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THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES: RECONCILING TEXT WITH POLITICAL REALITY

Shirley V Scott*

Since 1945 there has been a proliferation of multilateral treaties but the vast majority of these treaties have not solved the problems they were designed to solve. This article proposes a method of treaty interpretation by which to make sense of this enigma and by which to reconcile the political experience of an individual treaty with its legal text. The Theory of Cognitive Structures of Cooperation concludes that multilateral treaties have proved useful for governments, not necessarily because they have solved the problems of the environment, security, or human rights but because they have served as devices by which to contain and manage specific issue on the international agenda.

A useful distinction has sometimes been drawn between theories *of*, and theories *about*, international law.[1] As applied to multilateral treaties, the former would engage with aspects of treaty law while the latter would be concerned with political questions that arise from a position external to the normative framework of principles, rules, and concepts of international law. Political questions asked *about* treaties include assessing the effectiveness of a treaty regime or the reasons for non-compliance, whereas questions regarding treaties arising from within the system of international law include those concerning the precise nature of the legal obligations a treaty imposes on a State or the specification of allowable reservations. This article proposes that the distinction between theories *of* and *about* international law needs to be extended to theories of treaty interpretation. Within the international legal system, the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties (VCLT)[2] are appropriate to the interpretation of a treaty

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1 Myres S McDougal and W Michael Reisman "'The Changing Structure of International Law' – Unchanging Theory for Inquiry" (1965) 65 Colum L Rev 810, 813.

2 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

when the question asked of the treaty text is one internal to the international legal system, but are arguably not appropriate when the question asked of the treaty pertains to the political life of the treaty. Reading the text of a treaty in accordance with the VCLT when the question being asked of the treaty is of a political nature risks giving rise to scepticism that the treaty is of no more real-world significance than a "mere scrap of paper".[3]

This article outlines a theoretical approach to the political interpretation of treaties developed not as an alternative, but as a complement, to the legal interpretation of treaties.[4] The Theory of Cognitive Structures of Cooperation (CSC) was developed as a basis for better understanding the "real world" significance, as opposed to the legal meaning, of multilateral treaties that represent the accommodation of divergent political positions. The theory will be explored in this article through its application to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[5]

I THE MULTILATERAL TREATY ENIGMA

One of the most striking features of the international system since World War Two has been the huge increase in the number of multilateral treaties and the breadth of uses to which the multilateral treaty instrument is being put. The vast transformation that has taken place in international law since World War Two, one which has no equal in the four centuries or so of modern international law,[6] has been brought about largely by multilateral treaty. The multilateral treaty instrument has been used to establish a plethora of international bodies, including those of a judicial or quasi-judicial nature. The international community has come to rely on the multilateral treaty instrument for addressing some of its most serious problems, including use of force and climate change.[7]

As a political phenomenon the striking growth in the number of multilateral treaties and the breadth of subjects addressed is puzzling for at least two reasons. The first aspect of the multilateral treaty political phenomenon deserving of explanation is as to why States have chosen to negotiate so many treaties – let alone those with such idealistic sounding objectives as protecting the

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3 "Just for a word – 'neutrality', a word which in wartime has so often been disregarded, just for a scrap of paper – Great Britain is going to make war". Theobald von Bethman-Hollweg to Sir Edward Goschen (4 August 1914) Letter cited in EM Beck (ed) *John Bartlett Familiar Quotations: A Collection of Passages, Phrases and Proverbs Traced to Their Sources in Ancient and Modern Literature* (15 ed, Little Brown & Co, Boston 1980).

4 This theory is developed in Shirley V Scott *The Political Interpretation of Multilateral Treaties* (Martinus Nijhoff, The Hague, 2004) [*The Political Interpretation of Multilateral Treaties*].

5 Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13.

6 Robert Y Jennings "An International Lawyer Takes Stock" (1990) 39 ICLQ 513, 517.

7 "The climate change regime is the world's principal response to the problem of global warming". Ronald D Brunner "Science and the Climate Change Regime" (2001) 34 Policy Sciences 1, 1.

environment or respecting the dignity and worth of the human person – when the evidence of national priorities overwhelmingly indicates that national foreign policy decision-makers place most importance on the realist emphases of national security and economic well-being.[8] The second, related, aspect of the multilateral treaty phenomenon deserving of explanation follows on from the first, and that is as to why groups of States keep relying on the multilateral treaty instrument to address issues of concern when evidence shows that multilateral treaties have generally not solved the problems they were created to solve. While most "make a positive difference" they "fall short of providing functionally optimal solutions".[9] Even where a problem – such as ozone depletion – appears to have been solved by a regime, this may have been because of factors external to the regime; once industry became interested in the production of chloroflurocarbon substitutes it made business sense to save the ozone layer.[10] Multilateral treaties appear well-suited to improving a situation but not, the evidence would seem to show, to actually solving the problem that gave rise to their creation.

