Introduction

THE THEORETICAL QUEST

This book explores international negotiation as a structured process of relational governance generating international common interest (ICI) between and among international participants and in relation to the international public order. In its theoretical quest, this book systematically unveils the missing theoretical link between international negotiation and treaty. Both concepts, in their creative complementarity, are conducive to the construction and continuous operation of relations of ICI and, further, to a pragmatic, contextually relevant, and fundamentally relational approach to international public ordering. Providing an interdisciplinary analysis of the nature and working of this complementarity, this book places it under the perspective of public international law: as a structured process constructing ICI upon which the polycentric public international ordering is founded and evolves.

Such a perception of international negotiation challenges the one-dimensional way international relations theorizes negotiations and positivist international law understands it. The former, exclusively concentrating on the political feature of international negotiation, elaborates its explanations in terms of prescriptive, and unceasingly enriched, models pursuing prevalence or accommodation of interests in international power relations. The latter perceives international negotiation as a distinctive political process – and for this reason as theoretically untouchable – which is simply a flexible and effective means that can be used for achieving "objective" international law solutions with no further inquiry into international negotiation's nature and its relation to treaty. In fact, treaty, being approached as an objective concept of international law, analogous to contract and governed by rules and principles establishing a contract view of treaties, is the legal superstar in the positivist theory of international law, and its concept cannot be "theoretically contaminated" through linkages with political processes. Thus, both theories, chained with their methodological assumptions and serving their methodological barriers, provide a complacently authoritative version of a discrete and autonomous understanding of "negotiation" and "treaty." Understood as separate constructs, they

only marginally meet, always within the strictly defined bounds of their respective methodologies.

However, treaty and negotiation in their complementary relationship fundamentally challenge these methodologically imposed barriers. Shedding light on this complementary relationship, this book attempts to advance a self-sustained theoretical approach to the negotiation process as a multilateral structured governance process, between and among international participants, for preparing, constructing, and developing relational treaty regimes of ICI. It is a central tenet of this book that states and non-state entities negotiate in order to establish relations serving ICI. They do not simply negotiate in order to produce solutions to a problem. They negotiate for continuity, not for finality. And this book demonstrates, going into theoretical and practical depth, that such an approach is associated with certain fundamental qualities of international negotiation that make possible its authoritative creative role in the construction of ICI. It is relational (a complementary relationship with a legal [treaty] or declarative instrument), textual (a multilateral legislative-like function between the negotiating participants), contextual (a creative relation to the referential, international, and political ordering), process-phased (a development in three phases marking the distinguishing process characteristics), and subjective (an authoritative intra-subjective and intersubjective decision-making process governing the construction of ICI). This conceptualization of creative international negotiation and its fundamental qualities are equally ignored by the international relations theories and the positivist theory of international law.

THE NARRATION OF NEGOTIATION IN INTERNATIONAL RELATIONS THEORY

Negotiation is undoubtedly one of the central concepts of international relations theory. But within the bounds of its methodology, its theoretical narration is distinctly one-dimensional. Focusing on negotiation as a general process of achieving distributive or integrative solutions in power relations, international relations theory has basically embarked on the development of two competitive prescriptive models of negotiation.

The older distributive or positional negotiation model promotes a popular way of looking at negotiation as a subtle "bargaining," how to achieve the best distribution of benefits and losses at the expense of the other side. It is an autonomous prescriptive model that views negotiation in the most individualistic terms flattering the egotistic aspect of human nature: as a discrete process of intersubjective competitive manipulation with the aim to win, irrespective of consequences, relational context, interests of the other side or, of course, common interest. Inescapably, therefore, only incidentally and only if it is "winning," an agreement may be within the purview of this model. On the other hand, the more recent integrative model attempts to offer, as an alternative to the distributive or positional mode, a more

human and social – and hence more relational – perspective of negotiation. It views negotiation as a discrete intersubjective process integrating all interests involved with a view to create benefit for all. And its influential version, the Harvard principled negotiation model, brings to the fore the importance of specifically achieving what it calls a "wise agreement," focusing on the merits to achieve the most feasible balance between "relationship" and "substance" of this agreement. Yet the achievement of the "wise agreement" is carried out through a policy approach: a detailed elaboration of par excellence methodological standards setting out the programme that axiomatically leads to a wise agreement "of any kind." In doing so, it sets out a widely appealing anthropocentric model of principled negotiation that, however, simplifies and rationalizes the negotiation process by manipulating context, relation, process, and agreement instrumentality with a sweeping and unswerving generalization.

