RELATIONAL CONTRACT THEORY AND TREATY INTERPRETATION: END-GAME TREATIES V. DYNAMIC OBLIGATIONS

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The conventional, and generally followed, wisdom in international law regarding treaty interpretation is clear; "all treaties, regardless of their subject matter, are governed by the same rules."[1] The Vienna Convention on the Law of Treaties ("Vienna Convention") defines the interpretive norms and rules for all treaties, be it commerce, navigation, human rights or environmental protection.[2] In this regard, the conventional wisdom is misguided; treaties govern situations of varying levels of interaction between partners with vastly different relationships and should not be interpreted according to the same, universal set of rules. In order to more accurately reflect the depth, or lack thereof, of the relationship between treaty partners, courts should take into account the nature of the states' relationship by using the relational contract theory when interpreting a treaty in order to better reflect the true intent of the parties. The relational contract theory, and specifically its focus on the overall relationship between contracting parties, can be, and has been,

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1. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 130 (1997). The Akehurst book is one of the most widely used introductory texts in international law. Although the Vienna Convention represents the conventional wisdom in international law, tribunals have deviated from the Vienna Convention in a number of circumstances. For examples of international tribunals applying the Vienna Convention on the Law of Treaties see United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (98-0000).

2. *See generally* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts,* 28 VA. J. INT'L L. 281, 285 (1988).

selectively applied to make tribunals better able to accurately resolve conflicts in a way which promotes cooperation.

This note will apply relational contract theory to treaty interpretation by arguing for a re-examination of the Vienna Convention's provisions for interpretation as applied to particular types of treaties. Specifically, the current law of treaties is geared towards interpreting countries' intent when the treaty concluded deals with a static or discrete interaction between the parties. This is consistent with the nature of treaties and customary international law that existed when the Vienna Convention came into being.[3] An example of a discrete interaction is an armistice between enemies, or the settling of a land dispute.

To better reflect the intent and nature inherent in many modern treaties, the Vienna Convention and treaty interpretation in general should be modified to incorporate relational contract principles when interpreting dynamic or non-discrete interactions among signatories. Dynamic interactions occur when two or more parties interact numerous times under a treaty regime, such as a treaty that governs a shared natural resource; a river boundary for example. Such a distinction between these two types of treaties will lead to a more efficient international norm of conflict resolution by allowing a tribunal to give greater effect to the parties' intent to create both a flexible and dynamic regime and to preserve the states' valuable relationships.[4]

Thus, this note will create an heuristic tool; a spectrum of treaty, from dynamic to non-dynamic ("end-game") which can be used by a court to better interpret modern international agreements. Dynamic treaties, which constitute one pole on the spectrum, should be interpreted using relational contract principles, such as the parties' current practice. At the dynamic end of the spectrum, this Note will argue for a deviation from the Vienna Convention's concepts of a proper interpretive regime. At the end-game pole of the spectrum, this note will argue for continuation of the Vienna Convention and, thus, the status quo.

3. *See* William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice,* 17 U. PA. J. INT'L ECON. L. 995, 1057–58 (1996).

4. The subject of intent is difficult to define, temporally, in this context. Most of the following text will attempt to show the changing nature of intent as understood in international law. Therefore, it is useful to think of intent as a projection of future relations beyond the scope of the treaty being interpreted and at the time of creation. *See infra* text accompanying notes 18-22.

In Part I of this Note, the tenets of the relational contract theory will be discussed in the sphere of domestic contract law, including the theory's principal criticisms and implications for contract interpretation. Next, the latest attempts of relational theorists to incorporate the leading criticisms of their theory will be analyzed. From these criticism-inspired recapitulations of the relational theory, which produced a descriptive spectrum of contract, from static to dynamic, guidelines for the application of the relational theory to treaty interpretation will be introduced.[5] Such guidelines will enable a tribunal to distinguish a dynamic treaty from a more discrete interaction, and, subsequently, interpret the two in a different manner.

Part II will give a brief overview of the current state of international law on treaty interpretation. This section will also discuss the limited case law where the relational contract theory has already been applied to achieve some of the goals of treaty interpretation. The examples will show that tribunals have both successfully applied relational principles to treaty interpretation and have deviated from strict adherence to the Vienna Convention in defiance of the conventional wisdom on the subject with positive results. Furthermore, such deviations show the futility and inherent tension regarding broad application of the Vienna regime.

In Part III, the theoretical applicability of the relational contract theory to treaty interpretation will be examined by distinguishing between static ("end-game") and dynamic ("dynamic obligations") treaties based on analogies to similar dichotomies in private contracts. Specifically, the relational contract theory, because it recognizes the importance of the parties' relationship, should guide treaty interpretation when the instrument being examined creates dynamic obligations between the parties rather than an instrument designed to deal with an end-game situation.[6] Furthermore, such a distinction can be readily applied by international tribunals through a distillation of common characteristics. These conclusions are based on similarities between the theoretical and practical underpinnings between relational contract theory and norms of international cooperation.

Specifically, Part III will discuss changes in the academic discourse on international law favorable to application of relational principles, specifically concerning John Setear's iterative approach

5. For a full analysis of the spectrum see Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 894 (2000).

6. For the emphasis on relationship in the relational contract theory see *id.* at 881.

to treaties. The emerging legal status of unilateral acts will provide further justification for the application of the relational contract theory as a guide to treaty interpretation by aligning the current concept of consent as understood in the international relations field with the relational theory.

Part IV will give examples via case study of both an end-game treaty as well as a dynamic obligation in order to distill common characteristics and show the ability of a court to distinguish the two. Likewise, a case study of a treaty that has aspects of both an end-game and a dynamic obligation will be analyzed in the American context to show the real-world applicability of the theory in situations less clear-cut. In situations that have both dynamic and end-game elements, relational principles can still be used in a modified form by taking into account which aspects of the relationship remain valid. This observation makes the spectrum readily applicable to real-world interpretive situations.

I.
RELATIONAL CONTRACT THEORY

Relational contract theory, simplified to its most fundamental and universal elements, is based on four core propositions, first articulated by Ian Macneil, which place contract theory and, consequently, interpretation, into a rich and complex social background.[7] The first proposition is that every transaction is embedded in complex relations between both the parties and between the parties and the norms of society or the larger body politic.[8] From this proposition stems the most fundamental insight of the relational contract theory; private exchanges occur within ongoing relationships between parties, rather than the static transactional environment assumed in classical and neoclassical contractual theory.[9] To borrow an analogy from international relations theory, contracting parties are conceptually more than billiard balls whose interactions are akin to bumping off of one another at a discrete time and space.

7. *See generally id.* at 877. For a discussion of the relational contract theory as applied in American courts see generally Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998) (citing Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) and Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980)).

8. Macneil, *supra* note 5, at 881.

9. Keith A. Palzer, Comment, *Relational Contract Theory and Sovereign Debt*, 8 NW. J. INT'L L. & BUS. 727, 728–29 (1988).

In general game theory terms, contracting parties often form repeated transactional nexuses over many interactions, thus the discrete, one-shot "Prisoner's Dilemma" analytical device is not a suitable model to describe parties' behavior because it misses the value inherent in repeated iterations (interactions) between the two entities.[10] When this observation is taken into account, one realizes that the object of contracting in many circumstances is to define a cooperative relationship, rather than merely allocate risk between parties as it is understood in typical contract theory.[11] Thus, to interpret the agreement as a single-shot Prisoner's Dilemma ignores the intent of the parties as well as their true bargain. Often, a better analytical device is a Prisoner's Dilemma played over an infinite number of interactions, the results of which will be discussed later.

Such cooperative behavior is economically justified when one broadens the temporal evaluation of utility.[12] Since the parties are not strangers, the discounted value of the potential benefits of the relationship and all that the relationship encompasses may exceed the value of the opportunity which must be forgone to act in an otherwise opportunistic manner.[13] In broad terms, the relationship, or the dynamic aspect of the relationship, is a non-tangible investment by both parties in the contract which produces benefits that cannot be readily valued at a discrete time.

The second proposition, and the one that will be of most use in the application of the relational contract theory to treaty interpretation, is that *understanding* any transaction requires knowledge of all essential elements of the relationship, not just the four-corners of the agreement as written at a particular and identifiable point in time.[14] Hence, "classic interpretive methods which focus on the discrete contractual agreement to determine the parties' intent constitute [a] 'fundamental error'" in interpretation because they fail to recognize the cooperative relationship and general context of the agreement.[15]

10. For a discussion of a single Prisoner's Dilemma and the role of repeated interaction see John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L. J. 139, 176–213 (1996).

11. Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683, 713 (1990).

12. *See* John Kidwell, Comment, *A Caveat*, 1985 WIS. L. REV. 615, 616 (1985).

13. *Id.*

14. *See* Macneil, *supra* note 5, at 881.

15. *See* Adam B. Leichtling, Casenote, Scheck v. Burger King Corp.*: Why Burger King Cannot Have Its Own Way With Its Franchisees*, 48 U. MIAMI L. REV. 671, 682 (1994).