The issue of climate change has brought the multilateral treaty enigma to the fore. Experts are confident that, even if the emissions reduction targets contained in the Kyoto Protocol are met, it will "represent a rather small down payment on the degree of carbon reduction that will be needed over the next fifty to one hundred years if substantial protection of the climate is to be won."[11] There is an urgent need to better understand the multilateral treaty phenomenon in world politics so as to offer solutions as to what can be done when incremental progress is not enough.

II ATTEMPTS TO RESOLVE THE ENIGMA

How have international lawyers and political scientists responded to what could be dubbed the multilateral treaty enigma? It is fair to say that most political scientists have not recognised the enigma because they have not considered the multilateral treaty phenomenon to be of great political moment. Mainstream International Relations has managed throughout this period to avoid recognising international law as a serious dynamic in world politics. Interestingly, in the study of international environmental politics – a subfield of International Relations in which the phenomenon simply could not be ignored – rhetoric has generally referred to MEAs – multilateral environmental agreements – or IEAs – international environmental agreements – thereby downplaying the fact that the international legal system has been central to global governance in this area. Scholars have

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8 Charles W Kegley Jr and Eugene R Wittkopf *World Politics: Trend and Transformation* (9 ed, Thomson Wadsworth, Belmont (CA), 2004) 531.

9 Arild Underdal "Conclusions: Patterns of Regime Effectiveness"' in Edward L Miles and others *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT, Cambridge (Mass), 2002) 433, 435.

10 D MacKenzie "Now it Makes Business Sense to Save the Ozone Layer" (29 October 1988) *New Scientist* 25.

11 R T Pierrehumbert "Climate Change: A Catastrophe in Slow Motion" (2006) 6 Chi J Int'l L 573, 593.

identified a number of factors, including the slow speed of negotiations, the lowest common denominator approach, and creative ambiguity, that help explain why MEAs have not solved the problems they were created to solve.[12] Much less attention has been paid to understanding the multilateral treaty phenomenon as a whole.

The principal vehicle by which the multilateral treaty phenomenon has been addressed within political science has been the concept of a "regime". The heyday of regime theory is probably over, and its utility to understanding the multilateral treaty phenomenon has in any case been circumscribed by the fact that the relationship between international regimes – defined as "sets of principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations"[13] – and international law was never defined. But many of those entities – such as the nuclear non-proliferation regime – are based on one or more multilateral treaties and in most cases it is fair to substitute the term "regime" with that of "treaty regime".[14] Regime theory, like the analysis of MEAs, downplays the fact that multilateral treaties are part of a large and complex system of international law. But if we roughly equate a regime with a multilateral treaty regime, then the regime theorists *could* be said to have tackled the enigma of the multilateral treaty phenomenon.

Regime theorists tell us that regimes help self-interested States to coordinate their behaviour such that they may avoid collectively suboptimal outcomes, and that States have an interest in maintaining existing regimes even when the factors that brought them into being are not relevant.[15] Translation: you would not expect States to want to negotiate multilateral treaties, but it seems that sometimes they do and this must be because things would be worse without the regimes! This is what could be dubbed the "negative default" position. Extended to the puzzle of why States continue to negotiate multilateral treaties if multilateral treaties are not solving the problems they were designed to solve, the negative default position poses the question: "what's the alternative?" The negative default position would seem inadequate as a way of addressing the enigma because of the sheer scale of the phenomenon we are exploring. Maybe it could account for the existence of some

12 Aynsley Kellow "A New Process for Negotiating Environmental Agreements? The Asia-Pacific Climate Partnership Beyond Kyoto" (2006) 60 Australian Journal of International Affairs 287, 290.

13 Stephen D Krasner "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen D Krasner (ed) *International Regimes* (Cornell University Press, Ithaca (NY), 1983) 2.

14 Shirley V Scott *International Law in World Politics: An Introduction* (Lynne Rienner, Boulder (Col), 2004) 163.

15 Andreas Hasenclever, Peter Mayer and Volker Rittberger "Integrating Theories of International Regimes"' (2000) 26 Review of International Studies 3.

twenty or thirty such treaties but during the half-century between 1945 and 1995 over four thousand multilateral treaties were concluded.[16]

Some political scientists, particularly those interested in MEAs, have moved beyond the enigma of the multilateral treaty phenomenon to devote their efforts to the seemingly more practical question of how to enhance regime effectiveness. But the multilateral treaty enigma manifests in ongoing debate in the literature on regime effectiveness as to what should be the criteria against which to measure an "effective" regime. In contrast to the common-sense measure of the treaty having achieved its goals,[17] the negative default position suggests the option of assessing treaties according to whether things are better than they would have been without the treaty.[18] Without a generally agreed explanation of the multilateral treaty phenomenon, it is very difficult to judge the success of any particular treaty, let alone the phenomenon as a whole. In the literature on climate change, for example, one writer deemed the climate change regime a success on the basis that scientific research has become integrated through comprehensive computer models, so helping build an epistemic community and to bring the issue onto the agenda of governments.[19]