Perhaps, when the narration of negotiation in international relations theory takes a more contextually "coloured" turn, it draws particular interest. This is illustrated in a marginally developed and neglected model, rooted in game theory, which I call the prescriptive transformative model and which developed as an empirical, practice-oriented – and for this reason "open-ended" – negotiation model in the framework of the United Nations Institute for Training and Research (UNITAR) with a view to transforming the East–West conflict situation into a cooperative relation. Unlike the other two general prescriptive models, the transformative model sets out the elements of negotiating the transition to a cooperative relation at the international level – and with it, the transformation of the relations between international actors. Thus, it avoids the pitfalls of a grand theory-like perception of negotiation applicable everywhere and swallowing structural and contextual characteristics that are specific to the international negotiation process, and their management is reflected in its agreed outcome (e.g., the Helsinki Final Act, 1975). And as a practice-oriented theory, it calls for continuous enrichment and development of the model.

Nevertheless, all prescriptive models of negotiation do not touch the theoretical link between international negotiation and treaty and distance themselves from their conspicuous dialectical interrelationship in the construction of ICI. In their generalized approach to negotiation as a political process, both treaty and ICI perception become methodologically crippled. In the first place, it is abundantly clear that international relation theorists have an inadequate understanding of law. In particular, they assume law in general, and international law in particular, as a private law conceptualization and logic (a system of clear-cut, objective rules in a hierarchically organized national legal order, authoritatively established and enforced upon individuals when freely entering into objective relations determined by law). And it is this approach to law as a "state" rather than as a "process" that determines the way they envisage the role of law in their political analyses. Process understanding is assumed to belong to the privileged sphere of the political analysis of international relations theory regarding power relations

where international law and its concepts, in their static, objective, private law-like normativity, may be either entirely excluded or appropriately embedded into their theoretical models as mere factors. Overall, the static "private law" perception of international law by international relations theorists is, not only, hardly interesting, but, more importantly, hardly convincing for its anticipated force, accuracy, and effectiveness in their power relations modelling schemes.

On the other hand, it is clear that the knowledge of law as public law or as relational law governing continuous relations between social entities, private entities, or individuals generating distinct relational normativity for the attainment of public or social purposes in continuity (in a process) and in context, and the concomitant conceptualization of international law as a relational law construct of a public law nature, as a subjective law of relational governance performing ICI in context, remains – not surprisingly – a terra incognita for international relations theorists. Otherwise, they would have been more inquisitive about the linkage between treaty and negotiation, less mono-disciplinary in their vehemently defended approach, and more philosophically sensitive to interrelationships. Instead, they overall maintain an oversimplified and misguiding attitude about law, identified with an unquestionable and a rather opaque private law understanding, which leads them to misconceptions producing poor judgments about normativity and to the projection of a closed-shop approach to the negotiation process. In defence of the methodological borderline between international law and international relations, international relations theorists embrace international negotiation – and positivist international law theorists eagerly concur – as a political construct exclusively explained within the realm of international relations. So perpetuating this closed-shop approach to the negotiation process, theoretical books on negotiations in general, and recently on international negotiations or aspects of them, are predominantly written by political scientists, but also by managers, economists, or even by international lawyers practicing them on specific subjects and approaching them in an ad hoc-ish manner. Not by legal theorists.

TREATIES, NEGOTIATIONS, AND INTERNATIONAL COMMON INTEREST RELATIONS: A THEORETICAL REFOCUSING OF INTERNATIONAL LAW

The answer to the need for such theoretical refocusing given by this book is subsumed to the following thesis: treaties – and with them related declarative instruments operating either precursorily or systemically for the development of treaties – and negotiations should be viewed as the two inextricably interwoven aspects of one intersubjective process governing ICI. Under this integrating theoretical approach, treaties should be understood as patterned activities constituting relational regimes between states and relevant non-state entities serving ICI in continuity and not as "concluded" agreements, as completed projects entailing objective legal consequences like private law contracts. In fact, states and other

relevant institutional entities "are in treaty relations" governing their common interest as an aspect of ICI.[1]