The final two propositions are also of value to a domestic court interpreting a contract or an international tribunal interpreting a treaty and are highly related to the second proposition: effective analysis of any transaction requires recognition and consideration of all essential elements of its relations that may affect the transaction significantly.[16] Furthermore, a combined contextual analysis of the relationship and the transaction is more efficient in determining intent and produces a more complete and sure final analytical product than commencing with a non-contextual and hence, discrete analysis.[17]

Additionally, relational contract theory is characterized by a general movement away from the notion of consent as the binding force and principal source of legal obligation stemming from a contract.[18] Although relationalists differ on the extent of the de-emphasis of consent, there is general agreement as to its removal from the central focus of contract law.[19] Some relationalists have gone as far as to consider the objective theory of consent to be a mere fiction based on a belief that it creates inevitable gaps that cannot be filled by referencing back to the original consent.[20] Instead, relational contract theory proponents focus on the nature of the relationship rather than the role of consent.[21]

Macneil justifies the de-emphasis of consent by noting:

> Liberal society has always recognized numerous legitimate *relations* into which entry is by consent, but the content of which is largely unknown at the time the consent was given . . . . In spite of our ignorance liberal society will bind us to those unknown restraints. All that is required—besides our individual consent to join—is that the kind of relation in question be one upon which the collective stamp of approval has been impressed.[22]

For example, one may consent to be a member of a football team. However, it is understood that the general consent to be a member

16. *See* Macneil, *supra* note 5, at 881.

17. *Id.*

18. *See generally* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1176–77 (1992) (noting relationalist Ian Macneil as the leading critic of placing consent at the center of contract law).

19. *See, e.g.*, *id.* at 1200 (noting that all scholars, to a varying degree, are relationalists).

20. *Id.* at 1180 (noting that Macneil considers the objective theory of consent to be a fiction).

21. *See id.* at 1185.

22. *Id.* (quoting Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 20–21 (1984)).

of the football team implies an implicit consent to play whatever position the team, and specifically the coach, commands.

Before explaining how relational contract theory can apply to treaty interpretation it is necessary to deal with the theoretical de-emphasis on adjudication which is another prominent tenet of relational thought.[23] It may seem paradoxical to argue for an institutional change in interpretation when the relational theory of contracts itself de-emphasizes the need for formal adjudicating bodies. In this regard relational scholars have stated that the "focus on legal rules and formal contract interpretation is inappropriate in relational contracts."[24] The de-emphasis is part of relational theory principle due to a belief that the act of turning to adjudication itself can harm the underlying relationship.

The major danger in the above observation is that principles and terms in the formal or four-corners of the contract "may intervene in the real conduct of the relationship."[25] In the extreme, yet often inevitable, event that parties must go before adjudicating bodies (and examples do exist of companies with a continued and valued relationship going before a third-party adjudicator in the domestic as well as international sphere),[26] reliance on the four-corners of the document may harm the interests of the parties or the interests of others external to the relationship.[27]

The most concrete example of damaging misinterpretation concerns investment-backed expectations.[28] Specific investments made in reliance on the parties' relationship, which may even be explicitly contradictory to the four-corners of the contract, are at risk if courts do not take into account relational contract principles.[29] Inaccurate adjudication causes inefficient levels of investment due to the increased risk premium of misinterpretation.[30]

23. *Cf.* Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 901 (1978); *see generally* Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 595 (1983).

24. Palzer, *supra* note 9, at 732.

25. *Id.*

26. One recent international example was the United States and Germany in the LaGrand case. La Grand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). In LaGrand, Germany brought suit against the United States for alleged breaches of the Vienna Convention on Consular Relations. *Id. See also infra* text accompanying notes 127–28.

27. Palzer, *supra* note 9, at 732.

28. *See* Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U.L. REV. 823, 830 (2000).

29. *Cf. id.*

30. *Cf. id.*

For example, Keith Palzer noted in analyzing sovereign debt that "formal contract principles 'long decayed and made obsolete by less formally established patterns of communications and behavior'" between financial institutions and states may be resurrected by a tribunal to the detriment of the relationship.[31]

Thus, as the contract is de-legitimized by either the party's practice or a tribunal's conflicting interpretation, breakdown of the reciprocity needed for an effective relationship will occur, especially if this norm exists outside the formal contract.[32] If one believes that contract law should generally track the behavior and norms found in any contract to which it applies, then contract law should generally track the relational behavior and relational norms found in the relational contract to which it applies.

However, normative principles of contractual exchange from the relational theory "can . . . be serviceable as the foundations for framing more specific legal principles. . . . Moreover, they can serve as touchstones for testing the efficacy of those more precise rules in accomplishing their underlying purposes."[33] Since parties may rely on informal rules developed in the course of the contract and its subsequent relationship, their interests and investments may not be protected since no recourse to the formal contract will be possible to enforce such rules in the unlikely and isolated breakdown of the relationship.[34] With this premise in mind, academics have articulated aspects that a court should examine when analyzing a relational contract.

A court interpreting a contract according to the relational contract would accommodate the past and current practices in interpreting the agreement.[35] Given that parties to a contract often expect their relationship to evolve, simply doing something unobjectionable can make the action and subsequent implicit understanding part of the contractual relationship.[36] Consequently, a stronger obligation evolves the longer the action continues.[37] The past and current practices form the implicit understanding.

31. Palzer, *supra* note 9, at 732. *See infra* text accompanying notes 150–58.

32. *Cf.* Palzer, *supra* note 9, at 733.

33. Barnett, *supra* note 18, at 1179 (quoting Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 810 (1974)).

34. *See generally* Palzer, *supra* note 9, at 733.

35. *See generally* Perritt, *supra* note 11, at 716 (discussing the incorporation of past practice in the interpretations of collective bargaining agreements under sections of the Railway Labor Act).

36. *Id.*

37. *Id.*

Domestic courts applying the relational contract theory "have increasingly found rights and duties arising out of the parties' dealing with each other throughout the course of their relationship" above and beyond practice that the court deems as merely interpreting the four-corners of the agreement.[38] A relational court views a contract as a living entity rather than a snapshot taken of the parties' intent and purpose at the time of contracting. As such, legal obligations can emerge from the "contract" (as a metaphor for the manifestation of the relationship) in practice, rather than merely from the four-corners of the contract, with the four-corners being defined as the agreement only as written.

Additionally, a court using the relational contract theory would do its utmost to police against any form of opportunistic behavior.[39] This is done for the purpose of protecting the relationship formed between the parties, and, specifically, the transaction-based investments that parties have made based on the relationship in question.[40]

The need to protect the relationship justifies courts in applying a sophisticated version of the duty to negotiate and act in good faith, rather than a more simplistic interpretation of good faith as merely obeying the four-corners of the contractual document.[41] This version of good faith protects a party in its pursuit of the fruits of the contract while at the same time limiting the adverse party from gains that it is understood to have forgone during the creation of the contract in order to protect the investment-backed expectations.

In addition, a court applying the relational contract theory would do its utmost to facilitate negotiation and agreement in an effort to protect the underlying relationship between the contracting parties. Finally, the relational approach entails a broader utilization of extrinsic evidence than a court applying a more classical approach.[42]

Relational theory broadens what aspects of the agreement (and the relationship that the agreement represents) can form le-

38. *See generally* Leichtling, *supra* note 15, at 683.

39. *See* Speidel, *supra* note 28, at 835–36. An example of opportunistic behavior would be an individual who takes a suitable article of clothing back to the store on day 29 of a 30 day warranty simply to get another new garment.

40. *See id.* Transaction-specific investments are investments made by one party based on reliance on the reasonable behavior of another party. An example of this is a supplier who increases warehouse space based on a promise of future expanded business from a long-time consumer.

41. *See generally id.* at 836–38.

42. Perritt, *supra* note 11, at 716–17.

gal obligations valid in a court of law from just the mere text of the contract as written. This is done regardless of an expression of active consent. As Gidon Gottlieb states:

> [a] theory of sources in a relational order must identify the formal documents, agreements, and rules which parties intend to characterize or recognize as legal. It must identify the formal system of a relational order. But it should, in addition, identify the *mediating system* as a source of legal obligations. Tacit agreements, as well as past practice, course of performance, and other ingredients of the mediating system, such as acquiescence, function as sources of law. *The formal system, the mediating system, and the regime of a relational order are all sources of juridical obligations.*[43]

In laymen's terms, a wholesaler who may give a "grace" period to a late-paying retailer creates an expectation that the behavior will be reciprocated in the future, especially if, for example, the retailer is willing to accept additional product from the wholesaler so that he can make his quarterly sales projections.

The central critique of the relational contract theory is based on a belief that "transactors do not necessarily want the relationship-preserving norms they follow in performing contracts and cooperatively resolving disputes among themselves to be used by third-party neutrals to decide cases when they are in an end-game situation" (with the end-game situation being the beginning of judicial proceedings).[44] Under this strand of thought, the compromises and good will that a party might show in order not to go to a third-party arbitrator and cause ill will should not bind the party before a third-party if an arbitrator is eventually needed.

In her critique of the relational contract theory, Lisa Bernstein notes that parties recognize the distinction between relationship-preserving and end-game norms, i.e. the difference between what governs the relationship in practice versus what governs the relationship in court.[45] In short, parties want, and hence intend, the four-corners (i.e. the plain meaning) of the contract to govern the relationship when they go before an adjudicator rather than the conduct of the parties during the course of performance.[46] Conduct during the time of the relationship is not intended to have a

43. Gottlieb, *supra* note 23, at 604.

44. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1770 (1996).