In the legal literature, the multilateral treaty enigma manifests less at the big picture level than in analyses of individual treaties. Here there often seems to be a mismatch between the language of a treaty text and reality. Take as an example, CEDAW. If the treaty is read at face value this appears as a very significant legal commitment on the part of States to comprehensively abolishing discrimination against women; whether in the public or the private sphere, and even if unintended. States party to CEDAW undertake to condemn discrimination against women in all its forms, and to pursue a policy of eliminating such discrimination. CEDAW outlines all the areas in which obstacles to the achievement of women's human rights exist and to state the norm of equality in each area. Some 181 States have signed on to this treaty, albeit with many reservations. The trouble is that the enigma of the multilateral treaty phenomenon remains. If States had really sought in 1979 to

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16 Calculations based on the information provided in Christian L Wiktor *Multilateral Treaty Calendar 1648-1995* (Martinus Nijhoff, The Hague, 1998).

17 Thomas Bernauer "The Effectiveness of International Environmental Institutions: How We Might Learn More" (1995) 49 International Organization 351, 369.

18 Keohane, Haas and Levy have proposed that we regard an environmental regime as effective if things would be worse without it. Robert O Keohane, Peter M Haas and Marc A Levy (eds) *Institutions for the Earth: Sources of Effective Environmental Protection* (MIT, Cambridge (Mass), 1994) 7. Young has similarly suggested that a regime be considered effective to the extent that its operation impels actors to behave differently than they would if the institution did not exist or if some other institutional arrangement were put in its place. Oran R Young "The Effectiveness of International Institutions: Hard Cases and Critical Variables" in James N Rosenau and Ernst-Otto Czempiel *Governance without Government: Order and Change in World Politics* (Cambridge University Press, Cambridge (Mass), 1992) 160, 161.

19 Paul Edwards "Global Comprehensive Models in Politics and Policy-making" (1996) 32 Climatic Change 149, 150, cited in Ronald D Brunner "Science and the Climate Change Regime" (2001) 34 Policy Sciences 1, 16.

eliminate all forms of discrimination against women, how was Zoelle able to conclude in 2000 that the "only driving force behind the advancement of women's human rights [has been] women themselves"?[20]

Faced with a seeming mismatch between a treaty text and political reality, international lawyers understandably tend to look through their legal lenses. The subtext in discussion of multilateral treaties on the environment and human rights tends to be that treaties are generally pretty good sorts of things, albeit with much unrealised potential. The mainstream approach to reconciling the legal text with political reality has, then, been to accept the treaty at face value as a normative statement to which governments have agreed, albeit with many and often extensive reservations. A lawyer starting from the premise that multilateral treaties are generally good, albeit with unrealised potential, tends to view the task as then being to cajole, embarrass, or push States into removing their reservations and better implementing their obligations. This is in one sense the normative role of law at play; it is why non-governmental organisations (NGOs) are so keen to get multilateral treaties such as the Rome Statute of the International Criminal Court[21] or the Landmines Convention[22] in place even without the initial support of those most important to the treaties' ultimate effectiveness. But as a positive – as opposed to normative – explanation of what we have witnessed over the last sixty years, this approach leaves in place the multilateral treaty enigma, for it still does not answer in a way satisfactory to a realist or structuralist scholar just why States would have wanted to take on those commitments in the first place. Could national decision-makers really have been bothered to practise hypocrisy on this large a scale?

III THE NEED FOR A POLITICAL THEORY OF TREATY INTERPRETATION

There are three schools of treaty interpretation in international law. The textual approach seeks to understand a treaty in terms of its plain and ordinary meaning, the subjective school looks to the negotiating history to determine intentions, and the teleological approach interprets the treaty text in light of its apparent overall object and purpose as gleaned from the treaty.[23] These three schools are combined in articles 31 and 32 of the VCLT. Article 31, widely regarded as reflecting customary international law, provides that, unless it can be established that the parties intended to give a special meaning to a term, treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

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20 Diana G Zoelle *Globalizing Concern for Women's Human Rights: The Failure of the American Model* (Palgrave Macmillan, Houndmills (UK), 2000) 66.

21 Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3.

22 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (18 September 1997) 2056 UNTS 241.

23 Kenneth J Vandervelde "Treaty Interpretation from a Negotiator's Perspective" (1988) 21 Vand J Transnat'l L 281, 287-288.

purpose." The context for the purpose of the interpretation of a treaty shall comprise the whole treaty text, including its preamble and annexes. In addition to the context, account shall be taken of any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions, as well as any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in relations between the parties. Where an application of article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, article 32 provides for supplementary means of interpretation, including reference to the preparatory work of the treaty and the circumstances of its conclusion.

