shows a partially suppressed propensity towards the adoption of the tailored default approach (see Section 4b). The propensity is suppressed because formally the approach still remains unmistakably ‘untailoredist’. However, the substance of the proposed default rehearses, in a nesting fashion,²¹⁹ what could be understood as the traditional ‘tailoredist’ mentality.

Schematically, if we present this relationship in terms of a continuum of contradictions and coherence, the picture would look as follows:

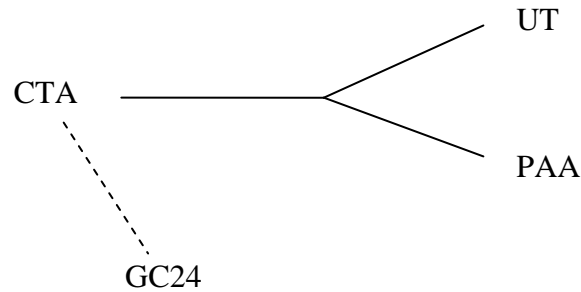


The retention by the Committee of the basic substantive element of the Vienna regime reproduced inevitably the same dynamics of suppressed ‘tailoredism’. Its declaration, however, of a long list of the types of reservations which it found to be automatically inadmissible under the Covenant (see Section 1c), coupled with its proposal in § 18 of the Comment to consider all

²¹⁹ KENNEDY, *supra* n.142, 119.

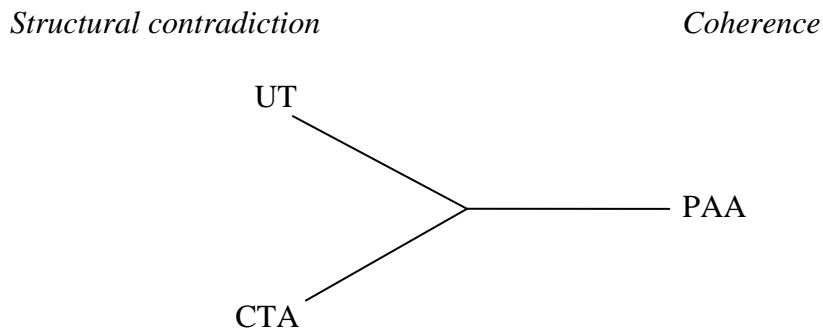
inadmissible reservations retroactively severable regardless of how the particular reserving States may have viewed the conditioning effect of these reservations on their acts of accession at the time of making them, can be taken as an indication of a strongly pronounced shift in the direction of a more consistently untailed default attitude.

Thus, once again, the intertextual doctrinal position of the Committee's vision appears schematically to follow the same structure:

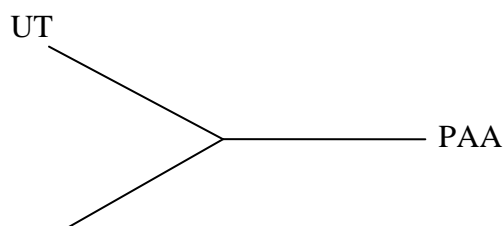


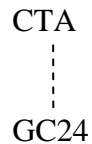
3. *Transcendence of Subjectivism.* While the Pan-American approach appears to offer a fully coherent enactment of the objectivist sensibility (see Section 3l), both the compatibility test and the unanimity theory approaches are premised on a fundamentally contradictory relationship to subjectivism. In the former case the contradiction manifests itself in what has been described as the schizophrenic split between the epistemological and the ontological implications of the compatibility model itself (see Section 4b). In the case of the unanimity theory, the contradiction takes the form of the Great Structural Rift created by the disjuncture between the model's operative practical setup and its official theory (self-justification) (see Section 3k).

Schematically, the structure of this relationship can be represented thus:



None of the changes proposed by the Committee in the Comment affected the substantive element of the Vienna regime. Hence, the structural relationship between the Committee's vision and the rest of the doctrinal archive in this case appears to look as follows:





4. *Typology of Rent-Seeking Exposure.* Both the Pan-American approach and the compatibility test approach suffer from an exposure to the free-rider dynamics in the case of what Gerald Fitzmaurice called ‘normative conventions’ (see Section 4d). The unanimity theory model, by contrast, is vulnerable to the holdout dynamics (see Section 4d). The two types of dynamics, as noted earlier, are in many ways mutually exclusive. The holdout falls under the umbrella of negative externalities; the free rider emerges under the conditions of positive externalities.