45. *Id.*

46. *Cf. id.* at 1794–1821 (distinguishing between "relationship-preserving norms" and "dispute-resolution norms" and arguing that treating the two as similar

legal personality to be used in a court of final adjudication.[47] The conduct exists as an extra-legal norm.[48] As a result of moving tacit agreements, present practice, and other non-written behavior taken from the relationship into the courtroom, parties may be less likely to accommodate their counterparts due to a fear that such accommodations may create undesired legal obligations.[49] Thus, parties will, in the end, be less accommodating toward each other. For this reason, the relational contract theory may be self-defeating; by enforcing norms created during the relationship a court may create an incentive not to cooperate during the relationship.

Returning to the prior example, the wholesaler may not give a "grace" period to a late-paying retailer because he fears the practice could come back "to haunt" him in the future. Thus, the relationship breaks down, and additional economic activity is sacrificed.

Under this critique, a violation of good faith would rarely be used as the explicit basis of a tribunal's decision, as merely acting under the terms of the written contract is per se acting in good faith.[50] In addition, course of dealing and course of performance are restricted in interpretation, as courts will often look to these factors only to interpret ambiguous provisions of the contract rather than to create legal obligations.[51] In short, the four-corners of the agreement govern when the relationship has broken down to a point as to facilitate the need for a third-party tribunal, often with the coercive power of the state, because the parties intend the four-corners to be the end-all default rule for their relationship.

Ian Macneil has attempted to incorporate the above critique into his recent formulations of the relational theory by acknowledging that while all contracts exist in a relational nexus, some govern, and hence can be more accurately described as a discrete relation-

in a tribunal setting will decrease a party's propensity to engage in relationship-preserving behavior).

47. *Cf. id.*

48. *Id.* at 1790.

49. *Cf. id.* at 1794–96:

> By elevating [norms of the relationship] to the status of legally enforceable contract provisions, and commercial context to the status of an over-arching interpretive framework, the [system] brings a substantial portion of the extralegal realm of contractual relationships within the purview of legal enforceability. This makes it difficult, if not impossible, for transactors to enter into purely extralegal agreements. If transactors rationally prefer to structure their transaction to include a combination of legal and extralegal obligations, but the Code prevents them from entering into purely extralegal agreements, transactors will be unable to select their preferred mix of legal and extralegal terms.

50. *Cf. id.* at 1775–76.

51. *See id.* at 1781.

ship.[52] Such relationships mirror the quintessential one-night stand or ships passing in the night (discrete) rather than a marriage (relational).

Macneil has devised an analytical tool consisting of a spectrum of contractual behavior and norms, with poles labeled "intertwined" and "discrete," which represent the extremes of dynamic and static.[53] "Discrete" contracts are "fully specified contracts in which all obligations are unambiguously expressed at the time of formation," while "intertwined" contracts "govern relationships that exist and evolve over long periods of time."[54] Thus, a contract designed to govern a singular interaction would be on the discrete pole, while a contract designed to govern an infinite number of interactions would be on the intertwined or relational pole. Across this spectrum, there are common contractual behavioral patterns and norms.[55]

Although Macneil stresses that his spectrum is a mere description, rather than a theory,[56] this spectrum, and the norms it represents, can serve as a guide for an international tribunal trying to interpret the intent of two (or more) countries to a treaty. This spectrum will form the basis for the following analysis, and direct a court as to when to apply relational principles. The spectrum is of value for treaty interpretation because of the ease with which it can be used to describe state to state relations when grafted onto international law. As I will discuss below, a court should apply relational principles when a treaty can be described as dynamic or intertwined and refrain from applying such principles when a treaty governs a discrete relationship with selective application for treaties falling between the two poles.

II.
CURRENT STATE OF INTERNATIONAL LAW ON TREATY INTERPRETATION

Academic discourse on treaty interpretation has been focused around two central dichotomies and three different schools of interpretation.[57] The central dichotomy apparent in treaty interpre-

52. For an example see Macneil, *supra* note 5, at 894–98.

53. *Id.* at 894–95.

54. Barnett, *supra* note 18, at 1177–78.

55. Macneil, *supra* note 5, at 896.

56. *Id.* at 896–97.

57. For a thorough review, see Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281 (1988).

tation is the difference between a rule and a standard.[58] Specifically, the legal community often expresses this difference as being "between the letter [i.e. rule] and the spirit [i.e. standard] of an agreement or the text and its intention."[59]

The other dichotomy is between objectivism and subjectivism.[60] An objectivist instructs the court to interpret an agreement as a neutral third party would by relying heavily on the plain and ordinary meaning of terms.[61] The tribunal is to act as an entity not particularly concerned with reflecting the true intent of the parties outside its manifestation in the document at issue, i.e. the four-corners of the agreement.[62] The assumption of the objectivists is that intent is adequately reflected in the text itself. A subjectivist interprets an agreement as he believes the negotiating parties intended, rather than in accordance with the plain and ordinary meaning.[63] Thus, the subjectivist may interpret a word to reflect the understanding of the expression as held by the parties, rather than the standard definition, provided that was the intent of the parties.

There are three principal schools of treaty interpretation.[64] The textual approach regards the text as written as the essence of the agreement between states; therefore, most other forms of extrinsic evidence such as negotiating history are considered inconclusive or, worse, misleading.[65] The subjective approach regards the parties' underlying intent as the essence of the agreement and will resort to broader usage of negotiating history and extrinsic evi-

58. *See id.* at 284. The rule and standard dichotomy is common in legal literature. In general, a rule entails "an advance determination of what conduct is permissible" while a standard entails "leaving both the specification of what conduct is permissible and the determination of factual issues for the adjudicator." Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

59. Vandevelde, *supra* note 57, at 284.

60. *Id.* at 286.

61. For a discussion of objective interpretation see generally Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 272–95 (2000). For a discussion of objective interpretation in the context of treaties see Vandevelde, *supra* note 57, at 286.

62. Vandevelde, *supra* note 57, at 286.

63. For a discussion of subjectivist interpretation in contracts see generally John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 339 n.297 (2000). For a discussion of subjective interpretation in the context of treaties, see Vandevelde, *supra* note 57, at 286.

64. Vandevelde, *supra* note 57, at 287.

65. For a comprehensive discussion of the textual approach see Michael P. Van Alstine, *Dynamic Treaty Interpretation,* 146 U. PA. L. REV. 687, 717–19 (1998); *see also* Vandevelde, *supra* note 57, at 287.

dence to discover the underlying intentions.[66] The third method, the teleological approach, interprets the treaty's text in light of what the court believes to be the dominant purposes gleaned from, primarily, the text.[67]

Articles 31 and 32 of the Vienna Convention largely codify the current international law of treaty interpretation.[68] The Vienna Convention treaty has been widely signed and ratified. Countries that have failed to ratify the Vienna Convention, such as the United States of America,[69] generally view the law of treaties as binding by way of its ascension as a customary norm of international law.[70]

66. Vandevelde, *supra* note 57, at 288.

67. *See generally* Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence*, 24 MICH. J. INT'L L. 103, 133–35 (2002); *see also* Vandevelde, *supra* note 57, at 288.

68. Vandevelde, *supra* note 57, at 290. Article 31 and 32 of the Vienna Convention state:

> Article 31. GENERAL RULES OF INTERPRETATION
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> *(a)* Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> *(b)* Any instrument which as made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> *(a)* Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> *(b)* Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> *(c)* Any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31:
> *(a)* Leaves the meaning ambiguous or obscure; or
> *(b)* Leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 332, 340.

69. Dana L. Christensen, Comment, *The Elusive Exercise of Jurisdiction Over Air Transportation Between the United States and South Korea*, 10 PAC. RIM L. & POL'Y J. 653, 664–65 (2001).

70. MALANCZUK, *supra* note 1, at 130.

The Vienna Convention adopts the textual approach, with the teleological approach used as an ancillary basis of interpretation.[71] Thus, the Vienna Convention codifies a primarily objectivist theory of treaty interpretation, since both the textual and teleological approaches are largely objectivist.[72] At the same time, the Vienna Convention prefers a rule, rather than a standard, orientation.[73]

From these observations, it becomes apparent that the relational contract theory differs from the approaches adopted by the Vienna Convention. The relational contract theory differs from a textual approach in that it encourages the use of a broader spectrum of evidence rather than strictly relying on the four-corners, or explicit text, of the agreement. The relational theory can be better reconciled with the teleological approach in that the relational theory implies that the overall purpose of the contract is to guide an emerging or pre-existing relationship between the parties in question. Since the teleological approach is sensitive to the overall purpose, it invites flexibility in interpretation when the purpose may not be fully expressed in the four-corners.

Although the Vienna Convention enjoys wide support, domestic and international tribunals have often deviated from its mandate when interpreting treaties.[74] One prominent example is in the sphere of domestic interpretation of international treaties.[75] For example, American jurisprudence traditionally applies a relational lens when interpreting the states' treaty commitments in that interpretation is done liberally and in good faith.[76]

The deviations from the Vienna Convention show that courts recognize that the Vienna Convention cannot be universally applied to all treaties. Thus, the deviations from Vienna are evidence of the need for a more flexible approach to treaty interpretation, one which is aware that treaties are not cut from the same universal cloth. As we will see, courts are already beginning to apply relational principles to treaty interpretation.