The VCLT thus places greatest emphasis on the textual approach. This is perhaps not surprising given that the international legal system is grounded primarily in legal positivism, which maintains a clear distinction between law and its political context. The VCLT and customary international law offer a guide to the legal interpretation of a treaty in the sense that the stipulated approach is incorporated into a legal document and intended for use by those working *within* the system of international law. A multilateral treaty addressing an issue on which political positions vary lives a double life, however. On the one hand, the treaty is a principal source of legal obligations for parties to that treaty. On the other, a major multilateral treaty on the environment or human rights represents a political compromise, the product of a process of negotiation. This is well-recognised by the subjective school of treaty interpretation, but the subjective school is not as influential in contemporary international law as is the textual approach. It is the contention of this article that what has been referred to as the "multilateral treaty enigma" can be resolved and that a treaty text can be reconciled with evidence of its political life. But in order to do so it must be recognised that a multilateral treaty is both a legal and a political entity and that a treaty needs to be read differently if it is to be understood in positive terms as a political phenomenon as distinct from when it is being read as a normative legal document. An international lawyer may well engage in both forms of treaty interpretation depending on the question being asked of the treaty.

Professor McLachlan has recently reminded us of the importance of what he referred to as a neglected principle of treaty interpretation: namely that of systematic integration within the international legal system.[24] McLachlan emphasised that all treaties are predicated for their existence and operation on being part of a much broader system of international law and must be interpreted in that context. However, as he points out, to say that a treaty needs to be interpreted in a broader legal context, does not in itself indicate how to go about doing so. In the same way that the place of the treaty in the broader legal system needs to be taken into account when undertaking a legal interpretation of a treaty, so does a political interpretation of a treaty text need to take account of the placement of that treaty within a broader political system. Just as Professor McLachlan

24 Campbell McLachlan "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279.

proceeded to outline a process for the application of systematic integration,[25] so this article will now proceed to outline a framework by which to undertake the political interpretation of a multilateral treaty. The framework has been developed in conjunction with the analysis of multilateral treaties addressing significant environmental, human rights, arms control, and sovereignty issues.[26] It was not developed with treaties of a narrow technical nature in mind but the precise scope of its application is yet to be clarified. Just as there has been a debate within international law as to whether different principles require different principles of interpretation,[27] so will future application of Cognitive Structures of Cooperation (CSC) theory to a range of treaties help refine the scope of its application.

CSC theory takes as its starting point a realist understanding of national decision-makers as pursuing the largely selfish goals of security and economic prosperity but at the same time recognises the multilateral treaty phenomenon as of political significance and international law as a force to be reckoned with in world politics. How is it possible to square these positions? Most basically, by positing that the objectives expressed in the preamble to a treaty are unlikely to be the key goals common to the negotiating States, pursuit of which gave rise to the treaty. There may well be some in the relevant bureaucracies who genuinely wish to respect the environment, human dignity and so on but governments must address multiple issues and it is unlikely that the often lofty preambular goals of environmental and human rights treaties are the top priorities of the governments concerned. It is submitted that the substantive provisions in a treaty can best be understood as imposing agreed limitations on pursuit of the goal common to the negotiating States – pursuit of which gave rise to the treaty – but that the primary goal being pursued by the negotiating States that served as the impetus for the treaty is not actually enunciated in the treaty.

IV PROPOSING A FRAMEWORK WITHIN WHICH TO INTERPRET THE POLITICAL MEANING OF A TREATY TEXT

In order to understand the political meaning of a treaty, the relationship of the treaty language to the political processes of which the treaty is integral, must be theorised. This will be done with the use of an artificial unit of analysis, CSC. CSC consists of a set of inter-related cognitive elements integral to the process of international negotiation on an issue of mutual concern which may then be incorporated in a multilateral treaty. As a heuristic device, a CSC can be pictured as a cognitive pyramid. At its base is the logical underpinning of the whole structure: a principle or small set of inter-related principles to be referred to as the foundation ideology. Above this is the goal common to the negotiating States, pursuit of which gave rise to the issue being addressed, and a solution as

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25 Ibid, 309-320.

26 See *The Political Interpretation of Multilateral Treaties*, above n 4.

27 Rudolf Bernhardt "Interpretation in International Law" in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law II* (North Holland Publishing Co, New York, 1995) 1421.

the agreed means by which to manage that issue of mutual concern. A multilateral treaty confirms the CSC and legitimates it through incorporation into the system of international law, thereby serving to retard the process of change in, and to, the CSC.