Structurally, the network of relationships connecting the three models in this dimension of their operability can thus be expressed in the following way:



Like the holdout, the free rider is a product of institutional design flaw. The partial reorganisation of the Vienna regime proposed by the Committee was intended to address precisely this issue.

In basic economic terms, the two keys to the emergence of the free-rider dynamics lie, on the one hand, in the non-exclusivity of the enjoyment of benefits and, on the other hand, in the endemic character of the conditions enabling the rise of positive externalities. Institutionally, both factors are tied to the decentralised character of the decision-making process establishing the level of collective investment, or, in other words, the absence of mechanism for cost-sharing enforcement. Seen in this light, the classical solution to the free-rider problem would be either to centralise the decision-making process, i.e. create a public authority that would be charged with the task of providing the respective collective good, or to introduce a system of ‘separate and selective’ incentives so that the enjoyment of the good in question becomes limited only to cost-contributors.²²⁰ Failing that, the dominant trend will remain towards, depending on the circumstances, a notably suboptimal provision of the good – in the present case, the upholding of the integrity of the normative convention’s object and purpose.

Not all types of collective goods, however, support the use of the second option. One could imagine such a restructuring of collective bargaining rules as would allow the benefits of any deals struck by the trade unions to be shared only among the union membership. But ‘classical’ public goods, such as *ordre public* or the light provided by the lighthouse, are non-exclusive ‘by design’ and so are impossible to turn into ‘club goods’ under any circumstances.

Viewed from this angle, the Committee’s proposal in General Comment No. 24 appears to embody the only possible effective solution to the institutional flaws of the Vienna regime in its application to the Covenant. By instituting a de facto centralised procedure for the appraisal and validation of reservations, the Committee both eliminated the scope for enforcement deficit dynamics created under Article 20 of the Vienna Convention and addressed the sort of abuse-of-

²²⁰ OLSON, *supra* n.209, 51.

right concerns one might typically have in the presence of an excessively eager enforcement practice (the rational over-spender scenario).

Every institutional solution, however, tends to create its own abuse-of-right (rent-seeking) opportunities. While it may certainly solve the problem of the free-rider in the case of human rights treaties, the Committee's initiative quite certainly would also open the scope for a whole new set of heretofore absent problems. Some of these problems, admittedly, would take the form of only potential weaknesses. Others, however, would result in the creation of very real negative externalities.

Consider, to begin with, the downsides of any monopoly arrangement. In classical economic terms, the negative externalities produced by any centralisation of market supply include at the very least foregone consumer surplus (monopolies have no cause to remain efficient in meeting the needs of consumers) and resources exhausted in seeking rents (monopolies are a textbook example of rent-seekers).²²¹ In the present context, what this translates into is, firstly, the new set of costs that would be created as the result of the Committee's capture of all decision-making possibilities when it comes to enforcing the compatibility test under the Covenant; and, secondly, the new set of costs that would be created as the result of Committee's rent-seeking behaviour.

In the first situation, the most immediate risk is the return of the holdout scenario, but this time within the internal institutional setup of the Committee: all it would take to derail an otherwise quite possibly legitimate enforcement action would be to a handful of individuals. One does not even have to worry about any nefarious plans, undue political pressure, or personal self-aggrandizement (although the proposed setup would certainly be vulnerable to all of these concerns). It is enough that there should arise a 'simple' well-intentioned ideological disagreement and one of the fractions thereafter starts to act strategically. People are stubborn, especially when the position they take is defended as a matter of principle. Now, suppose the holdout has not led to a complete breakdown of social cooperation but led either to a low-intensity stalemate or a pattern of alternating capitulations (forced deals). There is a good chance that whatever enforcement decisions are made at this point would not be perfectly synched with the Covenant's object and purpose. The very real risk this will result in is that there will either follow a pattern of 'unnecessarily' taken enforcement action (overzealous striking-down of suspect reservations) or there will be an 'unnecessarily' imposed reticence of enforcement (excessive tolerance). The former will carry a certain measure of 'extra' institutional costs; the latter will trigger a pattern of losses imposed on the ultimate beneficiaries of the Covenant – this is the foregone consumer surplus analogy – as the result of the undelivered or underdelivered protection to its object and purpose. Whenever the Committee fails to strike down a reservation that is otherwise legally impermissible, it will no longer be able to pass on the responsibility for encouraging in the respective State a policy of systematic neglect for human rights, i.e. for sponsoring, however unintentionally, mass-scale human rights violations. The responsibility at least partially will lie at its feet, which in the long run will inevitably lead to a system-wide evisceration of trust in the general effectivity, validity, and legitimacy of the system. The more entrenched, under these conditions, becomes the pattern of alternating capitulations, the more room there will be for the Committee to engage in the practice of 'double standards', the more pronounced, consequently, will become the evisceration of trust.²²² Add to this the costs that will