American courts have developed a host of techniques to avoid giving diplomatic offense in an effort to preserve relationships cre-

71. Vandevelde, *supra* note 57, at 290–91.

72. *Id.* at 292–93.

73. *Id.* at 293.

74. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 956 (1994). For an international example see Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 125 (April 12).

75. Bederman, *supra* note 74, at 956.

76. *Id.* at 966–70.

ated by the executive branch.[77] American courts will often act to protect the states' relationships by interpreting a treaty contrary to an objectivist reading.[78] American jurisprudence has resulted in a norm that American courts interpret treaties both "liberally and in good faith so as to preserve amity among nations."[79] However, recent Supreme Court jurisprudence has imparted a major return to the textualist theory of interpretation consistent with the judicially conservative emphasis on plain meaning articulated by Justices like Antonin Scalia.[80]

While the International Court of Justice and its predecessor have "consistently held that subsequent state practice maintains probative value as to the meaning and understanding of treaty provisions", international courts have gone further toward the application of a relational lens by holding that state practice can modify an international agreement in a way counter to the four-corners of the agreement.[81]

In interpreting the 1946 Air Transport Services Agreement between the United States and France, the ad hoc international tribunal in charge of resolving the dispute between the parties was quick to note the importance of the conduct of the parties after the conclusion of the Agreement.[82] The Tribunal held that subsequent conduct would be decisive in cases where consent (explicit or implied) had been given to a certain act, even if the act was not allowed in the four-corners of the agreement.[83] This was an intellectual leap from the typical, prior position of limiting subse-

77. *See generally* James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1066–67 (1988).

78. *Id.*

79. *Id.* at 1067.

80. For the *loco classicus* example of the textualist school of thought in action see U.S. v. Stuart, 489 U.S. 353, 371–77 (1989) (Scalia, J., concurring).

81. Aceves, *supra* note 3, at 1045–51. In the case of Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, the International Court of Justice held that an abstention is not "constituting a bar to the adoption of resolutions" in the same way that a "nay" vote is interpreted despite the ambiguity in the United Nations charter based of the consistent and uniform interpretation of the practice of the permanent members. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) 1970 I.C.J. 25 (July 29).

82. Aceves, *supra* note 3, at 1051. The principal issue was whether a U.S. air carrier, Pan American Airways, could route international aviation services through Paris in flights between the United States and Turkey and Iran. *Id.* at 1050–51. For the history of the case see Air Transport Services Agreement Arbitration (United States v. France) 38 I.L.R. 182, 186 (1963).

83. Aceves, *supra* note 3, at 1051.

quent conduct by the parties to define the mere meaning of an *ambiguous* term rather than the actual contradiction of a term.[84] Thus, the tribunal's interpretation of the Agreement is consistent with judicial recognition of the ability of the state-to-state relationship itself to create legal obligation with the treaty provisions in the background and consent relevant only to the general agreement, in opposition to the traditional or more "active" theory of consent.

Using relational reasoning, the tribunal concluded that the treaty did not authorize American air carriers to route international aviation services through Paris in flights between the United States and Turkey and Iran, but the subsequent (tacit) agreements, as well as the conduct of the parties, had modified the original agreement in a way to grant the right to the United States to provide aviation services through the disputed routes.[85] This decision flew in the face of the four-corners of the original agreement; the court was explicit in justifying the decision based on the relationship the parties enjoyed as a result of the treaty.

It is also important to note that the International Law Commission (ILC), the organization assigned the duty of codifying the international law of treaty interpretation, strenuously debated the idea of including subsequent practice during the development of the committee's preliminary work which led to the creation of the Vienna Convention. In its Draft Articles on the Law of Treaties, the ILC submitted an article recognizing *modification* of treaties through subsequent practice while noting the Air Transport Services Agreement Arbitration decision with approval.[86] The discussion at the ILC shows that the objection to the inclusion of subsequent practice was based more on a concern with duplication with other norms which eventually became the Vienna Convention, rather than on a consensus of ILC members that such inclusion would be per se incorrect as a reflection of international law.[87] Hence, a great number of the ILC's members believed that such relational principles were inconsistent with neither the current customary norms nor with the progressive development of international law.

In short, the relational theory has already been applied to treaty interpretation. Subsequently, courts have proven that they are capable of applying Macneil's intertwined-to-discrete spectrum when adjudicating an issue of treaty interpretation. If a treaty is

84. *Id.*
85. *Id.* at 1052.
86. *Id.* at 1052–53.
87. *Id.* at 1052–56.

determined to govern a more intertwined (or dynamic) relationship, it should be interpreted with relational contract principles in mind, while treaties determined to govern discrete (or end-game) relationships should be governed by the existing Vienna regime. Treaties which govern a relationship falling in the middle of the spectrum, such as a treaty that has had parts of it re-negotiated, can benefit from selective application of the relational theory. Such a distinction would serve the goal of interpreting the true intent of the parties at the time of contract, whether the intent was to create a discrete transaction to be governed by an end-game and end-relationship set of legal obligations and norms or if the intent at the time of treaty formation was to serve as a guide for a developing relationship.

III.
APPLICABILITY OF THE RELATIONAL CONTACT THEORY TO INTERNATIONAL LAW

Relational contract theory fits neatly into a developing academic discourse tying contract theory to international law in general, with a focus on treaties. By fitting relational theory into this developing literature, the theoretical basis for the application of the theory to interpretation is strengthened.

The application of contract theory to international law is a natural accompaniment to the application of economic theory to legal practice.[88] As contract theory has evolved to apply economic terminology and knowledge to contract doctrine, a parallel school of thought has emerged that equates international treaties between sovereign states to private- party contracts.[89] Hence, the application of economic doctrine to international law follows such broader trends in practice and scholarship.

"As an agreement intended to be legally binding, a treaty is often considered to be a form of contract."[90] "Like contracts, treaties are intended to serve as a source of rights and obligations between parties in that they are anchored in the mutual exchange of promises about future behavior."[91] Furthermore, treaties and contracts both derive their validity from the agreement of the parties.[92]

88. For one of the first articles bridging the gap between the domestic and international in economic theory see Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 2–4 (1999).

89. *Cf. id.* at 28–31.

90. *Id.* at 30.

91. *Id.*

92. *Id.*

Both contract and treaty are governed by the norm, applicable either internationally or domestically, that agreements should be kept: *pacta sunt servanda*.[93]

Aspects of relational contract theory make it highly transferable to treaty interpretation. Furthermore, many inherent aspects make the relational theory more transferable than other theories of contract which scholars have attempted to apply to international law. Such similarities begin at the theoretical underpinnings of both treaties and the relational theory.

As a theoretical underpinning of the relational contract theory, "[t]he coercive power of the state, activated through breach-of-contract litigation, exists as a means of changing bargaining power, but it does not preoccupy the parties in defining their relationship or in seeking remedies for disappointment."[94] Similarly, the lack of a truly coercive power in treaty formation and, to a large degree, enforcement is highly analogous to international relations where states are generally not concerned with a greater power, in the form of a super-state, coercing behavior through breach-of-contract litigation. In short, the idea that law is derived and dependent on legislative and judicial organs for efficacy is absent both in international law and relational theory.[95] This observation holds when one applies the relational contract theory, derived from the domestic contract world with its de-emphasized legislative and judicial organs, to the realm of international law with similarly de-emphasized legislative and judicial organs, if one believes that such organs exist at all. In short, the pragmatic flexibility of relational contract principles fits with the pragmatic view of the sources and functions of international law.

The majority of coercive power in state relations is used at the bargaining table rather than in enforcement. Examples of this phenomenon are seen in the negotiations between a Lesser Developed Country and a member of the G7 or the common North-South divide which often defines international relations. The sanction for unacceptable performance, in a relational contract or a treaty, is most likely, although not always, a termination or significant alteration in the relationship accompanied by a refusal to deal in the same manner in the future rather than an appeal to a third-party coercive power.[96] Despite this observation, appeals to third-party neutrals do occur, although their coercive power is of a different

93. *Cf. id.*
94. Perritt, *supra* note 11, at 713–14.
95. *See generally* Gottlieb, *supra* note 23, at 568.
96. *Cf.* Perritt, *supra* note 11, at 713.

nature in the international law sphere than in a domestic court adjudicating a contract dispute.

Relational contract theory is also suitable to treaty interpretation because the traditional requirement of consideration, needed for a contract yet unnecessary for the consummation of a treaty under international law, is satisfied by the norm of reciprocity, which is promoted by relational theory.[97] This observation explains the more fluid and dynamic nature of the relational contract theory versus classical contract doctrine and is conceptually similar to the developing majority of dynamic international treaties, to be explained below, and the constantly evolving international relationships they represent. Obligations can change via a broader notion of reciprocity rather than a concession-for-concession exchange.[98]

Along the same vein, the applicability of relational contract theory is further enhanced when one realizes the theory encourages the application of good faith and fair dealing.[99] Hence, "relational contract theory is particularly suited to long-term ongoing contractual relationships,"[100] and consequently, the long-term ongoing relationships that govern modern diplomacy and modern treaty creation.