A The CSC Issue

The first step in identifying a CSC is to specify the issue to which the treaty was a response. This requires investigating the political context that gave rise to the treaty negotiations as the issue may not be stated in the treaty. NGOs, scientists, and lawyers often help shape the definition of the issue: it may, for example, be climate change or ozone depletion. International relations theorists have told us that the precise definition of the issue does matter to the course of international cooperation.[28]

B The Legitimation Goal

The States negotiating a treaty may each have been pursuing a number of goals, but for the purposes of CSC analysis an attempt will be made to identify one, common to the negotiating States, pursuit of which gave rise to the perceived need to cooperate in relation to the issue. Was there a goal that, if unchecked, might not be attained by any or might bring the States into conflict? Viewed from a CSC perspective, the process of negotiating a treaty is that of agreeing to some common constraints on the pursuit of a particular goal, which, once in place, means that other States have accepted one's pursuit of that goal within those defined limits. The result is that the negotiating States are left free to pursue vigorously the legitimation goal with the approval of others, subject to the constraints imposed by the agreed solution. A treaty might, for example, free States to expand a particular industry, subject to the environmental restrictions stipulated in a treaty. The legitimation goal – what it is that the States negotiating that treaty were each really trying to achieve within the constraints of the treaty – is not to be found enunciated in the treaty itself and may well not appear in any official documents.

C The CSC Solution

The CSC solution emerges during negotiations on the issue of mutual concern and functions as an agreed constraint on pursuit of the common goal. It may take the form of a rule proscribing or prescribing particular action, which appears to treat all States equally but is unlikely to do so in practice. It is generally found near the beginning of the substantive provisions – in a not overly long treaty the solution is generally found within the first four articles and consists of one or two articles. The other substantive provisions in the treaty can be regarded as "fleshing out" or supporting the

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28 See Susan Carr and Roger Mpande "Does the Definition of the Issue Matter? NGO Influence and the International Convention to Combat Desertification in Africa" (1996) 34 Journal of Commonwealth and Comparative Politics 143.

solution, which may be contained within or correspond to what are sometimes headed the general or basic obligations.

D The Foundation Ideology

CSC components are not of equal significance to the CSC structure. One underlying principle or small set of inter-related principles underpins successful negotiation. The foundation ideology is a principle or small set of inter-related principles that States are willing to accept as a given in their interaction on the issue of mutual concern. It provides the basis on which States mediate their positions regarding the common goal so as to generate a solution; a CSC can be recognised as having begun to emerge when two or more States begin to negotiate regarding pursuit of a common legitimation goal so as to reveal acceptance of the same foundation ideology. In the case of the Treaty on the Non-Proliferation of Nuclear Weapons,[29] for example, the assumption underpinning the negotiations was that the further horizontal proliferation of nuclear weapons would increase security dangers.[30] This provided a logical basis for the solution, which restricts nuclear weaponry to those States that already possessed them at the time of the treaty negotiations.

The term "ideology" is very much a contested concept. It is often used in a pejorative sense, conveying a connotation that the idea in question is false. This is not its meaning in CSC theory, where it is used to signify that the principles that constitute the ideology are integral to a set of political power relationships. An ideology can be consciously used as a political tool, dissimulating a perception of an unequal distribution of power. CSC members advocating a particular solution will seek to show how it is not only compatible with the foundation ideology but a "must" given the verity of the ideology.

In a legal analysis of a treaty the value of the preamble is insignificant compared with that of the rest of the treaty,[31] although it is part of the context for the purposes of interpreting the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[32] In a political reading of a multilateral treaty, the preamble is of utmost importance for containing reference to, though not overtly defining, the foundation ideology of the CSC embedded in the treaty. The preambular paragraph(s) containing reference to the foundation ideology is/are likely to have been settled relatively easily during the negotiations for the treaty and may well be found near the beginning of the preamble.

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29 Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968) 729 UNTS 161.

30 *The Political Interpretation of Multilateral Treaties*, above n 4, 164.

31 Anthony Aust *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge (UK), 2000) 337.

32 Vienna Convention on the Law of Treaties, above n 2, art 31(2).

An ideology dictates a particular course of action. Once applied to the issue in question the foundation ideology will thus dictate what the solution should be. Or, to express it differently, the solution will follow logically from an application of the foundation ideology to the CSC issue.

E A Cohesive CSC

It is to be expected that there is a tight logical nexus between the issue, ideology, and solution in a CSC and hence in the multilateral treaty in which that CSC may be embedded. A cohesive CSC is one in which the agreed solution appears as the only one possible given the application of the foundation ideology to the issue of mutual concern. Rhetoric within the treaty regime will then serve to reinforce the ideology on which the solution, and the political relationships founded on the treaty, as premised, creating a stable treaty regime.

V UNDERTAKING A CSC ANALYSIS OF CEDAW

Let us now return to the CEDAW example, to see if an application of a CSC approach to the political interpretation of a multilateral treaty permits a reconciliation of the treaty language and political reality. An interpretation of CEDAW based on a legal reading of the text accepts that, despite what may be regarded as opposition or outright hostility on the part of States to the perceived consequences of women's equality, a large number of States have in fact pledged to eliminate all forms of discrimination against women. Along these lines, the rate and types of reservations to the treaty have been unacceptable, and compliance with CEDAW is deemed to have been inadequate, leading to the introduction of the Protocol.[33] Is it possible to reconcile that regime experience with the language of the treaty so that the preparedness of the States to take on these legal obligations can be better understood?