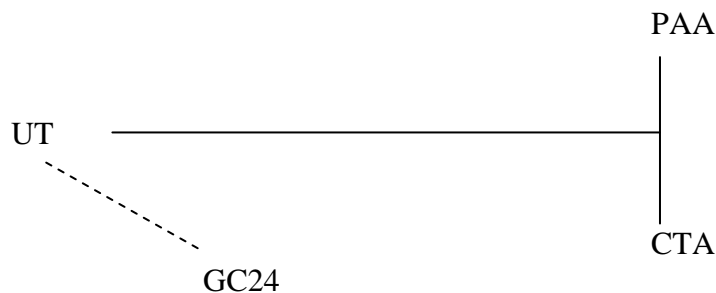
²²¹ Tyler Cowen and Alexander Tabarrok, *The Opportunity Costs of Rent-Seeking*, 17 J. of Public Fin. & Public Choice 121 (1999).

²²² The evisceration of trust will ensue even where there are no double standards. The key for trust-based legitimation systems is the preservation of direct continuity in expectations between the actor and their audience. Cf. Patricia Danzon, *Comment on Epstein*, 36 J. L. & Econ. 587, 593 (1993) ('the single owner principle is unambiguous only in circumstances in which preferences are similar'). The introduction of the single-owner (monopoly of enforcement) approach in the case of the General Comment No. 24 system inevitably begs the

be created in the process of effecting, denying, and dispelling rumours about the capture of the Committee by the various States and lobbying interests, not least the lost opportunities associated with expending all this energy and effort, and the classical effects of centralisation-induced inefficiencies are revealed in their full glory.

Let there be no misunderstanding: most of these scenarios are exceedingly unrealistic and most of these threats exist only on the paper. But, as a matter of legal-regime-design dynamics, there certainly remains a case to be made for the idea that the reassignment of absolute property rights over appraisal and validation from the contracting parties to a centralised decision-making organ not only resolves the problem of the free rider but also resurrects the problem of the holdout under the rubrics of ‘bureaucratic rent-seeking’ and ‘capture by special interests’.

Viewed from this angle, the structural relationship between the Committee’s vision and the doctrinal archive behind the modern law of reservations takes on the following form:



c. General Conclusion

On the basis of the foregoing discussion, it seems possible to detect the following general pattern in the doctrinal genealogy of General Comment No. 24:

- (i) In the context of its relationship with the Vienna tradition, the Committee’s vision bespeaks an attempt to combine the decisive return to the objectivist sensibility and the push for a higher degree of administrability with some form of normative fealty to the substantive dimension of the Vienna regime.
- (ii) The vision behind the model solution outlined in General Comment No. 24 exhibits a strong affinity not only with the traditional compatibility test approach but also, albeit to a lesser degree, the unanimity theory. This affinity is particularly noticeable in the institutional dimension of the model.
- (iii) The model consistently rejects the logic of the Pan-American approach and, with it, the modernist/late-objectivist sensibility in its application to the modern law of treaties.
- (iv) Recalling the general parallel established earlier between the modernist sensibility and the move to the Baudrillardian logic of simulation (see Section 3j), it may be possible to read the moving initiative behind the Comment as part of the broader trend of, in Baudrillard’s language, representation attempting to absorb simulation in the law of voluntary obligations. The shadows of Darius and the conservative contract law movement tentatively emerge on the margins.

question of whose exact preferences as to what should be the acceptable level of exclusion or modification of the treaty’s provisions by the reservation in question, the policy line adopted by the single owner (the Committee) should reflect, if, as is to be expected, the respective parties’ (contracting States’) preferences are going to differ.

CONCLUSION: THE CASE FOR DOCTRINAL GENEALOGY

The study of doctrinal genealogy can only reveal so much about legal history. However rich it may be in details, the account it generates about any given legal-historical event will always remain incomplete. Nor, in all fairness, would it be wise to expect otherwise. Every method has its limitations.