Recent academic scholarship on international law, specifically, efforts at synthesizing international relations theory with international law, as well as the discourse on unilateral acts, lend further credence to the applicability of the relational contract theory to treaty interpretation. Both phenomena de-emphasize consent and increase emphasis on iteration and the lessening of transaction costs as the theoretical underpinnings for successful treaties and regimes.

The emerging iterative perspective holds that the law of treaties should encourage repeated interactions among nations, also called iterations.[101] This is done through the adoption of certain behaviors tending to lead to international cooperation while moving away from the traditional consent-based perspective.[102] The theoretical basis of the iterative perspective, institutionalist theory, has been used to explain why an anarchical international system must allow "flexibility and dynamism in the interpretation of agree-

97. *Cf. id.* at 717.

98. *See generally* Speidel, *supra* note 28, at 823.

99. *See generally id.*

100. Leichtling, *supra* note 15, at 681–82.

101. Setear, *supra* note 10, at 140.

102. *Id.*

ments" when they regulate complex developing interests.[103] Flexibility and dynamism accurately describe the relational contract theory.

Institutionalist theory places the emphasis of international relations on lessening information and transaction costs.[104] In this regard, the theory is a derivative of the functionalist theory of international law proposed by Louis Henkin.[105] Both theories are based on a view that the intellectual glue which binds international relations and international treaties is a mutual desire to lessen costs rather than notions of consent or legitimacy.[106]

Such a view coincides with William Aceves' justification of the relational model as applied to state practice.[107] Courts are often in a better position, relative to cost, to make modifications that states would not make on account of transaction costs, such as the expense of bargaining.[108] The relational model allows for courts to fill such a role.[109] However, such a perspective necessarily demands a new definition of the term "consent."

Both the institutionalist view of international law and the relational contract theory view consent as less important than it is viewed in other theories in relevant fields.[110] Consent is less active in the sense that it must not be continually restated and modified to change with the environment.[111] Although institutionalists and relational theorists do not question the contracting party's right of consent, they question the assumption that the entity can truly be expected to actively consent to all aspects of the evolving contract

103. *See id.* at 144. Institutionalist theory states that "institutions can reduce verification costs in international affairs, reduce the cost of punishing cheaters, and increase the repeated nature of interaction, all of which make cooperation more likely" in an anarchical world. Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1825, 1840 (2002).

104. *See generally* Setear, *supra* note 10, at 145 (noting that "[i]nstitutionalist elaborations of assertions about the lessening of 'information' and 'transaction' costs offered by regimes . . . echo the functionalist theoretical apparatus of international law developed over the past few decades by Louis Henkin, Abram Chayes, and others"); Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT'L L. 673, 678 (2001).

105. For a general discussion of the relationship see William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y, 227 (1997); *see also* Setear, *supra* note 10, at 145.

106. *See* Setear, *supra* note 10, at 145; *Cf.* Kelly, *supra* note 104, at 678.

107. *See generally* Aceves, *supra* note 3, at 1013.

108. *Id.*

109. *Id.*

110. *Cf.* Setear, *supra* note 10 at 156–61; Barnett, *supra* note 18, at 1200.

111. *Cf.* Setear, *supra* note 10.

or treaty.[112] Such active consent raises levels of transaction costs above the level that can be sustained either domestically (between a manufacturer and a supplier) or internationally (between two states) in all but the most extreme examples. However, such examples do exist where the cost of flexibility is not greater than the price of relying on a broad notion of consent.

In short, there are two possible relationships between flexibility and consent. First, where the cost of flexibility is high (or the benefits of flexibility are low), the acceptable level of consent is narrow and thus a court should not look to apply relational principles. In this situation, the cost of renegotiating the treaty will be less than the potential cost of a court making an incorrect determination based on a broad notion of consent. Conversely, where the benefits of flexibility are high, the acceptable level of consent is broad and a court should apply relational principles. Here, the cost of renegotiating the treaty will be more than the cost of a court making an error based on a broad interpretation of the parties' consent, i.e. the party consenting to a fluid relationship.

The lessening of consent as the functional glue that holds treaties together is furthered by the phenomenon of unilateral acts in international law. It has been accepted as a customary norm of international law that continued practice by a country may create unintended legal consequences.[113] The International Court of Justice has pointed out that it is "difficult to see why the number of States between which a local custom might be established on the basis of long practice must necessarily be larger than two."[114]

In John Setear's iterative perspective, he presents another, alternate view of the law of treaties not based on the traditional consent and legitimacy oriented system.[115] In this model, cooperation is a pure public good that should be modeled as an *iterated* Prisoner's Dilemma; i.e. a Prisoner's Dilemma played a number of times rather than a discrete interaction.[116] The choice between defecting and cooperating in any one game affects the stream of choices to follow in the subsequent games, or iterations.[117] While it

112. *Cf. id.*

113. For the *loco classicus* see Nuclear Tests Cases (Australia v. France), 1974 I.C.J. 253 (Dec. 20).

114. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. (April 12).

115. *See generally* Setear, *supra* note 10, at 156–217.

116. *See generally id.* at 174.

117. *Cf. id.* at 174–84. *See generally* Daniel G. Arce M., *Stability Criteria for Social Norms with Applications to the Prisoner's Dilemma*, 38 J. CONFLICT RESOL. 749, 749 (1994).

may be the Nash-equilibrium solution to withhold cooperation in a discrete (singular) interaction, the repeated iterations and the relationship that forms can lift parties out of the dilemma of mutual cheating.[118] In fact, many players often find a tit-for-tat strategy, where party A cooperates in the next round if party B cooperated in the prior round, to be the most effective way to maximize gains.[119] The indefinite length of the relationship between states prevents the common backward induction solution that prevents cooperation. Since states do not know where their relationship may come to an end, they cannot predict when to cheat and game the system. Even if the concept of an end is feasible in an interdependent world, it is difficult for states to predict their last interaction and trigger a backward chain of defection.

The public good, or value worth protecting, as articulated by Setear, is the relationship that parties carry over from transaction to transaction.[120] Institutionalists identify and attribute this cooperation to an institution.[121] The manifestation of tangible cooperation can often be rearticulated as a regime in that a structure exists to decrease transaction costs, whether information costs or the cost of policing deviate behavior across iterations.[122] The iterative perspective, and the relational contract theory, attributes the cooperation to the relationship that bridges each discrete interaction into a relational nexus. In this manner, the relationship exists as a method to decrease transaction costs. Whether the relationship takes the more tangible form of an international regime or not, the value of the relationship continues.

To sum up: Setear's iterative perspective states that "the law of treaties reflects a deep and pervasive concern with the promotion of iteration."[123] Paradoxically, the promotion of iteration extends from a desire to protect the cooperation between iterations. This cooperation can also be defined as the developing relationship between the parties, the very aspect that relational theory adequately incorporates into its doctrine. Furthermore, the iteration/relationship is the same aspect that relationalists feel a need, at the least, to examine in order to understand the nature of the transactions and

118. *Cf.* Michihiro Kandori, *Social Norms and Community Enforcement*, 59 REV. ECON. STUD. 63, 63 (1992); *cf.* Setear, *supra* note 10, at 174–84.

119. *See generally* Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient*, 149 U. PA. L. REV. 2027, 2034–35 (2001); Setear, *supra* note 10, at 174–84.

120. *Cf.* Setear, *supra* note 10, at 174–84.

121. *See generally id.* at 181; Aceves, *supra* note 105, at 229.

122. *See generally* Setear, *supra* note 10, at 181.

123. *Id.* at 190.

at the further extreme, to protect as parties form specific investment-backed expectations based on the relationship. Iteration provides both a positive justification as well as a rearticulation of Macneil's observations and thus has the same implications for treaty interpretation because it ties the relational theory's underpinnings to the sphere of international relations.

"[R]elational contract theory contemplates a contractual regime where the parties intend to maintain an ongoing relationship," or ongoing iterations.[124] Drawing on the same observation, Setear calls for the iterations to have "clear definitions of what behavior constitutes cooperation."[125] Such observations guide the application of the theory to interpretation since they define the goals a court should consider in certain instances where parties value the relationship in a way that alters or redefines the four-corners of the states' agreement. In the case of international law, the theory applies to a treaty interpreted by an international tribunal.

Although the relationship itself will often promote the facilitation of treaty interpretation issues through negotiation and facilitation (as evident by the relational theory's de-emphasis on the role of third-party adjudicators),[126] even countries with long and peaceful relationships have found themselves before an international tribunal. Such disagreement between "friendly" countries with a rich history of repeated interactions is evident in the *LaGrand* case between Germany and the United States.[127] In this case, the United States found itself accused of violating international law because it failed to properly remedy Arizona's failure to inform the LaGrand brothers, German citizens, of their rights under the Vienna Convention for Consular Relations.[128] In order to address the alleged violation of international law, Germany brought an action before the International Court of Justice seeking a provisional order to prohibit the execution of the brothers. Despite an appeal to an international tribunal, it is clear that Germany and the United States still wish to preserve the basics of their relationship, particularly the norms which govern consular relations, despite any animosity the *LaGrand* case may have created.

At the other extreme, states with no desire to consummate an ongoing relationship, such as the United States and Iran at the sign-

124. Leichtling, *supra* note 15, at 682.

125. John K. Setear, *Treaties, Custom, Rational Choice, and Public Choice*, 94 AM. SOC'Y INT'L L. PROC. 187, 187 (2000).

