THE INTERNATIONAL LEGAL OBLIGATIONS OF SIGNATORIES TO AN UNRATIFIED TREATY

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I. Introduction

There are currently two major international agreements of the United States which have been signed by the parties and transmitted by the President to the Senate for its advice and consent: the Treaty with the Soviet Union on the Limitation of Strategic Offensive Arms, known as SALT II,¹ and the Agreement with Canada on East Coast Fishery Resources and the accompanying Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area.² Both agreements were signed after lengthy and complex negotiations.³ Both agreements are ex-

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¹ The Treaty on the Limitation of Offensive Arms and Protocol Thereto (SALT II Treaty) was signed by Presidents Carter and Brezhnev in Vienna on June 18, 1979. The Treaty was transmitted by President Carter for the advice and consent of the Senate to ratification on June 22, 1979. The following related documents were also transmitted to the Senate:
1. a series of Agreed Statements and Common Understandings concerning the obligations of the Parties under particular articles of the Treaty;
2. a Memorandum of Understanding that will establish an agreed data base by categories of strategic offensive arms along with associated statements of current data;
3. a Joint Statement of Principles and Basic Guidelines on the Limitation of Strategic Arms concerning the next phase of negotiation on this subject; and
4. a Soviet statement on the Backfire bomber, together with a United States response.
² The Agreement on East Coast Fishery Resources was signed by Secretary of State Cyrus Vance and Canadian Ambassador Peter Towe in Washington, D. C. on March 29, 1979. The Agreement was transmitted by President Carter for the advice and consent of the Senate to ratification on May 3, 1979. For the text of the Agreement and the accompanying Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, see MARITIME BOUNDARY SETTLEMENT TREATY WITH CANADA AND THE AGREEMENT ON EAST COAST FISHERY RESOURCES WITH CANADA, S. Exec. Doc. No. U, V, 96th Cong., 1st Sess. (1979).
³ The process of negotiation which ultimately produced the SALT II Treaty began on November 17, 1968 in Helsinki. On May 26, 1972, two agreements, known collectively as SALT I were signed. These were the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 9435, T.I.A.S. No. 7503 (1972), [hereinafter cited as ABM Treaty]
and the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3462, T.I.A.S. No. 7504 (1972), [hereinafter cited as Interim Agreement]. The ABM Treaty was of unlimited duration, ABM Treaty, art. XV §1, whereas the Interim Agreement was for a duration of five years, Interim Agreement, art. VIII §2. Both agreements contain provisions for the continuation of active negotiations for limitations on strategic offensive arms. ABM Treaty, art. X; Interim Agreement, arts. VII and VIII §2. When it became clear that a SALT II agreement could not be concluded before the expiration of the Interim Agreement, Secretary of State Vance issued the following statement on September 23, 1977:

In order to maintain the status quo while SALT II negotiations are being completed, the United States declares its intention not to take any action inconsistent with the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms which expires on October 3, 1977, and with the goals of these ongoing negotiations provided that the Soviet Union exercises similar restraint.

77 DEP'T STATE BULL. 642 (1977).


of the nations involved. Already there have been considerable delays in the ratification of both agreements. Perhaps neither agreement will be ratified. The President, however, continues to insist

4. President Carter has described SALT II as "the most detailed, far-reaching, comprehensive treaty in the history of arms control. Its provisions are interwoven by the give-and-take of the long negotiating process. Neither side obtained everything it sought. But the package that did emerge is a carefully balanced whole . . . ." Address Delivered Before a Joint Session of Congress, 15 WEEKLY COMP. OF PRES. Docs. 1089 (June 25, 1979). For a discussion of the compromises and reciprocal concessions that resulted in the final agreement, see T. WOLFE, supra note 3, at 226-35. Highlighting the complexity of the agreement are the lengthy and detailed accompanying Agreed Statements and Common Understandings which add further precision to the already detailed Articles of the Treaty. Secretary of State Vance has said that the Treaty and related documents were "meticulously negotiated over more than six years." Secretary's Letter of Submittal of June 21, 1979, 79 DEP'T STKTn Bu.. 4 (July 1979).

The East Coast Fishery Resources Agreement, in Annexes which are an integral part of the Agreement, establishes the terms of fishing access and entitlements to various fish stocks. The Agreement allocates, on a percentage basis, the "annual permissible commercial catch" for all commercially significant fish stocks in the area of the Gulf of Maine shared by both countries between American and Canadian fishermen. Agreement on East Coast Fishery Resources, supra note 2, art. 9.

5. The SALT II Treaty was transmitted by President Carter to the Senate on June 22, 1979. The Senate Committee on Foreign Relations has held hearings on the Treaty. The SALT II Treaty: Hearings on S. Exec. Y Before the Senate Committee on Foreign Relations: Parts 1-6, 96th Cong., 1st Sess. (1979). The East Coast Fishery Resources Agreement was transmitted by President Carter to the Senate on May 3, 1979. The Senate Committee on Foreign Relations has held hearings on the Agreement. Maritime Boundary Settlement Treaty and East Coast Fishery Resources Agreement: Hearings on S. Exec. U, V Before the Senate Committee on Foreign Relations, 96th Cong., 1st Sess. (1980). Neither agreement has been reported out of Committee.


For a complete collection of treaties which the United States has concluded but which have not entered into force, see I-V UNPERFECTED TREATIES OF THE UNITED STATES: 1776-1976 (C. Wicktor ed. 1980). For an interesting consideration of the role
that ratification of both agreements is in the national interest, and eventual favorable action on them is still possible.¶

Most contemporary treaties provide that they will enter into force only upon ratification by the states that are to become parties to the agreement.¶ While at one time signature played a more important


Kenneth Curtis, U.S. Ambassador to Canada, has reaffirmed the support of the administration for the East Coast Fishery Resources Agreement. Curtis airs fish treaty, Portland Press Herald, May 29, 1980, at 21. Secretary of State Muskie is reported to be working actively for ratification of the treaty. See Membrino, Meeting Fails to Get Compromise on Fishing Treaty, Bangor Daily News, July 12-13, 1980, at 29.

It appears that renegotiation of certain particulars of both treaties may be necessary to meet Senate concerns before favorable Senate action is even possible. Burt, There's a Greater Uncertainty Than the Outlook for SALT, N.Y. Times, Aug. 24, 1980, § 4, at 4; Fishing treaty: Mitchell 'no,' Bush not sure, Portland Press Herald, Aug. 8, 1980, at 1. See also Blechman, Do Negotiated Arms Limitations Have a Future?, 59 Foreign Aff. 102 (1980).

8. See, e.g., SALT II Treaty Article XIX §1: “This treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. This treaty shall enter into force on the day of the exchange of instruments of ratification. . . .” East Coast Fishery Resources Agreement Article XXV §1: “This Agreement shall be subject to ratification in accordance with the domestic requirements of the Parties and shall enter into force on the date instruments of ratification of this Agreement . . . [and the accompanying Treaty to Submit to Binding Dispute Settlement of the Maritime Boundary in the Gulf of Maine Area] are exchanged.” For descriptions of the ratification process in the Soviet Union, see Triska & Slusser, Ratification of Treaties in Soviet Theory, Practice and Policy, 34 Brit. Y. B. Int’l L. 312 (1958), and in Canada, see J. G. Castel, International Law 935-45 (3d ed. 1976). See also United Nations, Laws and Practices Concerning the Conclusion of Treaties, U. N. Doc. ST/LEG/Ser.B/3 (1952); Nascimento e Silva, Le facteur temps et les traités, 154 Recueil des Cours 215, 223-41 (1977).

It is necessary to distinguish (1) the date on which the international obligation of a treaty is perfected so that the treaty becomes binding on the parties and enters into force; (2) the date as from which, having become binding, it operates; and (3) the date as from which the treaty speaks. A. McNair, The Law of Treaties 191 (1961).

The date upon which a treaty enters into force is a matter for the parties to establish. “The critical date may be related to a particular event such as the exchange of ratifications, the deposit or notification of all or a certain number of ratifications, the passing of certain necessary legislation by the parties, [or] formal promulgation of the treaty . . . .” Id. At the time of entry into force the treaty becomes legally binding on the parties.

The entry into operation of a treaty is contingent upon its entry into force. The
role in the process whereby a state assumed treaty obligations, today the crucial event is ratification. Signature may impose the obligation to comply with the procedural provisions of the agreement, such as those provisions relating to the submission of the agreement for ratification in accordance with the internal law of the signatories or those provisions relating to the exchange of ratifications or their deposit. But it is now well settled that the signature imposes no legal duty on a signatory state to actually ratify a treaty. Ratification is discretionary with the signatory state and may be withheld for any reason. Furthermore, unless the signatories provide other-

The date as from which a treaty speaks is a question of interpretation, and the answer will depend on the circumstances of each case. McNair illustrates the problem with the following example:

Let us suppose that a clause . . . requires one of the parties to transfer certain rights and interests owned by it or by its nationals to the other parties or to a commission on their behalf, does that mean rights and interests existing at the time of (a) signature, or (b) the entry into force, or (c) the entry into operation, of the treaty?