A The CSC Issue

In this case, the title of the treaty establishing the regime is the "Convention on the Elimination of All Forms of Discrimination Against Women". This suggests that the issue that gave rise to the treaty was that of how to eliminate all forms of discrimination against women. This seems at first glance to make sense, given the timing of the treaty in the second-wave of feminism in the 1960s and 1970s, and is no doubt part of the story. The fact that the literature devoted to the international women's movement in the 1970s and 1980s makes passing, if any, reference to CEDAW,[34] and the fact that, even by the 1990s, many of the persons involved in the struggle for gender equality had

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33 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (6 October 1999) 2131 UNTS 83.

34 See, for example, Deborah Stienstra "Making Global Connections Among Women, 1970-99" in Robin Cohen and Shirin M Rai (eds) *Global Social Movements* (Athlone Press, London and New Brunswick, 2000) 63.

little or no knowledge of the rights for women contained in internationally recognised instruments,[35] seems to indicate, however, that we need to delve further into the context in which the treaty was conceived in order more precisely to define the issue to which this treaty was a response.

It appears that until relatively recently human rights NGOs were not actively involved in addressing the concerns of women and women's NGOs developed little interest or expertise in human rights.[36] Women's human rights were the focus of a relatively small community of lawyers and activists[37] who came to believe that a way of improving the lot of women was by having women treated as well as men by international human rights law. While many of those working for CEDAW no doubt hoped that its conclusion might improve the socio-economic condition of women in general, the issue was framed in terms of the narrower question of the place of women within international human rights law.

The human rights movement originated from a masculinist conceptualisation of the public world as a male domain.[38] Human rights were designed to regulate the relations between male, property owning heads of families, and the State.[39] Although the UN Charter refers to the equal rights of men and women[40] and the Universal Declaration of Human Rights states that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,[41] critics believed that the United Nations had not treated the rights of women as seriously as they had those of men. The CSC issue was thus framed in terms of extending to women the benefits that men had gained from international human rights law. This reading of the CSC issue portrays the Convention less as a grand and idealistic leap on the part of States than a step towards women being given the opportunity to "catch up" with the benefits men had purportedly already gained from international human rights law.

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35 Winston E Langley "Preface" in Winston E Langley (ed) *Women's Rights in International Documents: A Sourcebook with Commentary* (McFarland & Co, Jefferson (North Carolina), 1991) vii.

36 Jane Connors "NGOs and the Human Rights of Women at the United Nations" in Peter Willetts (ed) *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (Hurst & Company, London, 1996) 147, 167.

37 Kate Nash "Human Rights for Women: An Argument for 'Deconstructive Equality'" (2002) 31 Economy and Society 414, 414.

38 Mary Evans *Introducing Contemporary Feminist Thought* (Polity Press, Cambridge (UK), 1997) 7.

39 Noreen Burrows "International Law and Human Rights: The Case of Women's Rights" in Tom Campbell and others (eds) *Human Rights: From Rhetoric to Reality* (Basil Blackwell, Oxford, 1986) 80, 81.

40 Charter of the United Nations (26 June 1945) 59 Stat 1031, preamble para 2.

41 UNGA Resolution 217 (10 December 1948) A/RES/3/1948/217 art 2.

B The Legitimation Goal

Definition of the legitimation goal of the CSC embedded in CEDAW depends on whether one regards the State as neutral, or as actually functioning contrary to the interests of women. Most moderate would be the position of the liberal feminist who believes that, while the State can play a part in the redistribution of status and power along more egalitarian lines,[42] the institution would if left alone tend towards maintaining the status quo.

C The Foundation Ideology

The foundation ideology of the CSC instantiated in CEDAW would appear to be that the human rights of women are equal to those of men. This was a direct application to women, as the subject matter of the Convention, of a fundamental principle in international human rights law — that rights are to apply to all without distinction. The international norm of non-discrimination as applicable specifically to women had been stipulated in article 1 of the Declaration on the Elimination of Discrimination Against Women, which stated "Discrimination against women, denying or limiting as it does their equality or rights with men, is fundamentally unjust and constitutes an offence against human dignity." [43]

D The Solution

"Discrimination against women" having been defined in article 1 to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"; article 2 appears to contain the CSC solution. States Parties condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women. Identification of article 2 as containing the CSC solution is supported by its nomination in literature on CEDAW as containing "the obligations accepted by parties to the Convention".[44] The solution follows logically from an application of the foundation ideology to the issue of mutual concern.