The main strength of doctrinal genealogy – its capacity to zoom in on the internal logics of legal regimes, to take in the ‘inner life of the law’, as it were, in its basic legal-semiotic dimension – inevitably also constitutes the source of its main drawback. Like every intra-disciplinary investigative enterprise, doctrinal genealogy suffers from a certain predilection for epistemological formalism and thus, by implication, legal fetishism. The concept of legal History it projects is essentially modelled on the traditional concept of intellectual History, which, as conventionally practised, far more often than not tends to become nothing more than a History of ideas *simpliciter*,²²³ that is to say, a History of ideational constructs taken as objects-in-themselves, serenely floating, godlike, in splendid isolation from whatever political, economic, or cultural contexts may have generated, shaped, or conditioned their development. Unless supplemented by methodological assumptions imported from other analytical traditions, the enterprise of international legal historiography built on the model of doctrinal genealogy runs, thus, the very real risk of recasting the history of international law as though it were some kind of a quasi-Hegelian process: a mystical march of ideas driven by the internal logic of conceptual interactions between abstract legal doctrines.

Not that the proverbial grass has necessarily been any greener on the other side. Take, as an example, the typical methodological solution resorted to by most international law scholars writing about the history of international law today: international law is essentially made by States and, to some extent, international organisations; States and international organisations are political entities; everything they do is politics; hence, the key to any question of international legal history has to be sought in the history of ‘international politics’.

At first sight, the notion of approaching the history of General Comment No. 24 in terms of a political conflict between the Human Rights Committee, the contracting parties, and the International Law Commission may seem intellectually rather attractive. It implies an essentially anti-determinist notion of history, which, of course, is always a ‘good thing’, unless one is an unreconstructed Stalinist or a religious fanatic. It allows one to recognise the cardinal importance of agency and contingency, while also driving home the allegedly critical point that law is, after all, a continuation of politics (by other means). Its analytical structures provide its users with a strong sense of intellectual immunity against any form of disciplinary solipsism, Hegelian mysticism, and legal fetishism. Its mode of explanation seems to be easily empiricisable, which means that its claims can always be subjected to the Popperian test of scientificity-as-falsifiability. Last but not least, it seems to be relatively easy to research which means that it should also be relatively easy to write.

All this is unquestionably important and one should certainly not deny the relevance of productive facility considerations. And yet even if any of the ‘breakthroughs’ listed above should still be considered a praiseworthy achievement at the beginning of the 21st century, the analytical costs this approach imposes on its users quite obviously outweigh all of its benefits.

In the first place, this vision of legal history tends to reproduce the exact same set of flaws that every instrumentalist theory of law has been shown to suffer from in the last one hundred years since Hohfeld and Pashukanis: politicianist monism, radical underappreciation of the constraining force of legal reasoning, absence of any ontological notion of the legal form, etc. By presenting international law as little more than a stage on which the game of international

²²³ John Henry Schlegel, *The Line between History and Casenote*, 22 Law & Soc’y Rev. 969, 969 (1988).

politics is played out, it not only prevents the student of international law from learning how to recognise that which is specifically *legal* about international legal history, but also sets the enterprise of international legal studies as a whole a good several decades back by inducing it to ‘forget’ that law is not only a medium (for the pursuit of politics) but also a site; that every site has its own ‘rules of gravity’; that even the most flexible medium tends, if not to ‘shape’, then at least to ‘filter’ the ‘message’, and so on and so forth.²²⁴

In the second place, and much more importantly, instead of actually solving the aforementioned question of legal fetishism, it simply relegates it from the domain of legal concepts to that of institutional and political concepts. The evolution of legal ideas, theories, and doctrines, on this view of things, comes to be understood as a function of the history of international institutions and diplomatic interactions. But what exactly then determines the course of this latter set of events? Where does the causational impetus behind diplomatic history come from? Surely, the logic of international diplomacy cannot be self-generating. The more one thinks about it, the more the sense of the black-box approach becomes difficult to ignore.