Id. at 204-05.


10. Article 24 § 4 of the Vienna Convention on the Law of Treaties provides:

The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depository and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.


Mr. Sinclair, representative of the United Kingdom at the Vienna Conference, explained this provision as follows:

It was generally accepted that when the text of a treaty was adopted, certain provisions had legal effects which were impliedly accepted by the countries concerned even if the treaty was not formally in force. The provisions were those dealing with the processes of ratification, accession, acceptance, approval, the functions of the depository and reservations.


11. "The stream of unratified treaties since 1920 has established beyond doubt that the contemporary rule of practice is that ratification is discretionary and that no reasons need be given for refusing to ratify a treaty." J. Jones, supra note 9, at 79 (footnote omitted).
wise, a treaty has no retroactive effect. Thus, with the possible exception of obligations arising from its procedural provisions, a treaty has no obligatory force prior to its entry into force. Once a treaty is

12. Article 28 of the Vienna Convention on the Law of Treaties provides:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Vienna Convention, supra note 10.

Modern treaties typically enter into force on the date of exchange of instruments of ratification and not on the date of signature. At one time, however, the United States took the position that upon ratification of a treaty its provisions were deemed to have been in force from the date of signature even though ratification was necessary for the treaty to enter into force. The principal American case which established the now discredited doctrine of the retroactivity of treaty obligations was Hylton's Lessee v. Brown, 12 F. Cas. 1152 (C.C.D. Pa. 1804)(No. 6,980). In Hylton's Lessee the court stated that "ratification is nothing more than evidence of the authority under which the minister acted. . . ." Id. at 1158. The function of ratification was therefore simply to confirm the act of an agent by his principal. Professor Jones distinguishes this view of the function of ratification from the modern view as follows:

In the eighteenth century, full powers gave authority to make a binding agreement, subject to a confirmation which was usually held to be obligatory. Today, full powers give authority merely to discuss, to negotiate, and to sign a project, which may or may not become an international treaty by the formal acceptance of it by the States concerned. Ratification is now regarded as being this formal acceptance. It means the ratification of the treaty itself, although formerly it meant the ratification of the act of an agent signing it. With such a theory of the nature of ratification, it is impossible to reconcile the doctrine of retroactivity, for the theoretical basis of agency upon which the doctrine rests can no longer be maintained.


13. Provisional application may also be regarded as an exception to the general rule. Article 25 of the Vienna Convention on the Law of Treaties provides for the provisional application of a treaty or part of a treaty.

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating states have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Vienna Convention, supra note 10.

Thus,

Owing to the urgency of the matters dealt with in the treaty or for other
ratified and does enter into force, the principle *pacta sunt servanda* imposes the obligation on the parties to carry out the agreement in good faith.\(^{14}\)

The fact that treaties do not typically create obligations prior to ratification poses potential problems. In situations where ratification is delayed, actions by the signatories during the period between signature and entry into force may upset the delicate balance struck by the signatories during the negotiating process. For example, Canada or the United States would certainly be acting contrary to the purpose and spirit of the *East Coast Fishery Resources Agreement* if either should engage in large-scale fishing of certain stocks that are subject to the management provisions of the Agreement because those stocks might be fished to extinction or severely reduced. Such action, however, would not violate the Agreement since the Agreement is not yet in force and therefore cannot be a source of binding legal obligations.\(^{15}\)

Multilateral conventions provide particularly good examples of the problem. These treaties are often negotiated and concluded by large international conferences and usually provide that they will enter into force following the deposit of a certain number of instruments of ratification or accession.\(^{16}\) Where a state has signed and

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reasons the States concerned may specify in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.


15. *See K. Holloway*, supra note 9, at 60-61, for a discussion of the actions of the signatories contrary to the provisions of the Treaty of Sèvres which resulted in the destruction of the Treaty and “in the abandonment of thousands of defenceless people—Armenians and Greeks—to the fury of their persecutors, by engendering subsequent holocausts in which the few survivors of the 1915 Armenian massacres perished.”

16. For example, Article 84 of the Vienna Convention on the Law of Treaties provides:

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.
perhaps ratified a treaty that has not entered into force because the requisite number of states have not ratified the treaty, does the signatory state come under a legal obligation not to take any action inconsistent with the treaty before its entry into force? This question has some importance in the context of the on-going United Nations Conference on the Law of the Sea. The negotiators are attempting to resolve extremely important and timely problems, such as the right of a coastal state to control fishing in extensive areas.


The United States has recently enacted legislation concerning deep seabed mining. Deep Seabed Hard Minerals Resources Act, Pub. L. No. 96-283, 49 U.S.L.W. 105 (Aug. 12, 1980). The Act declares in section 2(b)(1) that one of its purposes is "to encourage the successful conclusion of a comprehensive Law of the Sea Treaty which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory access to such resources for all nations." See also Rosenne, Reflections on the Final Clauses in the New Law of the Sea Treaty, 18 Va. J. Int'l L. 133 (1978).
adjacent to its coast and the establishment of a regime for the conservation and exploitation of deep ocean mineral resources. Once a Law of the Sea treaty is signed, but before it enters into force, what are the obligations of signatory states? Could the United States, for example, enact legislation to regulate fishing in a 200-mile zone and even beyond? Could the United States enact legislation to authorize or license its nationals to engage in the mining of the deep seabed?

International legal obligations may arise by virtue of general international law as well as by treaties. There is growing agreement that general international law imposes on the signatories to an unratified treaty the obligation not to defeat the object and purpose of that treaty prior to its entry into force. Once viewed as a moral admonition, this obligation has come increasingly to be regarded as legal in nature. The desirability of such a principle is of course evident. The long and complicated process of negotiation during which each state may have made numerous concessions should be protected, especially where a signed agreement is the result. Furthermore, during negotiations the states may have refrained from taking certain actions—heavy fishing of certain stocks or the development of new weapons systems for example—because negotiations were pending. This self-restraint in expectation of a binding agreement should be encouraged.

It is the thesis of this Article that general international law im-

18. Article 38 of the Statute of the International Court of Justice provides that, in addition to "international conventions," the Court shall apply "international custom, as evidence of a general practice accepted as law" and "the general principles of law recognized by civilized nations." U.N. Doc. OPI/84-16500 (1984). As subsidiary means for the determination of rules of law, the Court may apply "judicial decisions and the teachings of the most highly qualified publicists of the various nations." Id.

19. The obligation discussed in this Article will be characterized as an "obligation not to defeat the object and purpose of a treaty prior to its entry into force." Vienna Convention, supra note 10. This is the terminology in Article 18 of the Vienna Convention on the Law of Treaties, id., and for the sake of consistency will be utilized throughout this Article.


poses on the signatories to a treaty the obligation not to defeat the
object and purpose of that treaty prior to its entry into force. Deci-
sional law, state practice, and the Vienna Convention on the Law of
Treaties all support this proposition. The obligation has a firm theo-
retical basis in the general principle of abuse of rights. Finally, after
examining the existence and nature of the obligation, the Article
concludes with a discussion of the content of the obligation and at-
ttempts to discern its contours and extent.

II. THE OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF
A SIGNED BUT UNRATIFIED TREATY

A. Decisional Law

The legal effect of signed but unratified treaties has been consid-
ered in a number of international court and arbitral decisions. While
some commentators regard this line of decisions as establishing a
legal obligation not to defeat the object or purpose of the treaty
prior to its entry into force, others regard it as inconclusive at
best. In those proceedings where the question has been considered,
the tribunal has typically either refused to impose the obligation or
has regarded it as not violated on the basis of the particular facts
involved in the case. In most of the cases where the tribunal does
deem the obligation to exist, the obligation does not actually provide
the rule for decision, but is stated either arguendo or as dicta. The
international decisions standing alone, then, are probably insuffi-
cient authority on which to rest the obligation. When considered in
the context of other legally relevant materials, however, these cases
do provide some support and do articulate theoretical justifications
for the imposition of the obligation.