126. *See supra* text accompanying notes 23–27.

127. La Grand (F.R.G. v. U.S.), 2001 I.C. J. 466 (June 27).

128. *Id.*

ing of the Algiers Accords after the Iranian hostage crisis, have found themselves facing issues of treaty interpretation where little of the relationship is valued by the parties, at least to the extent of altering the four-corners of the written agreement. Both of these situations can require third-party arbitration, but the two situations differ in the applicability of relational theory based on cooperation and repeated iteration. Some situations can be characterized as having the cost of flexibility outweighed by the cost of reliance on broader notions of general consent. Therefore the relational theory is not applicable based on the unique geopolitical nature of the contracting parties.

However, whether the iterative approach of Setear or the initial relational aspects of Macneil, critiques of discrete-based methods often overlook that some treaties can be more accurately modeled as a single-shot Prisoner's Dilemma that resembles a one-night stand rather than the married relationship that relationalists envision. Although the relational nexus still gives information as to how the treaty should be interpreted, discrete-based methodologies substantially reflect the desires of the parties who are intending to play a single-shot game rather than form a relational nexus. Setear acknowledges the iteration perspective is valid "so long as one equates a 'treaty' with a 'cooperative effort.'"[129]

Unfortunately, the events that have shaped many of the world's treaties are not a cooperative effort, and do not justify the application of the relational or iterative approach. Such treaties were largely the international norm at the time of the consummation of the Vienna Convention, thus the Law of Treaties reflects such concerns as a manifestation of the prevalent norms of the time as gathered by the authors of the Vienna Convention, the International Law Commission.[130]

Animosity between countries with a deep history of distrust, or even violent confrontation, leads to a greater polarization of the discrete to intertwined spectrum than is present in domestic contracts. This observation makes Macneil's descriptions of a spectrum

129. Setear, *supra* note 10, at 191.

130. *See* Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1575 (1991) (noting "before this century, very few international agreements established continuing, dynamic relationships between states. Most were political agreements defining control of peoples or territories"). The International Law Commission is dedicated to the codification and progressive development of international law. For a description of the Commission's work see International Law Commission, Introduction, *available at* http://www.un.org/law/ilc/introfra.htm (last visited on Dec. 20, 2003) (copy on file with NYU Annual Survey of American Law).

of even greater analytical value to describe treaties.[131] Religious hatred, economic exploitation and a host of other factors may influence relations between states in a way not even comparable to private parties who simply wish to maximize profits. This makes discrete interactions all the more likely in international contracts, although such contracts will remain a minority. In addition, sovereigns often are forced to deal with other states, while private parties can more readily walk away. For example, the situation between Iran and the United States over the Iranian hostage crisis had to be resolved in some peaceful manner while domestic parties who view flexibility as more risky than the transaction cost of continuous, active consent likely do not even contract.

What is needed is a guide for international tribunals as to when to apply a relational contract "lens" onto treaty interpretation, when to rely strictly on the Vienna Convention and when to apply some relational principles. In this regard, commentators have increasingly called for international tribunals to use different schools of treaty interpretation in different situations regarding different types of treaties.[132] A central critique of the current legal regime is that it unnecessarily attempts to apply a uniform approach to all matters of interpretation.[133]

International tribunals should distinguish treaties that form dynamic (formally called intertwined) obligations between states and those that form end-game (formally called discrete) scenarios between often, but not always, hostile countries that have created a treaty whose four-corners provide the end-all of their relationship because neither country intends its relationship, at least in the foreseeable future, to provide the norms of reciprocity and advanced notions of good will needed to alter the agreement as written.

In determining intent, if the language, duties, and negotiating history of the treaty convey an effort to create a discrete, or "one-shot," interaction then the parties intended an end-game treaty and the Vienna Convention should be applied, but where the treaty is based on a sense of continuity and effort to minimize cost by reduc-

131. *See* Macneil, *supra* note 5, at 894–98.

132. Kenneth Vandevelde argues that the treaties should be interpreted under varying standards, in order to reflect the negotiator's perspective. For example, in a situation where the plain language is all that passed between the parties, it is wholly appropriate for the court to regard the agreement as consisting of the text itself and to interpret that text objectively. In cases of explained, clarified, reworded and modified provisions the court should regard the agreement as consisting of a standard, not a rule, and interpret it subjectively. Vandevelde, *supra* note 57, at 307–08.

133. *Id.* at 282.

ing risk and opportunism then the parties intended a relational treaty.[134] International courts should distinguish between the two and apply different standards of interpretation.

A. Dynamic Obligations

"Dynamic obligations," a phrase coined by Edwin Smith to describe the evolving nature of arms control agreements between the United States and the former Soviet Union near the end of the Cold War, are synonymous with "intertwined" contracts as defined on Macneil's spectrum.[135] They are characterized by repeated interactions, or iterations, between the sovereign parties. Dynamic obligations describe a treaty that encompasses an ongoing relationship between two countries rather than a treaty created to end a relationship or a state of conflict. Furthermore, dynamic obligations "cannot be fully explained by traditional models of international legal agreements. Instead, an appreciation of international regimes, relational contracts and reciprocity is needed to fully understand agreements that create dynamic obligations."[136] In short, "reliance upon traditional evidence of the intent of the parties at the time of ratification provides much less guidance about the rights and duties imposed by a dynamic obligation."[137]

Dynamic obligations must be both categorized and interpreted by a court using a relational lens to protect the relationship and the investment-backed expectations that have occurred because of the treaty and its resulting rights and duties.

In analyzing and adjudicating contractual exchanges, the relational approach considers and analyzes the "temporal dimension" of the agreement in the form of the relationship.[138] Therefore, an international tribunal, when analyzing a dynamic obligation, should focus on the same temporal aspect. Strict analysis based solely on the discrete transaction derived from the text of the treaty, when viewed out of the context of the possible on-going relationships, makes effective interpretation of the parties' intent nearly impossible.[139]

134. Fred O. Boadu, *Relational Characteristics of Transboundary Water Treaties: Lesotho's Water Transfer Treaty with the Republic of South Africa*, 38 NAT. RESOURCES J. 381, 393 (1998).

135. Smith, *supra* note 130, at 1549. The terms "intertwined" and "dynamic" are interchangeable.

136. *Id.*

137. *Id.* at 1588.

138. Palzer, *supra* note 9, at 730.

139. *Id.*

Dynamic obligations are characterized by the following traits: the treaty is of a significant or undetermined duration, there are numerous open terms, there is transaction-specific investment, future cooperative behavior is expected, and close relationships between the parties are an integral part of the treaty.[140]

Dynamic obligations were very apparent in three forms of international obligations to be explored: arms-control treaties between the United States (US) and the former Soviet Union (USSR) in the twilight years of the Cold War, sovereign debt arrangements and shared resource contracts. By going through these examples, the common characteristics of dynamic obligations will become apparent.

However, not all characteristics are present in any one relationship that can be classified as a dynamic obligation. For example, US-USSR arms-control treaties had very few open terms, yet did contain a great deal of flexibility in their own right.[141] Furthermore, the relationship does not have to be characterized as friendly in a geopolitical sense. The relationship between South Africa and Lesotho during the apartheid era when they forged their shared resource contract concerning the Lesotho Highlands water system was not at the time of consummation accurately described as friendly.

The arms-control regime between the US and the USSR is a classic example of a Prisoner's Dilemma game given the cost to one party of the other party's deviation from the agreement and the tremendous advantage a party could gain if it were to defect.[142] However, the actual observed interaction was not the kind of non-cooperative Nash equilibrium that one would expect from a typical, one-shot, Prisoner's Dilemma.[143] The value of the evolving relationship between the two parties was evident in that the two states sought to maintain the growing arms control relationship, and subsequent regime, "notwithstanding viable legal claims of noncompliance by the other state."[144] Specifically, the United States failed to jeopardize future iterations in spite of grossly apparent Soviet defections.[145] Despite reports of Soviet violations in the American media, the US responded with quiet diplomacy rather than resorting to a legal claim or even asserting much overt political pressure on

140. Speidel, *supra* note 28, at 827–31.
141. *Cf.* Smith, *supra* note 130, at 1599.
142. *Id.* at 1551.
143. *See id.*
144. *Cf. id.*
145. *Id.*

the USSR.[146] Thus, a proper investigation of the US-USSR agreement would be incomplete if it focused exclusively on the four-corners of the agreement, as did the American media.

The actual practicability of implementation of an arms control treaty is dependent upon the relationship between the parties; thus the treaty itself would not exist unless the parties had an understanding of the relationship.[147] With this in mind, an international tribunal would more accurately determine intent if it took the relationship into account. In this manner, a tribunal would be more able to determine the norms which govern the treaty and the subsequent regime and relationship that the treaty spawned if it viewed the treaty through the relational lens.

In addition, the "technology creep" phenomenon, where technology changes faster than treaty writers can handle, causes arms control initiatives to be necessarily classified as a dynamic obligation.[148] Static arms control agreements become obsolete because they fail to provide for changing weapons technology.[149] Since the four-corners of the agreement can become vastly devalued to each party due to technological change, the true value in the treaty exits in the relationship and the subsequent ability of the parties to expand the treaty, either implicitly or explicitly, to cover new circumstances. Often the expansion is done through acquiescence to the other party's behavior, thus the relationship of acquiescence contains the true value of the treaty.