Such a theoretical perception of treaties automatically "subjectifies" them: it points to the direction of the subjects performing this activity and, with it, it reveals the importance of properly understanding the way they perform this activity; they negotiate. At the same time, its process aspect is indicated through the integrated structured negotiation. In practice, states and other non-state entities, operating as "legislators" of their own relations within and in consistency with their "legislated" contexts (international and national), negotiate the establishment or the development of their relational ICI treaty regime in a structured negotiating process and in view of the patterned elements of treaties as well as the patterned management of the related multilevel context. As a result, the missing theoretical link between treaty and negotiation is unfolded and their complementary relationship is restituted. This theoretical refocusing requires a consistent and thorough analysis of the performance of the treaty activity, a theory of international negotiation constructing ICI as a purposive complementary relationship with international normative instruments, conventional (treaties) or declarative (declarations, decisions, action plans, strategies, etc.).

Unsurprisingly, there is no room for such an approach in the realm of the positivist theory of international law. Accordingly, it is completely ignored by mainstream international lawyers who are methodologically directed to basically limit their conceptual understanding of treaties to private law contracts, as legally "concluded" agreements to which international law attaches legal consequences analogous to private law contracts. The negotiating aspect of treaties is entirely subdued to the logic and application of its methodological objectification. As a result, international negotiation only emerges under the mantle – and within the methodological limitations – of a general (private) law rule-approach. As a distinct political process, because of its mysterious qualities, it may constitute a means for peaceful settlement of international disputes or for the creation of new international norms of conduct. And the only anticipation is that its "general" application takes place within the frame of relevant principles of international law and would be conducted following a few general guidelines for the achievement of its objective. This is a kind of second-order negotiation. Projecting an exclusive "lawyer's view" of objective treaty law – as opposed to a "legislative view" of treaty relational normativity aimed at ICI – the positivist theory of international law methodologically denies the process element of treaty expressed as intersubjective relational governance of ICI.

[1] As Parry insightfully put it, "to treat is but to negotiate and to be 'in treaty' is but to be in negotiation." International law "is essentially public law and the relations of public bodies inter se, whether within the State or without, are not governed by rules of law related to market or money economics." C. Parry, "Of Treaties," in A. Parry (ed.), *Collected Papers of Clive Parry*, vol. II, Wildy, Simmonds and Hill Publishing, 2012, 289, 305.

UNVEILING THE THEORETICAL VOICE OF THIS BOOK

The theoretical approach developed in this book and its attempt to point to a different theoretical perspective in the international negotiation process unfolds in two Parts. The general Part I contains two chapters that elaborate on the inadequacies of the theoretical narration on negotiation advanced by international relations theory and on the need for a holistic theoretical approach to international negotiation as a process creating and governing relations of ICI based on the complementarity between negotiation and treaty.

Chapter 1 sets the stage for exploring, with a critical look, the terrain of the efforts to theorize the international negotiation process through autonomous prescriptive models in the field of international relations theory. It argues for two distinct and competitive prescriptive models of negotiation, the "distributive" or "positional" negotiation model and the "integrative" or "principled" negotiation model. The former, prescribing the elements of negotiation as a discrete intersubjective process of competitive manipulation leading to the best possible distribution of benefits at the expense of the others, clearly ignores common interest. The latter, and its eminent Harvard version, prescribes the elements and method of negotiation as a process for integrating, in a unitary manner, all interest involved in achieving agreements of common interest, while its anthropocentric negotiation model eliminates relational contextuality. In a less celebrated manner, an interesting prescriptive transformative model of international negotiation, developed from game theory, sets up the elements of an agreed, practice-oriented, and open-ended model of historically transforming the East–West conflict situation into a cooperative one. The chapter explains why, although different in theoretical significance, all these models are inadequately equipped to go beyond a general managerial approach to international negotiation and describe how it constructs ICI as an ICI governance process. Providing autonomous, generalized, one-dimensional approaches to the negotiation process, they are set to prescribe their par excellence methodological standards that objectify negotiation as a political process that, in all cases, may lead to the attainment of their final theoretical aim.