Furthermore, virtually all the cases that have considered the ques-
tion involve peace treaties, concluded upon the termination of hos-
tilities. They are not treaties like SALT II or the East Coast Fishery
Resources Agreement that represent the conclusion of a long negoti-
at ing process where the negotiating states are bargaining on the ba-
 sis of equality. Rather they are treaties that to a greater or lesser
degree are imposed by one party or parties upon another party or
parties. Where true bargaining on the basis of equality takes place,

22. See note 20 supra; see B. Cheng, General Principles of Law as Applied by
International Courts and Tribunals 111-12 n.28 (1953).
23. See note 21 supra.
Recueil des Cours 191 (1955), draws the distinction between "treaties governed by
the law of power . . . which are imposed under irresistible pressure" and "the sphere
of the law of reciprocity . . . [where] treaties are freely concluded." Id. at 295. For
definitions of the "law of power" and "law of reciprocity," see G. Schwarzenberger,
A Manual of International Law 9-10 (6th ed. 1976). For a fuller discussion, see G.
there would appear to be more justification for creating rights and imposing obligations intended to increase the likelihood of the states involved achieving the purposes embodied in the signed agreement.

1. **The Legal Effect of Signature.** Coming at the conclusion of long and complex negotiations, signature should have some legal effect. This is especially true where the negotiators have been granted full powers by the states which they represent and where,

25. Governments have full freedom of action in confirming or rejecting a treaty which they have signed subject to the condition of subsequent confirmation—such condition being the normal rule in the absence of express or implied provisions to the contrary. What, as a matter of good faith, they cannot do is to sign a treaty and subsequently conduct themselves as if they had no concern with it or as if their signature thereto were merely a clerical act of authentication. There is no warrant in international law for reducing to that level the meaning of the signature. Signature of an instrument—even when made subject to subsequent confirmation or ratification—is more than a method of authenticating a text. In many cases the text exists already, as is the case when an established text is approved by a conference and opened for signature, subject to ratification, within a prescribed period, or when accession to or acceptance of an already established text takes place through signature subject to ratification. There are compelling reasons why a signatory should not be permitted to treat his signature as a meaningless formality. In signing a treaty it exercises an important influence on some of the procedural clauses of the treaty. Its signature is instrumental in determining such matters as the right of accession, the admissibility of reservations, the conditions of entry into force, and many others. In fact this consideration applies not only to the formal and procedural clauses of the treaty but to its substantive provisions as well. For these provisions may have been substantially—or decisively—influenced by the signatory State or States in question. The treaty is in many respects the result of a painfully achieved compromise to which some States agree, often with reluctance, in order to secure the participation of others. Often a State signs—or ratifies—a convention because the signature of another State or States is regarded by it, in case of doubt, as a sufficient inducement for its own signature. But if these other States are subsequently at liberty to treat their signature as implying no manner of obligation whatsoever, the concessions made by other signatories will have been made in vain seeing that the consideration which they could legitimately expect will not be forthcoming. All these considerations prompt the conclusion that signature, although not implying an obligation of ratification, implies the duty to take some action showing a deliberate acknowledgement of the principle that eventual ratification is the natural outcome and purpose of the signature.


26. Paragraph 1(c) of Article 2 of the Vienna Convention on the Law of Treaties defines full powers:

(c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

Article 7 provides:
as is often the case, the executive of the states and perhaps those other organs which must be involved in the ratification process under internal law keep apprised of and involved in the negotiating process. The legal effect of signature has been considered in a

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
   (a) he produces appropriate full powers;

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty.


27. Department of State control over negotiators goes beyond issuing full powers. "The receipt or possession of a 'full power' is never to be considered as a final authorization to sign [a treaty]. That authorization is given by the Department by a written or telegraphic instruction, and no signature is affixed in the absence of such instruction." 11 Foreign Affairs Manual, Dep't of State, 730.3 (Oct. 25, 1974).

Kaye Holloway argues:

[Where treaty-making is a joint competence under the constitution, the government is under obligation to consult other competent organs. . . .

In spite of doctrinal divergence, there seems to be a clear indication that in the minds of the framers of the Constitution, Article 2, cl. 2, associated the Senate with the making of treaties and not just empowered it to approve or reject a treaty concluded by the President.

K. Holloway, supra note 9, at 54.

Whether or not the executive branch is legally required to consult with the Senate during the negotiating process, such consultation is often helpful in obtaining Senate approval of the treaty. Secretary of State Vance made the following remarks at hearings before the Senate:

Indeed, SALT II as presented significantly reflects the influence of the Senate.

Throughout these negotiations, we have consulted closely with this committee and with individual Members of the Senate at every stage. Twenty-seven Senators traveled to Geneva to observe the negotiations firsthand. We have strongly encouraged that process. Secretary Brown, General Seignious, his predecessor, Ambassador Warnke, and I have discussed SALT issues in nearly 50 separate congressional hearings since January 1977. Most of those have been in the Senate.

In the same period, there have been over 140 individual SALT briefings of Senators by responsible officials of the administration, and another 100 briefings of members of Senators' staffs. The consultation and cooperation between the Executive and the Congress on this treaty have been extensive.

Those sessions have been held to receive your advice as well as to report on our progress. Time and again, issues raised by Members of the Senate have been taken up directly in the negotiations. Our negotiators were conscious of the need to meet a number of specific objectives of the Senate.

The SALT II Treaty—Part 1: Hearings on Ex. Y Before the Senate Committee on Foreign Relations, 96th Cong., 1st Sess. 94-95 (1979). See also FOREIGN AFFAIRS AND
number of international decisions. In the Advisory Opinion on Res-
ervations to the Convention on the Prevention and Punishment of
the Crime of Genocide, the International Court of Justice was con-
cerned, among other things, with the effect to be given to certain
objections to other states' reservations made by signatories and non-
signatories to an unratified multilateral convention. In that context
the court stated:

Without going into the question of the legal effect of signing an
international convention, which necessarily varies in individual
cases, the Court considers that signature constitutes a first step to
participation in the Convention.

It is evident that without ratification, signature does not make
the signatory State a party to the Convention; nevertheless, it es-
tablishes a provisional status in favour of that State. . . .

. . . Pending ratification, the provisional status created by signa-
ture confers upon the signatory a right to formulate as a precau-
tionary measure objections which have themselves a provisional
character. These would disappear if the signature were not fol-
lowed by ratification, or they would become effective on
ratification.

Objections made by a state which had not signed the Convention to
reservations made by other states were held to be without legal ef-
fect. The Reservations case thus recognizes signature as conferring
certain legal rights on a signatory. The purpose of the conferral of
such rights would appear to be to enable the signatory to continue
to participate in the on-going process whereby the final balance of
rights and obligations of all the parties is struck. In this sense the
court is providing legal protection for the process of agreement lead-
ing to eventual ratification and entry into force.

The Mavrommatis Palestine Concessions (Jurisdiction) case also
provides support for attributing legal consequences to signature. In that case, Greece filed an application in the Permanent
Court of International Justice claiming certain rights against Great
Britain under the Treaty of Lausanne and a supplementary Proto-
col. When Greece filed its application in the court, the Treaty had

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29. Id. at 28.
30. Id. at 30.
31. [1924] P.C.L.J., ser. A, No. 2, reported in 1 World Court Reports 297 (M.
Hudson ed. 1934).
33. Protocol Relating to Certain Concessions Granted in the Ottoman Empire and
Declaration, July 24, 1923, 28 L.N.T.S. 203.
been signed by both Greece and Great Britain, but it had not yet entered into force. Great Britain sought dismissal on that ground. In rejecting Great Britain's contention, the Court said that "[e]ven . . . if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by subsequent deposit of the necessary ratifications." By regarding the Greek filing as legally effective, even though the Treaty had not yet entered into force, the court in effect accorded provisional status to the signed but unratified Treaty.

Judge Moore dissented:

The treaty was at length ratified (August 6, 1924); but, in the interval of nearly two months that elapsed after the Court met, the application evidently was, as it stood, subject to dismissal on the ground that the enforcement of unratified treaties, whether by the award of damages for their alleged infraction or otherwise, is beyond the Court's jurisdiction. On this point Article 36 of the Statute limiting compulsory jurisdiction to matters specially provided for "in treaties and conventions in force", is definite and conclusive. The doctrine that governments are bound to ratify whatever their plenipotentiaries; acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past.

The court would certainly not have retained jurisdiction and rendered a decision if the Treaty had not been subsequently ratified. But by refusing to accede to the British position, the court did give legal effect to mere signature.

The importance of eventual ratification is highlighted by two other international decisions. In the Case concerning the Territorial Jurisdiction of the International Commission of the River Oder, the Permanent Court of International Justice considered whether Poland should be bound by the provisions of the Barcelona Convention on the Régime of Navigable Waterways of International Concern which Poland had signed but not ratified. The court concluded that the Barcelona Convention could not be relied on as against Poland, saying that "it cannot be admitted that the ratification of the Barcelona Convention is superfluous. . . ." A similar result was reached by the International Court of Justice in the

35. Id. at 293, 333-34.
37. For the text of the Barcelona Convention, see Convention and Statute on the Régime of Navigable Waterways of International Concern. Barcelona, April 20, 1921, 7 L.N.T.S. 35 (1921); 1 INTERNATIONAL LEGISLATION 638-44 (M. Hudson ed. 1931).
38. 2 WORLD COURT REPORTS, supra note 36, at 623.
North Sea Continental Shelf Cases, where the court refused to hold the Federal Republic of Germany bound by the provisions of the Geneva Convention on the Continental Shelf which the Federal Republic had signed but not ratified.