International tribunals have a positive goal of giving efficacy to the agreements of parties, which has often forced courts to expand definitions and principles past the text of the agreement to keep the treaty relevant. The phenomenon of technology creep encourages a court to look at how the parties have reacted to technology creep in order to give efficacy to a treaty.

Sovereign debt agreements are similar to arms-control agreements in that they show the necessity of using relational principles to understand agreements which cannot possibly be captured in the four-corners of a treaty. In the case of sovereign debt, the "overriding fact of sovereign lending in the modern world is that the well-being of international banking is now tied to the domestic economies of developing country debtors through an interdependent world economy."[150] Hence, bankers and the sovereign borrowers

146. *See id.* at 1550–51.
147. *Id.* at 1587.
148. *Id.* at 1562.
149. *Id.*
150. Palzer, *supra* note 9, at 735.

form a mutually dependent relationship. In addition, the vast complexity and exposure to changing circumstances beyond the comprehension of the parties means that "no agreement captures the full texture of such a relationship."[151] Scholars also note the existence of an emerging de-facto lender of last resort in the form of the International Monetary Fund, which creates even more inextricable relations.[152] These realizations make sovereign loan restructuring one of the "grandest relational exchanges in the contract universe."[153]

Domestic regulators, who have jurisdiction over the creditors, have allowed the informal rules that emerged throughout the iterations to govern the loan structure since a great deal of the sovereign debt relationship takes place outside the four-corners of the contract over an indefinite time.[154] Banks have an interest in preserving a relationship so as not to be shut off from a major economy that may turn into a profitable area for future investment even if the country is currently a drain on bank resources through nonperforming loans.[155] In addition, the sheer magnitude of sovereign debt makes breach and acceleration virtually (if not completely) impossible, forcing a reciprocal relationship on both parties.[156]

In Keith Palzer's essay on relational theory and sovereign debt, he calls on treaty authors to use the relational theory to serve as a drafting model for the lawyer asked to "craft the contract needed to govern a successful restructuring."[157] Assuming Palzer is correct in his instructions to lawyers, it follows that tribunals should use relational theory to interpret the result of any relational based drafting. Such an outcome may stem the criticisms concerning the alleged state of inadequate legal remedies for breaches of sovereign loan agreements.[158]

Shared resource treaties are another example of a dynamic obligation. Quite often, parties in a shared resource treaty intend a relational governance structure in order to "gain economies of scale by using flexible language to resolve controversial [and technologically challenging] issues."[159] One prominent example is the

151. *Id.*
152. Gottlieb, *supra* note 23, at 572.
153. Palzer, *supra* note 9, at 735.
154. *See generally id.* at 746.
155. *See* Gottlieb, *supra* note 23, at 571.
156. *See* Palzer, *supra* note 9, at 746.
157. *Id.* at 758.
158. Gottlieb, *supra* note 23, at 567.
159. Boadu, *supra* note 134, at 381.

Lesotho Highland Water Project treaty between Lesotho and the Republic of South Africa, which governs the transfer of water from the Lesotho highlands to the Republic of South Africa.[160] Both parties gathered information jointly, rather than conducting their own costly feasibility studies, reflecting the dynamic governance preferences of both parties.[161] This was part of a larger pattern of behavior to reduce information costs, an important indicator of a dynamic obligation.[162]

The parties also took very overt actions to decrease acts of opportunism in the form of cost-increasing bargaining techniques.[163] This was done through a heavy incorporation of broader international norms to reflect utilization of the world's water resources in a global perspective.[164] The use of broader norms reflects the parties consent to a relational nexus that incorporates norms in which both states were active participants in forging.[165]

B. End-Game Treaties

End-game treaties differ from dynamic obligations in that the parties forming the treaty envision a discrete interaction between themselves rather than a developing relationship.[166] In these increasingly rare situations, the main critique of relational contract theory leveled by Linda Bernstein is the most prevalent, and the theory is of limited value for treaty interpretation.

For end-game treaties, the Vienna Convention is an appropriate framework for interpretation, and the usage of the relational interpretive methods would not add value to a court's analysis of intent. In the situations where a treaty represents the end-game of sovereign relations for the foreseeable future, the parties have often intended for the text of the treaty to govern the ordering of their mutual affairs and serve as the manifestation of their intent. An international tribunal would gain little from undertaking a relation-

160. *Id*; *see generally* Treaty on the Lesotho Highlands Water Project, Oct. 24, 1986. Because the Treaty has not yet been registered with the United Nations Treaty Office, a reference to an official treaty series or publication is not possible. The discussion of the treaty is taken from Boadu's account.

161. Boadu, *supra* note 134, at 394; *see also supra* note 160.

162. *Id.* at 393; *see also supra* note 160.

163. *Id.* at 395; *see also supra* note 160.

164. *Id.*; *see also supra* note 160.

165. *Id.* at 395–96; *see also supra* note 160.

166. For simplicity, I have limited discussion to bilateral treaties, although there is no theoretical objection to dividing a multilateral treaty into a dynamic obligation v. end-game dichotomy. The topic would be of great interest and would make an excellent area for future research.

ally influenced analysis of the treaty. The four-corners of the doctrine as described by the Vienna Convention are sufficient to decipher intent.

In defining contract, Ian Macneil states that the term contract encompasses "relations among people who have exchanged, are exchanging, or expect to be exchanging in the future—in other words, exchange relations."[167] Regarding international law, it is readily possible to envision a diplomatic exchange between countries in the form of a treaty that does not amount to two countries forming anything that resembles a relationship as defined by relational theory. Therefore, the resulting treaty is not properly interpreted in terms of the relational contract theory given the failure of this central tenet. The most prevalent example would be a treaty created to end an open hostility between countries, yet not created with the intent of developing the social and economic ties that the parties may eventually form.

End-game treaties have the following characteristics in common: the treaty is not intended to govern over an extended duration, there is a lack of open terms, future cooperative behavior is not expected, benefits and burdens are divided and allocated rather than shared, there is no transaction-specific investment, and close relations do not form an integral aspect of the relationship.[168]

A ready example of an end-game treaty is the Algerian Accords between the United States of America and Iran. Contrary to the assumption by Ian Macneil that, in any society, "it takes great imagination to produce examples . . . of exchange characterized by only the minimum degree of relationality,"[169] it does not take a great deal of imagination to envision an exchange between countries premised on the complete absence of a relationship, especially the kind of relationship that would add value to treaty interpretation. Such an example is found in the animosity and distrust that precipitated the signing of the Algerian Accords.[170]

The treaty between the two countries was not intended to govern Iranian-American relations over a long period of time. The

167. Macneil, *supra* note 5, at 878.

168. *Cf.* Speidel, *supra* note 28, at 828–31.

169. Macneil, *supra* note 5, at 884.

170. True relational contract theorists would argue that, apart from theoretical transactions, such as those of rational choice theory, non-embedded transactions are virtually impossible to find. *See id.* at 884. In short, relational contract theory allows contracts to be viewed on a spectrum of discrete at one end and intertwine at the other. Although even the most discrete exchanges postulate a social matrix involving the most basic elements, these observations do not assist a court when interpreting a party's intent.

agreement was created to peacefully resolve the Iranian hostage crisis. The bargaining history of the treaty as related by the then American Secretary of State, Warren Christopher, shows that the Americans wanted to have every detail articulated, in order to avoid future disputes.[171] Future cooperative behavior was not expected: the relationship between the two countries was at a historic low-point that would have dramatic geo-strategic implications for the Middle East. To illustrate, the relations between the two countries had deteriorated to the point that the two states had no face-to-face negotiations during the crisis; Algerian negotiators acted as mediators between the parties up to the conclusion of the treaty.[172]

The Claims Tribunal established by the Algerian Accords faced questions of treaty interpretation which were often decided in a non-relational manner. When confronted with questions of interpretation, it largely followed the Vienna convention.[173] For example, the Tribunal severely limited the role of subsequent practices by the two countries on treaty interpretation.[174] The Tribunal stated, "[i]t is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties *to the treaty* and one which establishes the agreement of the parties *regarding the interpretation* of that treaty.[175] Furthermore, the Tribunal expressed a general preference not to rely on such subsequent practice, although it did refer to such practice when applicable.[176]

Thus, the Tribunal held that Article II of the Claims Settlement Declaration did not include a right for Iran to press claims against United States nationals based on the "clear formulation" of that article.[177] The minority opinion held that the majority's literal construction failed to give effect to the agreement's reciprocal nature.[178]

The Tribunal also took a very limited view of the context of the decision with regard to incorporation of norms from international

171. RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: CONTROVERSIES, CASES AND CONTRIBUTIONS 117 (1990).

172. *Id.* at 116.

173. GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 372 (1996).

174. *Id.*

175. U.S. v. Iran, 5 Iran-U.S. Cl. Trib. Rep. 57, 71 (1983) (emphasis added).

176. ALDRICH, *supra* note 173, at 364.

177. Martti Koskenniemi, *The Politics of International Law,* 1 EUR. J. INT'L. L. 4, 24 (1990).

178. *Id.*

law. This is contrasted with the Lesotho Highland decision which incorporated many of the norms of shared resources in international law. Thus, the (Iran-U.S.) Tribunal concluded that the Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930, relevant only to issues of diplomatic protection, was not applicable to the question of jurisdiction over claims by dual nationals.[179] In this manner, the Tribunal essentially created a self-contained regime. In short, the four-corners of the Algerian Accords defined the relationship between the parties, sometimes even taking the context of customary international law out of the interpretation.