E Using a CSC Analysis to Understand How Negotiation of CEDAW May Have Fit Within a Realist Foreign Policy Agenda

A CSC analysis of CEDAW highlighted that the treaty was a response to calls for women to be treated as well as men by international human rights law. States ostensibly responded

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42 David Bouchier *The Feminist Challenge: The Movement for Women's Liberation in Britain and the USA* (Macmillan, London, 1983) 66.

43 UNGA Resolution 2263 (7 November 1967) A/RES/22/1967/2263.

44 Burrows, above n 39, 91.

comprehensively to the demands of women. But the danger was that the treaty would then be an end in itself, freeing States to retain the status quo just as they had been doing, within the limits specified by the solution. In other words, States can be seen as having made some concessions to women's rights but through doing so, to have deradicalised the challenge feminism posed to the State. This is not to dismiss the enormity of the achievement of those who got States to agree to the treaty, but to be realistic in accepting the limitations of the treaty. The language of "discrimination" has limited potential because of the "male comparator" standard of equality, which "ignores the biological and structural differences between the sexes and makes systematic inequality invisible."[45] As Charlesworth and Chinkin have explained: "The fundamental problem for women is not simply discriminatory treatment compared with men … Women are in an inferior position because they lack real economic, social or political power in both the public and private worlds."[46]

VI COMPARING A CSC APPROACH TO THE POLITICAL INTERPRETATION OF A TREATY TEXT WITH A LEGAL INTERPRETATION AS PER THE VCLT

Having briefly applied CSC analysis to one treaty, let us now clarify and get a sense of its broader applicability by comparing a CSC approach to the political interpretation of a treaty text with a legal interpretation as per the VCLT.

A The Objective of the Treaty Analysis

The objective of a legal interpretation of a treaty is to understand the treaty text as a source of legal obligation. The context of the treaty negotiations is considered only to the extent that it helps make legal sense of the treaty text. In contrast, a political theory of treaty interpretation seeks to understand a treaty text as a step towards better understanding the place of the treaty in political processes of which the treaty is a part. In order to do so, CSC analysis removes the schism between the treaty text and political reality. The CSC approach to the political interpretation of a treaty thus highlights what is an often-forgotten premise of those who advocate the rule of law in international affairs: that ideational structures are very much integral to non-ideational power structures. Multilateral treaty regimes have considerable cohesion as sets of inter-related ideas through which States and other international actors mediate their positions in world politics.

B The Preamble

CSC analysis accords the preamble much more emphasis than does a legal interpretation of a multilateral treaty, and places emphasis on the earlier preambular paragraphs. The preamble is thought to contain reference to the shared principle or assumption on which the treaty regime is

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45 Nash, above n 37, 421.

46 Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) 229.

founded and from which the solution flows logically. This foundation ideology lends cohesion to the group of States involved in addressing the issue via the treaty regime. In this respect, it is interesting to note the generality of the shared philosophical underpinning of the United Nations Framework Convention on Climate Change (UNFCCC).[47] Its preamble refers to concern that global warming "may adversely affect natural ecosystems and humankind". The final paragraph of the preamble refers to determination "to protect the climate system for present and future generations". Only mid-preamble does it suggest why climate change might be a problem for humans. The 1989 Basel Convention,[48] on the other hand, makes direct early reference to damage to human health and the environment, while the Vienna Convention for the Protection of the Ozone Layer[49] cites the "potentially harmful impact on human health and the environment". The "why we are doing this?" basis of the UNFCCC regime would thus seem to be particularly weak in comparison with other environmental regimes. Interestingly, the lack of congruence between the global distribution of power in respect of this issue and the agreed international law approach to tackling the problem has been a key aspect of the rationale for the Asia Pacific Partnership on Clean Development and Climate (AP6).[50]

C The Substantive Provisions

The legal interpretation of a treaty regards all the substantive provisions of a treaty as of equivalent legal standing but CSC analysis has hypothesised that one or two of the early substantive provisions are generally of much greater political significance to the treaty regime than others. Identifying the solution contained in the treaty indicates the legal obligation that the States most influential in the negotiations regarded as the heart of the matter. The Treaty on the Non-Proliferation of Nuclear Weapons[51] is premised on the principle that the further horizontal spread of nuclear weapons would increase security dangers. This was the logical underpinning of the core provisions in articles I and II that those States with nuclear weapons must not help others acquire them and that those without nuclear weapons must not acquire them. Interpreting the treaty regime as having this logical nexus at its heart helps explain how nuclear-weapon States have been able to treat the disarmament obligations in article VI as less central than those pertaining to proliferation.[52]

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47 United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107.

48 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (22 March 1989) 1673 UNTS 57.

49 Vienna Convention for the Protection of the Ozone Layer (22 March 1985) 1513 UNTS 293, preamble.

50 The AP6 involves countries that account for more than half of the world's economy, energy use, and greenhouse gas emissions. John Howard, Prime Minister and others "Asia-Pacific Partnership Sets New Path to Address Climate Change" (12 January 2006) Press Release.