2. The Legal Obligation. The only decision of an international tribunal which clearly rests on the rule imposing an obligation not to defeat the object or purpose of a treaty between signature and entry into force is Meidalidis v. Turkey, decided by a mixed Greco-Turkish Arbitral Tribunal in 1928. In that case, a Greek claimant sought the return of certain items taken forcibly by Turkish authorities from a strong-box which he rented in the Crédit Lyonnais in Smyrna. The seizure occurred on August 14, 1923. The claimant relied on various provisions of the Treaty of Lausanne, which was signed on July 24, 1923, but which did not enter into force until August 6, 1924. Article 65 of the Treaty provided:

Property, rights and interests which still exist and can be identified in territories remaining Turkish at the date of the coming into force of the present Treaty, and which belong to persons who on the 29th October, 1914, were Allied nationals, shall be immediately restored to the owners in their existing state.

To recognize the forced expropriation of the property of an allied national by Turkish authorities subsequent to the signature of the Treaty but prior to its entry into force would, of course, severely limit the scope and effectiveness of Article 65. In holding the Turkish seizure to be a violation of international law, the tribunal stated: “[A]ready with the signature of a Treaty and before its entry into force there exists for the parties an obligation to do nothing which may be prejudicial to the Treaty by diminishing the significance of its provisions. . . .” The precedential value of the decision in establishing the obligation not to defeat the purpose or object of a signed but unratified treaty is somewhat reduced, however, by the high probability that the Turkish seizure was illegal under international law as an unlawful expropriation of alien-owned property. Nevertheless, the tribunal did not base its decision on that ground and did regard the rule under consideration as an established princi-
ple of international law.  

There are several international decisions that appear to accept the existence of a legal obligation not to defeat the object or purpose of a signed but unratified treaty, but which do so only arguendo or in dicta. The principal case in this category is the Case concerning Certain German Interests in Polish Upper Silesia, decided by the Permanent Court of International Justice in 1926.  

That case, so far as pertinent here, involved the legality of a transfer by sale by Germany of property, located in territory that Germany was required to cede to Poland, to a corporation formed for the purpose of acquiring the property. Poland denied the legality of the transfer, relying on Article 256 of the Treaty of Versailles.  

That Article provided that “Powers to which German territory is ceded shall acquire all property . . . situated therein belonging to the German Empire. . . .” The Treaty of Versailles was signed by Germany on June 28, 1919, and was ratified on January 20, 1920. The contract of sale for the transfer of the property was entered into on December 24, 1919, between the date of signature and the date of ratification. The court upheld the German transfer as not violating Article 256:

Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.

It should be noted that the court deemed that under German law the actual transfer took place on January 28-29, 1920, when the Treaty of Versailles was already in force. In the court's view, the

46. In the Megalidis case, the tribunal supported its imposition of the obligation by reference to the fact that “this principle . . . has received a certain number of applications in various treaties.” 8 Recueil des Décisions des Tribunaux Mixtes 386, 395 (1928). The tribunal then refers to a treaty provision which is apparently Article 8 of the protocol annexed to the Treaty of Neutrality, Conciliation and Judicial Settlement, May 30, 1928, Greece-Italy, 95 L.N.T.S. 185. That provision does not provide support for the tribunal’s contention.

Whereas the Megalidis case provides some support for the rule under discussion, the Iloilo Claims decision may be regarded as authority for a contrary view. F. Nielsen, American and British Claims Arbitration 382 (1926). In that case, before a British-American Claims Commission in 1925, claimants suffered damage at Iloilo caused by Filipino insurgents during the interval between the signature and ratification of the Treaty of Paris, December 10, 1898, Spain-United States, 30 Stat. 1754.


49. Id.

Treaty, even after its entry into force, did not impose on Germany an obligation to refrain from making the sort of transfer involved in the case. "In these circumstances," the court said that it "need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place."1

The Permanent Court of International Justice was faced with a similar problem in the German Settlers in Poland case.2 In that case, the court allowed the German Government and the Prussian State to undertake transactions falling within the normal administration of the country during the period between the signing and entry into force of the Treaty of Versailles. The court approved the transactions even though the effect of those transactions was to finalize the transfer of property owned by the German State to private individuals, thereby removing the property from the operation of the Treaty which called for its passage to Poland.

Another decision containing dicta approving the imposition of pre-ratification obligations on the signatories to a treaty is Ignacio Torres v. The United States, decided by Francis Lieber as umpire in 1871.3 In that case American troops attacked, sacked, and burned the town of Zacualtipan, Mexico, thereby causing damage to the property of a Mexican citizen. The military action occurred subsequent to the signing of the peace treaty of Guadalupe Hildago4 by the United States, but before it had been ratified by the Senate. The umpire rejected the damage claim of the injured party:

How is it, however, when a treaty of peace has been signed, but has not yet been ratified? Many of the best authorities hold that peace begins de jure when it is signed, and not from the day it is ratified

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In the Polish Upper Silesia case the treaty had entered into force and the State concerned had ratified the treaty; moreover, the Court itself appears to have approached the matter from the point of view of whether the acts done prior to ratification constituted a breach of the treaty. One point of view might therefore be that the "good faith" obligation of a negotiating State not to frustrate in advance the objects of the proposed treaty is merely inchoate until the treaty enters into force with respect to that State; but that then it becomes complete on the State's entering into the obligations of the treaty. In drafting article 17, however, the Commission took the position that an independent obligation not to frustrate the objects of a proposed treaty attaches to a State when it takes part in the negotiations or in the drawing up or adoption of the text; and a fortiori when it ratifies, accedes to, accepts or approves the treaty. (footnote omitted).

52. [1923] P.C.I.J., ser. B, No. 6, reported in 1 World Court Reports 297 (M. Hudson ed. 1934).

53. 4 J. Moore, International Arbitrations 3798 (1898).

by the two supreme belligerent powers or the authorities which by the law of the land have alone the right to ratify. This, however, is far from being unconditional. If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction. But it is well understood that a peace is not a complete peace until ratified; that, as a matter of course, the ratifying authority has the power of refusing unless, for that time, it has given up this power beforehand. . . .

B. State Practice

Numerous treaties have included provisions placing obligations on the signatories prior to entry into force. Such provisions oblige the

55. 4 J. Moore, supra note 53, at 3800-01.

56. There are conceptual problems with the establishment of legally binding pre-ratification obligations. "Any arrangement, whether expressed or implied, that a treaty is to take effect for any purposes prior to the completion of the contractual relationship between the signatory parties, is obviously subject to the condition that that relationship be perfected." 2 C. Hyde, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 522, at 1451 (2d rev. ed. 1945). Briggs comments that "[i]t is not inconceivable, however, that certain provisions of a treaty may be intended by the signatory parties to come into force upon signature, although the treaty as a whole is intended to come into force only upon the exchange of ratifications." THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 867 (2d ed. H. Briggs ed. 1952). One possible solution to this problem is to regard the pre-ratification undertaking as a separate agreement that enters into force at the time of signature. See Vienna Convention, arts. 12(1), 24(1), supra note 10, at 287; Bolintineanu, Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention, 68 Am. J. Int'l. L. 672 (1974). From the point of view of domestic American law, such an agreement may be regarded as an executive agreement, which does not require Senate participation. See Memorandum of Law from Monroe Leigh to Senator James Abourezk (October 31, 1975), reprinted in [1975] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 307-16; State Department Circular No. 175 Procedure, Dept. of State Foreign Aff. Manual, Vol. 11, ch. 700, reprinted in A. Rovine, [1974] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 199-215. See also McDougal & Lang, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy I & II, 54 Yale L.J. 181, 534 (1945). As regards SALT see section 33 of the Arms Control and Disarmament Act of 1961 § 33, 22 U.S.C. § 2573 (1976):

[N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

The most frequently cited example of a treaty provision which imposes obligations on the signatories from the date of signature is Article 38 of the General Act of the Conference of Berlin, Feb. 26, 1885, 165 CONSOLIDATED TREATY SERIES 485, 502 (C. Parry ed. 1978). For citations to other treaty provisions, see Research in International Law, supra note 21, at 786; Lauterpacht, The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment, III, 6
signatories to adhere to the terms of the treaty or not to take action that would interfere with the operation of the treaty once it entered into force. It is not uncommon for responsible government officials to make similar representations with respect to treaties signed by


STANDSTILL

On May 6, 1972, Minister Semenov made the following statement: In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the Interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972: The U.S. agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that, pending ratification and acceptance, neither side will take any action prohibited by the agreements after they had entered into force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.