The downsides are only marginally less obvious if instead of a ‘political history’ one decides to write a ‘social history’ or opts for some form of the ‘international law as a collection of biographies’ project. Again, almost immediately one stumbles into the same problems of instrumentalism and relegation-instead-of-explanation mentioned earlier, with the added complication that, in the second case, one also runs the risk of erasing the generic boundary between history and hagiography. But, as Jack Schlegel so aptly reminds us, there is something else that is entirely new here too. The radical premise on which both of these modes of inquiry rest is that ‘social actions are intelligible preliterately’.²²⁵ That is to say, if one were to practice either of these enterprises in a methodologically coherent *fashion*, one would need to assume that the gravitation of different sectors of the ‘invisible college’ towards different projects (social history) and the making of professional life choices by various disciplinary luminaries (biographism) tend to happen *completely independently* not only of the discipline’s internal landscape of ideas but also the actual contents of the various international legal regimes which the people in question worked for, with, despite, or against. An interesting hypothesis this may be to entertain, to be sure, but just how many international lawyers do you know who would actually fit this profile?

Naturally, one could dispense with the ‘completely independently’ part in one way or another, or at least relax it enough to be able to introduce some form of ‘feedback effect’ qualification or a multiple causation thesis. But the further one moves down that slope, the more one risks slipping into the everything-is-a-cause-of-everything mode of reasoning, and once you become happy with that kind of holistic fuzzy mysticism, why bother doing any history at all?

²²⁴ This is not the best place, nor indeed the best occasion to offer any solutions to the classical antinomy between legal fetishism and legal instrumentalism. But the following note from Nicos Poulantzas made in a similar context seems to offer a promising point of departure: ‘It should be understood of course that [the thesis of the relative autonomy of the state] cannot be taken in the sense of the state being the arbiter of inter-monopoly contradictions, nor the locus of a coherent and rational policy “external” to monopoly capital. If we reject the analysis of a “fusion of the state and the monopolies in a single mechanism”, this is not at all in order to uphold the position of an “independence” of the state in relation to the monopolies, but to refute a problematic which, whether under the label of “fusion” or under that of “independence”, poses the relation between the state and the hegemonic fraction as relations between separate entities, such that the state could “possess” its own “power”, and that one side could “absorb” the other (take away its “power”, leading to fusion) or “resist” it (leading to independence or arbitration). Moreover, by maintaining that there is today such a fusion, the conclusion must be drawn that in the past the state was independent or played the role of arbiter, which is just as false. The state does not have its own “power”, but it forms the contradictory locus of condensation for the balance of forces that divides even the dominant class itself, and particularly its hegemonic fraction – monopoly capital.’ (NICOS POULANTZAS, *CLASSES IN CONTEMPORARY CAPITALISM* 158-9 (trans. by David Fernbach; 1978).)

²²⁵ Schlegel, *supra* n.223, 970.

Most importantly, by reducing the phenomenon of legal history to the history of social movements or the life-stories of disciplinary heroes, both of these approaches inevitably end up losing the concept of the legal-historical event itself. Whatever great unique insights they may enable its adherents to derive, they leave no theoretical space in which questions such as those raised in the course of this article can be raised. Put differently, one could write the history of the international human rights movement, or a history of the old guard of the International Law Commission, or a whole library of biographies of each of the Committee's members and of the Commission's special rapporteur who opposed the General Comment No. 24 so vigorously. But one could never even begin thinking about (let alone research or write) the history of General Comment No. 24 itself.

None of this means, of course, that the best way forward is to accept that there is no best way forward, that no method is perfect, and that historical truth is therefore either completely inaccessible in principle or that 'as always, the answer lies somewhere in the middle'. To subscribe to the former view would be a complete *non sequitur*. To endorse the latter would be to embrace the philosophy of principled relativism, and, at least in this context, to choose relativism as one's methodological lodestar would seem to be a form of charlatantry.

Not every 'account' has something valuable to contribute to the 'conversation'. The answer to 'what ended colonialism?' is not 'forty-two'. Some 'stories' are plain silly; others are almost certainly the product (and the cause) of large-scale mystifications. Still others tend to impose implicit theoretical frameworks that can as easily develop into useful cognitive instruments as they can turn into insurmountable epistemological blocks. For the study of the specifically *legal* component of any legal-historical event, so long as the main thrust of the inquiry remains limited to determining the legal meaning of the given event in its immediate context, doctrinal genealogy as a method of legal historiography has no equals. It has very little to offer its users when the analytical focus of the inquiry shifts (as it eventually must) to the exploration of the specifically *historical* aspect of that same event. For that, one must turn to other analytical traditions and methods.