51 Treaty on the Non-Proliferation of Nuclear Weapons, above n 29.

52 See discussion in *The Political Interpretation of Multilateral Treaties*, above n 4, 145-167.

D Recognising the Legal Fiction of a Treaty's Goal

A CSC approach to the political interpretation of a treaty reveals the legal fiction of treaties having goals. Legal texts often make reference to the aims of a particular treaty. While it might make perfect legal sense to refer to a treaty as having goals, such personification of a "scrap of paper"[53] does not make sense in a political analysis. It can only be the parties to the treaty that have goals. To state, for example, that the UNFCCC has as its "ultimate objective … to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[54] is very much a legal statement deriving from a straightforward reading of the treaty text. To the extent that the goals specified in the preamble of a human rights or environmental treaty do reflect true political objectives they would tend to be those of single-issue actors such as not-for-profit NGOs who may have been early advocates for the treaty. But as governments are brought on board to tackle the issue, so must the pure objectives of the activists be reconciled with the multi-dimensional agenda of States in order to produce a text acceptable to a large number of States.

E Fresh Insights into What Constitutes an Effective Regime

The significance of recognising the legal fiction of a treaty having goals lies in our understanding of what constitutes an effective regime. Common sense suggests that a treaty regime is effective to the extent that the institutional goals have been achieved.[55] But recognising as problematic in a political sense the statement of goals expressed in the treaty leaves us with much more moderate expectations that better accord with the record of the multilateral treaty phenomenon.

F Resolving the Discrepancy between Treaty Language and Realist Goals

Confirmation of a CSC in a treaty imposes some agreed limits on pursuit of the legitimation goal but through so doing frees participants to pursue the goal with, if anything, greater intensity. While implementation of the agreed constraints on pursuit of the legitimation goal effects some progress towards solving the issue to which the treaty was a response, that issue is not fully solved because the treaty has the counter-intuitive effect of legitimating the very goal that had given rise to the problem in the first place. Hence, we can view most environmental treaties as having arisen not so much because governments have embraced environmentalism as an overriding philosophy, but because pursuit of economic growth has brought about environmental problems and an environmental movement to which governments must appear to respond – if only to clear the way for further focus on economic growth. Left unchecked, environmentalism could represent a

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53 Bethman-Hollweg, above n 3.

54 United Nations Framework Convention on Climate Change, above n 47, art 2.

55 Bernauer, above n 17, 369.

fundamental challenge to capitalist philosophy. From this perspective, multilateral environmental and human rights treaties have for several decades been invaluable management devices for national governments, useful as a means of giving a little ground to the human rights and environmental communities without fundamentally reordering the shared priorities of the global decision-making elite. Hence the continued use of the multilateral treaty to address global issues – even in the face of the less than perfect record of the multilateral treaty in terms of problem-solving.

VII CONCLUSIONS

Multilateral treaties lead a double life; not only are they an important source of legal obligation, their sheer number is a striking political phenomenon. And yet as a political phenomenon multilateral treaties remain an enigma: evidence points to States being overwhelmingly concerned with security and economic objectives and yet in treaties States profess many other lofty objectives, including protection of the environment and human rights. Even if we accept that the States Parties to human rights and environmental treaties do have these objectives, it is hard to understand why they continue to rely on the multilateral treaty device as a means of addressing significant global concerns – including use of force and, more recently, climate change – when it would seem that few multilateral treaties fully solve the problems they were designed to solve.

This article has argued that efforts to understand multilateral treaties as political phenomena have been hampered by reading treaty texts in the same way when they are being viewed as political, as when they are being read as legal, documents. When human rights scholars ask what the next step for the CEDAW regime will be or whether the refugee regime is up to the tasks asked of it, they automatically cross from working within the realm of pure law into that of politics. However, this has generally been done without any acknowledgement that the wording of a treaty may mean something different within the political sphere.

The article has not called for a re-writing of articles 31 and 32 of the VCLT but rather for a separate method of treaty interpretation by which to understand the meaning of the multilateral treaty as a political phenomenon as well as by which to make political sense of specific provisions in the treaty text. Just as a multilateral treaty has two lives, so too do we need two approaches to assessing the meaning of that treaty. An international lawyer may well use both. A CSC approach to the political interpretation of a multilateral treaty both redirects the emphasis we place on particular parts of the treaty text, and suggests new ways of understanding the way we interpret specific portions of the text. In this way, a multilateral treaty on human rights or the environment can be viewed as a management device fully consistent with a realist perspective on world politics. This, in turn, presents us with a challenge, for it removes some of the comfort that comes with the belief that, by promoting international environmental and/or human rights law, we are likely to facilitate fundamental change. The bottom line of the theory of the political interpretation of multilateral treaties that has been outlined in this article is that it is the ideologies and goals *not* enunciated in multilateral treaties that may be most influential in shaping our future.