ABM Treaty, supra note 2, 23 U.S.T. at 3459; Interim Agreement, supra note 2, 23 U.S.T. at 3479.

As to the legal effect of the Common Understandings, see the exchange between Senator Percy and Secretary of State Rogers:

II. Question. Will these clauses [understandings and interpretations made available to this Committee by the Administrator when it forwarded this treaty for consideration] have exactly the same force as if they were included in the text of the agreements?

Answer. The agreed interpretations will clearly be binding on both parties.


Concerning the Agreed Statement and Common Understandings appended to the SALT II Treaty, the following exchange took place at hearings of the Senate Committee on Foreign Relations:

The Chairman. Then do the agreed statements and/or the common understandings represent binding obligations of the two parties?

Secretary Vance. The answer is clearly yes. They were signed by the leaders of the two governments involved and there is no question about it.

The Chairman: So, they will not be regarded simply as negotiating history from which to interpret the obligations contained in the treaty, but will have equal, binding force with the treaty itself?

Secretary Vance: That is correct.

their countries but which have not yet entered into force. Article

57. For example, President Carter has repeatedly indicated that the United States regards itself bound by the provisions of the SALT II agreement. In his State of the Union Message in January 1980, he called for "observing the mutual constraints imposed by the terms of [SALT I and SALT II]." The State of the Union Address of January 23, 1980, 16 WEEKLY COMP. OF PRES. Doc. 194, 196 (Jan. 26, 1980). In his news conference of March 14, 1980, he said:

SALT II has been signed by me and President Brezhnev. I consider it binding on our two countries . . . .

But my present intention, within the bounds of reciprocal action on the Soviet Union and consultations with the Senate and, to some degree, the House leadership, I intend to comply with the provisions of SALT II.

Ordinarily, when a treaty is signed between the heads of two nations, the presumption is that the treaty will be honored on both sides absent some further development. One further development that would cause me to renounce the treaty would be after consulting with the Members of the Senate to determine an interest of our Nation that might cause such a rejection, in which case I would notify the Soviet Union that the terms of the treaty were no longer binding.

So, there will be two provisos in the continued honoring of the SALT II treaty. One is that the Soviets reciprocate completely, as verified by us, and secondly, that the consultations that I will continue with the Senate leadership confirm me in my commitment that it's in the best interests of our country to do so.


On March 19, talks commenced in Geneva between the United States and Soviet governments to discuss plans for carrying out the provisions of SALT II. Soviet representatives refused, however, to engage in discussions on procedures for complying with the treaty in apparent reaction to President Carter's news conference statement that there might be circumstances under which the United States would renounce the agreement even if the Soviet Union continued to adhere to its terms. See Burt, Soviet Balks at Geneva Discussions on Carrying Out the Arms Accord, N. Y. Times, March 20, 1980, at 1; Whitney, Complying with Arms Pact, N. Y. Times, March 24, 1980, at A8.

See also the letter of June 15, 1979, of Elliot Richardson, Ambassador at Large, Special Representative of the President for the Law of the Sea Conference, to Congressman Gerry Studds, concerning the legal effect of signature by the United States of a Law of the Sea treaty on United States unilateral deep seabed mining legislation:

**Question 24.** What is the legal effect of signature of the treaty on unilateral ocean mining?

**Answer.** United States signature of a Law of the Sea treaty would not necessarily have an effect on unilateral ocean mining undertaken pursuant to U.S. legislation now pending before Congress. The United States would be bound by the treaty only upon deposit of its instrument of ratification and the treaty's entry in force pursuant to final clauses contained in the treaty itself. Signature only serves as a preliminary indication of intent to become a party and, under customary international law, imposes no obligation other than refraining from acts which would defeat the object and purpose of the treaty. This very general obligation continues only until such time as it becomes clear that the State no longer intends to become a party to the treaty. Signature would not impose any obligation to abide by the
(1)(b) of the Statute of the International Court of Justice provides that "international custom, as evidence of a general practice accepted as law" shall be a source of law for the court.68 Clive Parry has called international custom a "practice followed in the persuasion that it is binding."69 Treaty provisions may be evidence of such a practice and in that way "may . . . exercise their effects, qua evidence of customary international law, upon nonparties."60 The statements of responsible government officials may also be evidence of what practices states regard as legally obligatory. While certainly not conclusive, the treaty provisions and the public statements of government officials do provide further support for the existence of a pre-ratification obligation upon the signatories to a treaty.

C. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties61 provides in Article 26 that "every treaty in force is binding upon the parties to it substance of the treaty itself, and the United States would still be free to regulate United States activities undertaken as high seas rights. Moreover, refusal or likely refusal of the U.S. to ratify would probably influence the ratification decisions of other major powers, and thus could affect customary international law.

The legislation now pending before Congress is designed to be compatible with the eventual ratification and entry into force for the United States of a Law of the Sea treaty. Seabed mining undertaken pursuant to it will not in any way defeat the object or purpose of the treaty.

Letter from Elliot Richardson to Gerry Studds (June 15, 1979), reprinted in Law of the Sea: Hearings on H.R. 2759 Before the Subcomm. on Oceanography of the Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 206 (1979). McNair reproduces a Report by the Attorney-General and the Queen's Advocate dated May 15, 1857 to the same effect. That report contains the following language:

That Altho' the Convention between Her Majesty and the Republic of Honduras has not yet been ratified, yet the ratifications, when exchanged, will relate back to, and confirm the Convention, as from the 27th of August 1856. No Act can in the mean time be properly done by Her Majesty . . . which may at all affect any of the stipulations of the Treaty.

McNAm, supra note 21, at 201.

There are, however, examples of official statements to the contrary. See, e.g., Statement of Secretary Hull to the British Ambassador:

This Government considers that, in the case of any treaty or convention to which it is a signatory, it has not accepted any obligations or acquired any rights until it has duly ratified such instrument in accordance with its constitutional procedure and until the requirements of the treaty or convention with reference to exchange or deposit of ratification also have been fulfilled by it.

Reprinted in 5 G. Hackworth, supra note 56, at 199.

58. I.C.J. Statute, art. 38(1)(b).


61. See Vienna Convention, supra note 10.
and must be performed by them in good faith." 62 This principle, *pacta sunt servanda*, is described by the International Law Commission as "the fundamental principle of the law of treaties." 63 Since the obligation of good faith performance is dependent upon a treaty's being in force, the determination of when a treaty enters into force with respect to a party is critical. Article 24 (1) specifies the basic rule that "a treaty enters into force in such a manner and upon such date as it may provide or as the negotiating States may agree," 64 and Article 24 (2) provides that "failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established." 65 Article 28 denies retroactive effect to a treaty, "unless a different intention appears from the treaty or is otherwise established." 66 These provisions, read together, express the general principle that treaties do not have legal effect before their entry into force.

The Vienna Convention also contains an exception to this general principle in Article 18:

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. 67

Article 18 represents the codification of a rule of customary international law, as it was developed in the decisions of international tribunals and state practice, and was refined in the work of the International Law Commission and the Vienna Conference on the Law of Treaties.

The provision which became Article 18 of the Vienna Convention has its origin in Article 9 of the Harvard Draft Convention on the Law of Treaties. The Harvard Draft reads as follows:

Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the

62. *Id.* at 292.
64. Vienna Convention, *supra* note 10, at 292.
65. *Id.*
66. *Id.* at 293.
67. *Id.* at 291.
treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.  

The Comment to Article 9 states that the Article "does not envisage a legal duty, e.g. a duty under international law . . . . Under Article 9 a signatory is only under a duty of good faith to refrain from the action referred to therein." The Comment continues:

The essential distinction between the two kinds of duty is that non-performance of the former involves important legal consequences—the responsibility of the non-performing party and its liability to make reparation for any losses or damages sustained by the other party or parties; whereas non-performance of the latter produces no such legal results. It may expose the non-performing State to the charge of bad faith or may impair its good name and reputation, but it does not render such State liable to damages for violation of a legal obligation, because no legal obligation existed which could be violated.

Professor Brierly, Special Rapporteur on the Law of Treaties, adopted Article 9 of the Harvard Draft Convention (with inconsequential alterations) in the Draft Convention he submitted to the Third Session of the International Law Commission in 1951. In his Comment, Professor Brierly made clear his belief that the Article states a moral rather than a legal obligation. In his report the following year, the provision was omitted. Professor Brierly commented that:

A certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf and its ratification, that would render ratification by other States superfluous or useless. This material is, however, of too fragmentary and inconclusive a nature to form the basis of codification.