C. Middle of the Spectrum

It is readily apparent that not all treaties can be neatly categorized as poles on the end-game to dynamic spectrum. Many treaties have varying levels of discreteness or can be characterized as non-infinite iteration. The relational principle is still applicable in these mixed situations when it is realistically and selectively applied, thus the theory retains its validity to more real world applications.

One prominent example of a middle-of-the-spectrum situation regards the interpretation of a renegotiated treaty. In many aspects, a renegotiated treaty represents a significant break in the relational aspect, thus the need for renegotiation. Since something in the pre-existing relationship did not fully encompass (at least one of) the parties' desired outcomes, the treaty was re-negotiated and much of the past relationship must be either abandoned or reinterpreted in light of the end-game of re-negotiation. However, many renegotiated situations do not represent a complete break from the prior relationship. Often, treaties that are overall effective are simply fine tuned, and much of the relational nexus and social norms that govern the regime remain in force and of value to the parties and thus to a tribunal.

For example, in 1972, the United States and the United Kingdom negotiated a treaty governing reciprocal extradition of a person accused or convicted of certain offenses committed in the other state.[180] Unfortunately for the United Kingdom in the context of IRA terrorists, the treaty, as was the international custom at the time, allowed the United States to refuse extradition if the crime was one of a political character.[181] The exception quickly

179. ALDRICH, *supra* note 173, at 364.

180. *In re* Extradition of Howard, 996 F.2d 1320, 1324 (1st Cir. 1993).

181. *Id.*

threatened to overtake the rule when American federal judges began interpreting the provision to bar the extradition of members of the Provisional Irish Republican Army (IRA).[182]

To help remedy the state of affairs, the two countries renegotiated the treaty in the mid-1980s to nearly extinguish the political exception doctrine for acts of violence.[183] The alteration was done by eliminating the ambiguity in defining political offenses which American courts had seized on to deny requests for alleged Irish fugitives.[184] The Proposed Supplementary Treaty eliminated the exception by narrowing the list of offenses and excluding a number of crimes typically committed by terrorists from the political exception.[185]

However, the American Senate was concerned with the initial, renegotiated treaty and passed a different version, the Supplemental Treaty of 1986, with novel safeguards attached for the protection of some future extradited persons.[186] The Senate Foreign Relations Committee claimed that the safeguard constituted "an attempt to balance the need to deal with the threat of international terrorism and the necessity for maintaining basic democratic traditions and individual safeguards."[187] Thus, the prior relational nexus was significantly altered; here the two countries acknowledged through renegotiation that part of their prior relationship was malfunctioning.[188]

Subsequently, American courts were left to interpret and apply the new treaty, and specifically Article 3(a), which dealt with the extradition of individuals claiming the political exception. The focus and scope of inquiry into Northern Irish courts authorized by the article was the topic of much debate.[189] Courts were quick to note that the Supplementary Treaty openly and unambiguously al-

182. *Id.*

183. *Id.* at 1324.

184. Leslie A. Firtell, Note, *The Evidentiary Burden in Establishing an Article 3(a) Defense to Extradition in Light of* In Re the Requested Extradition of James Joseph Smyth, *a Case of First Impression*, 4 CARDOZO J. INT'L & COMP. L. 73, 75 (1996).

185. *Id.* at 75–76.

186. *See Howard,* 996 F.2d at 1330.

187. Firtell, *supra* note 184, at 76.

188. The relevant article of the Supplementary Treaty, 3(a) reads as follows: "if the person sought establishes . . . by a preponderance of the evidence that . . . he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions [then extradition is forbidden.]" Extradition Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Dec. 23, 1986, U.S.-U.K., T.I.A.S. No. 12050, art. 3(a).

189. Firtell, *supra* note 184, at 78–79.

tered the traditional practice in the field.[190] Traditional practice in the field was the doctrine of non-inquiry, where courts on either side of the Atlantic would not sit in judgment of the other state's judiciary.[191] Specifically, the non-inquiry doctrine states that a court is not authorized to examine the requesting country's criminal justice system, nor can it deny a person's extradition on the ground that the individual will not receive a fair trial if returned.[192] Hence, in exchange for weakening the traditional barrier of the political exception doctrine the United Kingdom was forced to accept a weakening of the doctrine of non-inquiry.

However, the Court of Appeals was quick to point out that the Supplementary Treaty did not completely destroy the relational nexus the two countries had forged during their long history of interaction or its unwritten norms. "Still, the article 3(a) defense, though a refreshing zephyr to persons resisting extradition, is not of hurricane force; its mere invocation will not sweep aside all notions of international comity and deference to the requesting nation's sovereignty."[193]

The court went on to note its duty to interpret extradition treaties to produce reciprocity between, and expanded rights on behalf of, the signatories.[194] Although the doctrine of non-inquiry was a function of the assumption that an extradition treaty constitutes a general acceptance of another country's legal system, and the lack of non-inquiry could be seen as altering the norm of general acceptance of fairness in the United Kingdom's system, the existence of an overall framework must inform the interpretation of article 3(a).[195] The court went on to rule that it is not enough to show some possibility that bias may occur; it must rise to the level of prejudicing *the accused* as an individual and not merely as a member of a particular class.[196] In short, a District Court errs if it considers the fundamental fairness of Northern Ireland's justice system.[197] At least one other Circuit Court has ruled that article 3(a) allowed the judicial officer to make only a *narrowly* circumscribed inquiry.[198]

190. *Howard*, 996 F.2d at 1330.

191. *Cf. id.*

192. Firtell, *supra* note 184, at 77–78.

193. *Howard,* 996 F.2d at 1330.

194. *Id.*

195. *See generally id.*

196. *See id.* at 1331.

197. Firtell, *supra* note 184, at 98.

198. United States v. Kin-Hong, 110 F.3d 103, 115 (1st Cir. 1997).

The result of the interpretation drastically shifted the burden of evidence on the extradited person from that which a more isolated interpretation could have created. Instead of relying "extensively upon evidence of the general discriminatory effects of the Diplock[199] system upon Catholics and suspected Republican sympathizers" a defendant needs to demonstrate the potentially unfair treatment that he himself would receive.[200]

The federal system's interpretation of article 3(a) can be thought of as a result of a number of different factors. One could argue that the courts were merely attempting to reflect the intent of the Senate. However, evidence shows that there was much debate and no firm consensus on the scope of 3(a) for a court to apply.[201] Simply put, congressmen vastly differed on the scope of inquiry into Northern Ireland's judicial system. Perhaps a better explanation was that courts were attempting to keep as much of the American-British extradition relationship/nexus intact and steer the middle course by preserving the general norms of reciprocity and acceptance of judicial fairness in each country's system, yet altering the relationship where the United States saw fit. In short, courts were applying a hybrid of the relational contract theory in that the courts interpreted the subsequent agreement in a way to preserve the long history of American-British cooperation.

For example, in *In re Howard* the court refused to apply 3(a) in affirming a ruling that a black man would not suffer discrimination within 3(a) when returned to England on rape charges.[202] This was done despite the plain meaning of 3(a), which did not purport to treat discrimination against the Irish any differently than against African-English.

It must be kept in mind that the basic framework for American-British extradition has lasted over two hundred years since the creation of the Jay Treaty of 1794.[203] In choosing a more moderate interpretive stance, American courts have shown deference to the centuries old relational nexus while reflecting the intent of the

199. The term Diplock comes from a report authored by Lord Diplock that argued that fewer protections for defendants' rights were justified to deal with the "troubles" in Northern Ireland. *See In re* Smyth, 61 F.3d 711, 713 (9th Cir. 1995).

200. Firtell, *supra* note 184, at 98.

201. *See generally id.* at 77–81.

202. *Howard*, 996 F.2d at 1320.

203. John Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1517 (1988).

United States Senate to fundamentally alter one aspect of the relationship.

CONCLUSIONS

"Before this century, very few international agreements established continuing, dynamic relationships between states."[204] Treaties ended wars, defined specific and non-transient boundaries, and generally dealt with situations that could be analyzed at a discrete point in time to the benefit of all concerned parties. The Vienna Convention was based on the ILC's codification of treaty law that was designed to interpret "political agreements defining control of peoples or territories" and not agreements that could be made obsolete in a short period of time by an engineering breakthrough.[205]

The revolutions that have become so cliché in the world of modern commerce and modern diplomatic relations (globalization, the Internet, human rights) all share a sense of consistent change. Human rights change as a new world consensus evolves, globalization makes it possible for capital flows changing according to the speculative whim of George Soros and the Internet's discrete address cannot even be defined. The new paradigm of change must be acknowledged in the way international law deals with its needed manifestations of discrete interactions, lest treaties become worth less than their four-corners. Through an acknowledgement of the complex relationships that govern the treaty process, tribunals, both international and domestic, can help ensure that the rule of law plays an increasing role in governing state relations.

204. Smith, *supra* note 130, at 1575.
205. *Id.*