Sir Hersh Lauterpacht succeeded Professor Brierly as Special Rapporteur on the Law of Treaties. In his report for the Fifth Session of the International Law Commission in 1953, Lauterpacht included an Article entitled Signature. The Comments to this Arti-

68. Research in International Law, supra note 21, at 778.
69. Id. at 781.
70. Id.
72. Id.
74. Id. at 54.
article make it clear that Lauterpacht's views differ significantly from those expressed by the Harvard Draft and Professor Brierly. Lauterpacht regarded signature as having "the effect of obliging the signatories to abstain, prior to ratification, from a course of action inconsistent with the purpose of the treaty" and believed "that obligation constitute[d] a legal, and not merely a moral, duty." In response to Professor Brierly's contention that the relevant legal material was of "too fragmentary and inconclusive a nature to form the basis of codification," Lauterpacht maintained that "judicial practice . . . is as complete as can be desired in the circumstances." The next Special Rapporteur, Sir Gerald Fitzmaurice, followed the Lauterpacht approach.

Sir Humphrey Waldock, who succeeded Sir Gerald Fitzmaurice as Special Rapporteur, concurred in the views of Lauterpacht and Fitzmaurice regarding the existence of a legal obligation during the period following signature and prior to the entry into force of a treaty. That obligation was extended to the negotiating period, prior to signature, in the Draft Articles of 1962 and 1965. The pertinent article which was the immediate predecessor of Article 18 of the Vienna Convention, reads:

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

1. The signature of a treaty constitutes an assumption of a binding obligation in all cases in which the parties expressly so agree or where, in accordance with Article 6, no confirmation of the signature is necessary.
2. In all other cases the signature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies the obligation, to be fulfilled in good faith:
   (a) To submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection;
   (b) To refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed.

77. See note 74 supra.
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(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.82

The Commentary of the International Law Commission to this article, Draft Article 15, notes, "that an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted."83 Discussion of Draft Article 15 in the nineteenth and twentieth meetings of the Committee of the Whole evidences a general agreement that the portion of the Draft Article (subparagraphs (b) and (c)) which eventually became Article 18 "were acceptable and conformed to general rules of international law"84 and were "accepted . . . both in doctrine and in practice."85

The Vienna Convention on the Law of Treaties was the product of a conference in which 110 nations participated.86 The Draft Articles presented to the conference were the result of twenty years of study and debate. As the foregoing discussion has shown, Article 18 underwent considerable discussion and modification, although from the time of the Lauterpacht draft in 1953, there was general agreement that the obligation contained in Article 18 existed as a matter of customary international law. When and if the Vienna Convention enters into force, states that are parties will of course be subject to the obligations imposed by Article 18. But the Vienna Convention has not yet entered into force. Even as an unratified multilateral convention, though, it may be regarded as evidence of a customary rule. Judge Baxter of the International Court of Justice has argued persuasively that there are good reasons for regarding multilateral conventions that propose to codify rules of customary international

84. United Nations Conference, First Session, Comments of Mr. Bindschedler of Switzerland, supra note 10, at 97.
85. United Nations Conference, First Session, Comments of Mr. Jagota of India, supra note 10, at 98. Interestingly, a Soviet Representative believed that "subparagraphs (b) and (c) had a perfectly sound basis in positive international law" and that "no provision of the article was prejudicial to the sovereign right of a State to withdraw from the treaty at any time before it finally became binding." United Nations Conference, First Session, Comments of Mr. Lukashuk of the Ukrainian Soviet Socialist Republic, supra note 12, at 100.
law as evidence of those rules. While the Vienna Convention has not yet entered into force, good reasons also exist for giving weight to those of its provisions that the drafters regarded as codifying existing customary rules. Judge Lachs, writing in dissent in the North Sea Continental Shelf Cases, said: "It is generally recognized that provisions of international instruments may acquire the status of rules of international law. Even unratified treaties may constitute a point of departure for a legal practice."88

Finally, the process of hammering out the Convention's text may, in itself, lead to clarification of a norm of customary international law. In the North Sea Continental Shelf Cases, Denmark and the Netherlands advanced the argument, concerning the status of a certain rule embodied in the Geneva Convention on the Continental Shelf, that "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference. . . ."89 Although the court rejected this argument, it did so primarily because the Article in question "was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or as an emerging rule of customary international law."90 In this respect Article 18 is quite different because the prevalent view in the International Law Commission from at least 1953 on was that Article 18 codified an existing rule of customary international law.

III. BASIS OF THE OBLIGATION: THE THEORY OF ABUSE OF RIGHTS

There is growing agreement that the obligation not to defeat the object or purpose of a treaty after signature but prior to its entry into force is legal in nature. It has come to be regarded not simply as a moral admonition, but as a binding obligation whose breach entails legal consequences. This is certainly the opinion of the last three International Law Commission Special Rapporteurs on the law of treaties.91 That such an obligation exists is the import of Article 18 of the Vienna Convention.92 While this view also finds support in recent scholarly literature,93 the primary legal materials on which it

87. Baxter, supra note 60, at 36-56.
89. Quoted by the Court in North Sea Continental Shelf Cases, [1969] I.C.J. 3, 38.
90. Id.
91. See text accompanying notes 61-90 supra.
92. Id.
93. See notes 20 & 22 supra.
is based are fragmentary and ambiguous. No international tribunal has ever provided an analysis of the principle or given it more than the most cursory treatment. Although the principle is cited with approval in several cases,\textsuperscript{94} it appears to have provided the rule of decision only once, and in that case the actions of the offending state were reprehensible and probably illegal on other grounds.\textsuperscript{95} State practice is also fragmentary and inconclusive.\textsuperscript{96} Various theoretical bases have been advanced for the obligation. The principle of good faith is mentioned. The principle of abuse of rights has been invoked. The thesis of this Article is that the obligation under consideration is a legal obligation, as demonstrated in the preceeding part. Clarification of the theoretical basis of the obligation is necessary to allow the contours of the obligation to be defined.

The obligation can logically derive from only two sources: the signed treaty itself or general international law. Since the treaty is not yet in force, and assuming that it contains no provisions giving it either retroactive or provisional effect, it is difficult to see how any pre-ratification obligations can flow directly from it. To impute binding force to a treaty not yet in force would run counter to the principle of \textit{pacta sunt servanda}. Leaving the signed treaty aside as a basis of obligation, one possible basis for finding an obligation would be a presumed agreement of the signatories to the effect that it was their intent that such an obligation be imposed. Intent to enter into what would amount to a side agreement might be inferred from the context of the negotiations. For example, the SALT II agreement is part of an on-going process of negotiations. That process began more than ten years ago and in the contemplation of the parties is to extend into the future. If one of the signatories were to take actions prior to ratification that violated the terms of the agreement and perhaps made execution of its provisions impossible, the larger process of negotiations might be detrimentally affected. Thus an agreement to be bound by the legal obligation not to defeat the treaty's purpose might be inferred. While this theory is superficially attractive, international tribunals are reluctant to find that a state has entered into binding consensual arrangements without the clearest expressions of intent to be bound.\textsuperscript{97}

\textsuperscript{94} See text accompanying notes 41-55 supra.
\textsuperscript{95} Megalidis v. Turkey, 8 Recueil des Décisions des Tribunaux Mixtes 386 (1928).
\textsuperscript{96} See text accompanying notes 56-60 supra.
\textsuperscript{97} In the \textit{North Sea Continental Shelf Cases}, Denmark and the Netherlands argued:

\textit{[T]he Convention [on the Continental Shelf] or the regime of the Convention, and in particular of Article 6, has become binding on the Federal Republic [of Germany] . . . because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention . . . .}
In the *Megalidis* case, the tribunal indicated that it regarded the obligation to be based on the principle of good faith. Good faith, however, cannot impose a legal obligation on a state. An obligation which a state undertakes or which is imposed by some other general principle of international law may carry with it the additional obligation of good faith performance. Or it may be said that the reason an assumed obligation must be performed at all rests on the principle of good faith. Whatever is meant by the term good faith, a state is clearly not obliged to do or refrain from doing an act simply because that act is required or forbidden by notions deriving from the general principle of good faith. From one point of view, it may even be argued that “good faith requires first and foremost scrupulous respect for the freedom which international law grants to sovereign States.”

The International Court of Justice has recognized that the principle of good faith alone is not sufficient to give rise to an international obligation. In the *Nuclear Tests Case*, the court held that a state could be bound by a unilateral declaration. The state was bound because the court found that the state officials making the declarations intended that the state should become bound by the declarations. According to the court, it is the intention to be bound that confers on a declaration the character of a legal undertaking. Once the obligation has been assumed, it may be appropriate to say that the obligation is binding because of the principle of good faith. Thus, the court in the *Nuclear Tests Case* said that “[J]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on

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good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”

States have an obligation, however, not to act in such a way as to injure other states. Such obligations are not consensual, but are imposed by general principles of international law. International tribunals have applied such principles with specific reference to the obligation under consideration. Professor Schwarzenberger regards the dicta of international tribunals as “justify[ing] the prognosis that . . . a fraudulent exercise of a right, which is alleged to be based on rules underlying the principle of sovereignty, amounts to an illegal disappointment of the expectations of the other contracting party and constitutes an international tort.” The Permanent Court of International Justice in the Case concerning Certain German Interests in Polish Upper Silesia adopted a similar approach, making use of the theory of abuse of rights to evaluate the legality of certain actions of the German government during the period between the signature of the Treaty of Versailles and its entry into force. Allegedly, the acts were contrary to the terms of the Treaty and would have interfered severely with the operation of the Treaty once it did enter into force. In that case, Germany had the legal right to effect transfers of property that it owned in territories which were then under German sovereignty. Since the Treaty was not yet in force, German transfers could not be illegal as in violation of treaty obligations. The court, however, thought it proper to evaluate the legality of the German acts under the abuse of rights theory. If the German transfer could be shown to be an abuse of rights, it would be illegal. The court held, however, that an abuse of rights could not be presumed, thus placing the burden on Poland, the state alleging that an abuse of rights had occurred. The court regarded the German transfer as part of the normal administration of its sovereign territory.

Resort by international tribunals to the abuse of rights theory


103. See text accompanying notes 41-55 supra.

104. Schwarzenberger, supra note 24, at 299. See also L. Oppenheim, supra note 102, at 345-47.


106. Id. at 30, 1 World Court Reports at 530.
raises two questions. Is the theory a "general principle of law recognized by civilized nations" so that it is properly part of international law, and, if so, what acts are proscribed by the theory?

The theory of abuse of rights developed in France during the second half of the nineteenth century. According to the usual formulation of the theory, the use of a right may be susceptible of abuse, and thus constitute a fault giving rise to legal liability. The doctrine originally developed in connection with a property owner’s use of his property to cause intentional harm. Thus, in an early French decision it was held to be an abuse of rights for a property owner to construct a false chimney for the sole purpose of interfering with his neighbor’s view. The doctrine was later extended into other areas, like abusive use of legal process, and expanded to include inconsiderate, negligent, or selfish behavior as sufficient to constitute wrongful acts. The abuse of rights doctrine was later


108. Professor Planiol strongly disagrees with this formulation of the theory: This new doctrine [abusive use of rights] is based entirely on language insufficiently studied; its formula “abusive use of rights” is a logomachy, for if I use my right, my act is licit; and when it is illicit, it is because I exceed my right and act without right .... One must not be misled by the use of words; the right ceases where the abuse commences .... What is true is that rights are almost never absolute; for the most part they are limited in their scope, and submitted, as to their exercise, to divers conditions. When one exceeds such limits, or when one does not observe the conditions, one acts in reality without right.

M. Planiol, supra note 107, at 477.

But see Walton, supra note 107, at 503-05. Professor Walton disagrees with Planiol and argues that the traditional formulation correctly places emphasis on the end sought to be achieved by the exercise of a right. “It is the intention to injure, or the want of a lawful motive, which converts an act otherwise lawful into one which is unlawful.” Id. at 505.

Professor Politis formulates the doctrine in these terms: “[T]here is an abuse if the general interest is injured by the sacrifice of a very strong individual interest to another interest which is weaker.” Politis, Le Problème des Limitations de la Souveraineté et la Théorie de L’Abus des Droits dans Les Rapports Internationaux, 6 Recueil des Cours 5, 81 (1925) (trans. by author).

109. See Catala & Weir, supra note 107, at 222-25.

110. Court of Appeal at Colmar, May 2, 1855, [1856] D.P. II 9, cited in Catala & Weir, supra note 107, at 222-23 n.3.

111. See Catala & Weir, supra note 107, at 226; M. Planiol, supra note 107, at 480-84.

112. [I]ntentional harm as the test of liability for the abuse of a right has today secured the approval of both the judges and the legislature.

. . . .
adopted by other civil law countries.113

In 1925 Professor Politis presented a series of lectures at The Hague Academy of International Law in which he argued that the French doctrine of abuse of rights constituted a general principle of international law and thus could be applied by international tribunals.114 In his book The Function of Law in the International Community, published in 1933, Sir Hersh Lauterpacht also enthusiastically embraced this view:

The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right. For the determination of such abuse of rights the question of subjective fault and intention may, but need not always, be material.115

[But] insistence on the presence of an intention to cause harm greatly restricts the scope of liability. . . . In many cases, indeed, the sense of what is fair and reasonable requires that a sanction be imposed on the author of the damage even though he had no intention to harm his neighbor. The defendant merely conducted himself in a negligent, imprudent or careless manner, without having been really motivated by the desire to cause damage to others.

Catala & Weir, supra note 107, at 227. See also Draft Article 147 of the Preliminary Report of the Civil Code Reform Commission of France, which extends liability beyond intentional harm:

Every act or every fact which, by the intention of its author, by its object or by the circumstances in which it occurred, manifestly exceeds the normal exercise of a right, is not protected by the law and ultimately incurs the responsibility of its author.

This provision does not apply to rights which by their nature or by virtue of the law can be exercised in a discretionary manner.

Quoted in de la Morandière, supra note 107, at 27 n.13. In commenting on this proposal de la Morandière notes: "[T]his article is but legislative incorporation of a well-established jurisprudence which finds application in all the fields of private law (family law, property law, law of contracts and obligations, law of judicial proceedings . . . )." Id. at 28.

113. See, e.g., Swiss Civil Code, Art. 2 which provides in pertinent part: "Every person is bound to exercise his rights and to fulfill his obligations according to the principles of good faith. The law does not protect the manifest abuse of a right." The Swiss Civil Code § 2 (I. Williams trans. 1925). See also German Civil Code, Article 226: "The exercise of a right is unlawful, if its purpose can only be to cause damage to another." The German Civil Code § 226 (I. Forrester, S. Goren & H. Ilgen trans. 1975). See also Bolgar, Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine, 35 LA. L. REV. 1015 (1975); Brunner, Abuse of Rights in Dutch Law, 37 LA. L. REV. 729 (1977); Sono & Fujioka, The Role of the Abuse of Rights Doctrine in Japan, 35 LA. L. REV. 1037 (1975).

114. Politis, supra note 108.

115. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY
Lauterpacht thought that "there is . . . no difference of substance between English law and other legal systems. The major part of the law of torts is nothing else than the affirmation of the prohibition of abuse of rights."¹¹⁶

There is some disagreement as to whether the principle of abuse of rights is a general principle of law capable of application by an international tribunal. Professor Guttridge regarded the doctrine as quite unsettled in French law.¹¹⁷ "[I]t must still be considered," he wrote, "to be uncertain both as regards its basis and the degree to which it is applicable to the exercise of legal rights."¹¹₈ Moreover, he regarded the doctrine as a "dangerous expedient, which should only be utilized to prevent manifest injustice,"¹¹₉ and as incompatible with the common law.¹²₀

While Professor Guttridge may be correct in cautioning against wholesale reliance on a doctrine that is ill-defined and provides little guidance for a court, this should not mean that in certain limited situations, clearly demarcated and understood, an international tribunal should not make use of certain aspects of the doctrine. Although approaches to problems may differ, and the abuse of rights doctrine might not fit into the scheme of common law jurisprudence, policy outcomes in similar situations do not markedly differ under common law tort concepts and the continental abuse of rights doctrine.¹²¹ Professor Catala posited that the test for the abusive exercise of a right which has emerged in French law "compares the defendant's conduct with that of a prudent and careful citizen. The exercise of a right is unlawful when the bonus paterfamilias would not have exercised it in the same way as the defendant."¹²² In a companion portion of the same article, Professor Weir argued that in English law "rights tend to contain their own qualifications. Very often this is in terms of 'reasonableness.'"¹²³

The doctrine of abuse of rights has been specifically accepted by international tribunals.¹²⁴ The Permanent Court of International Justice has utilized the principle in the Upper Silesia case, already discussed,¹²⁵ and in the Free Zones case.¹²⁶ Furthermore, interna-

²⁸⁶ (1933).
¹¹⁶ Id. at 295.
¹¹⁷ Guttridge, supra note 107.
¹¹⁸ Id. at 42.
¹¹⁹ Id. at 43.
¹²⁰ Id. at 30.
¹²² Catala & Weir, supra note 107, at 230.
¹²³ Id. at 258.
¹²⁴ See generally B. CHENG, supra note 22, at 121-36.
¹²⁵ See text accompanying notes 41-55 supra.

...
tional tribunals have accepted the more general principle that the discretionary rights of action traditionally regarded as inherent in state sovereignty may be limited in certain situations.

In the Anglo-Norwegian Fisheries case, for example, the International Court of Justice regarded Norway’s delimitation of an exclusive fisheries zone as necessarily a unilateral act. But “the validity of the delimitation with regard to other States depends upon international law.” Judge Alvarez, in his individual and dissenting opinions, had been the most persistent proponent of a theory limiting the discretionary rights of states. In his view, international law has moved beyond what he characterizes as the traditional individualistic regime to a regime of social interdependence. The international law of social interdependence is characterized by, among other things, a concern with both delimiting and harmonizing the rights of states, while condemning the abuse of these rights.

Other individual and dissenting opinions of the International Court of Justice have supported the notion of the relativity of sovereign rights and in that context have elaborated the theory of the abuse of rights. Judge de Castro, in his separate opinion in the Fisheries Jurisdiction case, speaks of the abuse of rights theory as a “safety valve” rule which provides flexibility and permits more just solutions in individual cases. In his separate opinion in the Legal Consequences for States of the Continued Presence of South Africa in Namibia case, Judge Ammoun sought to define a standard for evaluating the legality of the exercise of discretionary power:

"[T]he international judge cannot be denied the right of determining in all circumstances whether proper use has been made of the discretionary power. . . . To pass an opinion in these various situations, a judge cannot rely on his personal judgment, which is bound to be subjective and vary according to the mentality of each judge, his legal, philosophical and ethical outlook, his views on natural law and his cultural and social background. An objective criterion or standard is clearly necessary. Such a criterion is afforded by the general conduct of States and international organizations as a whole. Should the judge further decide to derive criteria from municipal precedents, which abound in such examples as the notion of the bonus paterfamilias . . ., or from powerful moral trends in a given country, they must still be acceptable to other countries in general or be already enshrined in the universal conscience of mankind."

A state’s breach of an obligation arising from the application of
the abuse of rights doctrine will cause the state to be held internation-ally responsible. The Draft Articles on State Responsibility of the International Law Commission provide that "An Act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation."132

Whatever the limitations of the theory of abuse of rights as a gen-eral principle of international law, that theory has been elaborated with sufficient specificity and has obtained sufficient support with re-spect to the obligation not to defeat the object or purpose of a signed but unratified treaty to provide a firm theoretical legal justi-fication for that obligation. The following portion of this Article will examine the scope and content of that obligation.

IV. THE EXTENT OF THE OBLIGATION

The obligation not to defeat the object or purpose of a treaty com-mences when a state signs the treaty.133 Draft Article 15 provided that the obligation commenced when a state "has agreed to enter into negotiations for the conclusion of the treaty,"134 but there was general agreement at the Vienna Conference that this was clearly not a rule of international law,135 and it was accordingly deleted from the final document.136 While domestic law in some nations has been moving in the direction of imposing certain obligations on the parties to negotiations,137 there is no evidence of a comparable trend at the international level.

Any obligations imposed on a signatory should terminate when that state indicates that it will not ratify the treaty, since a signa-tory is under no obligation to ratify a signed agreement, and may refuse ratification for any reason.138 The Vienna Convention regards the obligation as terminated when a signatory state "shall have made its intention clear not to become a party to the treaty . . . ."139 This provision may lead to uncertainty in application, since, as the French delegate pointed out, "the most obvious way for a State to make clear its intention not to become a party to the

133. Vienna Convention, supra note 10, at 291.
138. See note 11 supra.
139. Vienna Convention, supra note 10, at 291.
treaty was for it to frustrate the object of the treaty.”

The content of the obligation as it emerges from application by international tribunals is extremely uncertain and there are few interpretational guides. Various principles, however, may be discerned from the relevant legal materials. First, the obligation in its present form imposes no affirmative duty upon a signatory to do certain acts or to carry out specific provisions of the treaty. The formulation of Article 18 of the Vienna Convention is thus expressive of the general rule: “A state is obliged to refrain from acts which would defeat the object and purpose of a treaty. . . .” The obligation is phrased in purely negative terms—not to do certain acts. In the Iloilo Claims decision, for example, an arbitral tribunal refused to impose the affirmative obligation of keeping order upon the United States in the Philippines during the period between the signing of the Treaty of Peace Between the United States and Spain and its subsequent entry into force.

Second, a signatory may engage in normal activities incident to its sovereignty after signature but prior to entry into force, even though the effect of a particular activity may be to reduce the benefit of the bargain for the other signatory or signatories. In the Upper Silesia case, for example, German transfers of property were upheld as coming within the state’s normal administration of territory over which it had sovereignty. Under this principle, the United States or Canada could engage in the fishing of stocks governed by the provisions of the East Coast Fishery Resources Agreement if such fishing were of the type and magnitude normally engaged in by that country.

Third, a signatory state may do those acts whose consequences would not render provisions of the treaty impossible of performance when the treaty enters into force. The Reporter’s Note to section 314 of Tentative Draft No. 1 of the American Law Institute Restatement of the Foreign Relations Law of the United States (Revised)

gives the following example:

Issues have been raised as to the application of these principles to the Strategic Arms Limitation Treaty signed in 1979. Testing a new weapon in contravention of a clause prohibiting such a test would presumably violate the purpose of the agreement since the test's consequences might be irreversible. Failing to dismantle a weapon scheduled to be dismantled under the treaty might not defeat its object since the dismantling could be effected later.146

There is some confusion concerning whether intentional action in bad faith is required for a violation of the obligation or whether the rule incorporates an objective standard. Sir Hersh Lauterpacht, in his 1953 Report on the Law of Treaties to the International Law Commission, said that “the purpose of that rule is to prohibit action in bad faith deliberately aiming at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration.”147 In Draft Article 15, the obligation was stated in the following manner: “A state is obliged to refrain from acts tending to frustrate . . .”148 The final wording of Article 18 is: “A State is obliged to refrain from acts which would defeat . . . .”149 The American delegate, Mr. Kearney, favored changing “tending to” to “which” because that change would, in his view, emphasize the element of intent required for a violation.150 Mr. Riphagen of the Netherlands, however, thought that this change would have precisely the opposite effect.151 Subsequently, when Draft Article 15 was referred to the Drafting Committee for further consideration,152 the Committee replaced the words “acts tending to frustrate the object of a treaty” with “acts which would defeat the object and purpose of a treaty.”153 The Committee stated that “it wished to emphasize that that was a purely drafting change, made in the interests of clarity. . . . The change in no way affected the substance of the provision and did not widen the obligation imposed on States by article 15.”154

The most likely conclusion to be drawn from the discussions in Vienna, the prior work of the International Law Commission, and the decisional law is that the purpose of the rule is to prevent a signatory from claiming the benefits to which it is entitled under the treaty while at the same time engaging in acts that would materially

149. Vienna Convention, supra note 10, at 291.
154. Id.
reduce the benefits to which the other signatory or signatories are entitled. Actual proof of state of mind is probably difficult or impossible in most situations, especially since the burden of proving a violation is on the state claiming that a violation has occurred.\textsuperscript{155} Therefore, an objective standard is necessary, and one like that proposed by Judge Ammoun, which incorporates the general conduct of both states and international organizations, would serve well to effectuate the purpose.\textsuperscript{156}

V. Conclusion

In giving content to international obligations, like the one under consideration, extreme care must be taken not to impose legal responsibilities that exceed the reasonable expectations of the states involved. Rather than discourage actions contrary to the spirit of a signed but unratified treaty, the imposition of such legal obligations may in fact deter states from signing treaties in order to preserve their freedom of action when delay in ratification is considered a possibility. Such a consequence would be generally harmful to the process of international agreement and might especially inhibit the conclusion of multilateral agreements. The reasonable expectations of states must be ascertained and evaluated on a case-by-case basis in light of a full appreciation of the history of the particular negotiations and with a view toward effectuating the real long-term objectives of the states involved. One major consideration must be the preservation and furtherance of the particular negotiating process itself, for it is ultimately the fostering and strengthening of the process by which nations eventually reach mutually satisfactory agreements that is the real challenge facing international law.


\textsuperscript{156} See text accompanying note 131 \textit{supra}, describing the test proposed by Judge Ammoun. A similar development occurred in the French doctrine of abuse of rights, where originally an evil intention had to be shown, but later such intention could be inferred from the acts themselves. See note 112 \textit{supra}. 