Chapter 2 advances a holistic theoretical approach to the international negotiating process as a creative process instrumentation for preparing, constituting, and expanding relational treaty regimes performing ICI in correlation with their constantly unveiling contexts. Focusing on the theoretically neglected complementarity relationship between "treaty" and "negotiation" in the process of creating and governing relations of ICI, it sails through the methodologically limiting, generalizing, and mono-disciplinary approaches of international relations (negotiations as "autonomous prescriptive models") and positivist international law theory (a "contract view" of treaties) and brings to light the relational, process-related, and intersubjective ICI normativity of treaty. The chapter contends that international creative negotiation reinforces the relational link between "treaty and negotiation" and

provides a holistic understanding of the reality of ICI governance enshrined in the continuity construction of ICI treaty regimes. The chapter specifically demonstrates that international creative negotiation has four distinguishing features: it is conceptually relational in the sense that it rests on the complementarity between "treaty" and "negotiation" in the process of creating and governing relations of ICI; it is focused on the language of a negotiating text and its intricacies (textuality); it is structured in three distinct phases, Prenegotiation, Constitutive Negotiation, and Renegotiation (phase-structured); it operates in relation to a generic context of an idiomorphic international "societas" and the evolving public international legal order (contextuality); and it is an authoritatively formed intra-subjective and inter-subjective decision-making process of collective governance through specially organized collectivities, the negotiating teams, vested with a multifaceted role subjectivity.

Part II of this book unfolds a specific in-depth analysis of the three phases of the international creative negotiation process – preparing, constituting, and renegotiating relational treaty regimes of ICI – thus providing a comprehensive and interdisciplinary view of complex issues that, so far, are fragmentally and inadequately treated. In this process, these phases develop a certain *relational governance structure*: each consecutive phase builds upon certain appropriate elements of the previous one.

Chapter 3 analyses the Prenegotiation phase of the international negotiation process as a collective attempt to transform a seemingly "zero-sum" or "distributive" situation into a negotiable relationship reflecting a "non-zero-sum" or "integrative" situation serving ICI. Such collective transformative governance has a declarative character and serves as a precursor for the constitutive phase of international negotiation. Prenegotiation, as an exercise of transformative governance of international relations, is a structured intersubjective process, generating the negotiation focus, and heavily dependent upon the perception of the role of its initiator-leader. It is constructed in two interrelated levels. First, the diagnostic level encompasses the identification of the negotiable issues through cognitive management carried out knowledgeably (diagnostic thematic management), intersubjectively (management of "subjective framings"), and contextually (management of the special context of reference). Second, the level of multilateral governance is featured by its tiered structure, its comprehensive negotiating approach and management of the subject matter, and the collective framing of its declarative product. It is properly initiated by standard techniques employed by the initiator-leader consisting of the drafting of a supporting report dealing with the issues under negotiation, the drafting of a single negotiating text setting out the negotiable elements of the intended Declaration/Decision etc., and the drafting of the agenda. The content of the declarative outcome of Prenegotiation is patterned and is formally adopted by consensus.

Chapter 4 embarks on an extensive analysis of the Constitutive phase of the international negotiation process, which refers to the collective establishment of

an ICI treaty regime or to its expansion through a performative Protocol. Here negotiation is rigorously examined as an intersubjective relational process whereby a new treaty or a new Protocol related to it are "constituted" as collective normative activities pursuing the protection and promotion of ICI on a consensual basis and by consistent reference to their context. The product generated by Prenegotiation is part of this context; however, the transition from the Prenegotiation phase to the Constitutive Negotiation phase is nonlinear, linked to the efficient management of a variety of contextual factors. Constitutive Negotiation applies, mutatis mutandis, certain methodical elements of the diagnostic level of Prenegotiation. This phase is generated from a multilateral, institutional, or conventional regime action and is carried out by an ad hoc body of conferential negotiation. In this process, the role of the Secretariat is central, operating as its guardian, vested with a catalytic administrative, creative, and diplomatic role, protecting it from possible breaks. The adoption of the consensus procedure is the basic procedural safeguard providing the necessary negotiation space for forming decisions constituting a relational treaty regime in pragmatic terms and legitimating it. Having an important "constructing-negotiating" aspect, it is structured in three distinctive and interrelated levels, the consensus-relational, the strategic management, and the organizational management levels. Correspondingly, the adoption of the patterned rules of procedure, supplemented by international practice, set up the organizational and functional framework of the negotiating forum. The chapter then proceeds from the more institutive to the more legislative-like constructive processes of constitutive ICI treaty negotiation. Here, the negotiation of the textual pattern of the treaty instrument takes centre stage in the Constitutive Negotiation process. It is specifically associated with three levels of treaty patternment that provide the necessary normative material for the construction of ICI: referential patternment (context identification, contextual compatibility, and "added value" or constructive heuristic); morphological patternment ("framework agreement – performative protocols" or "integrative agreement – executing annexes"); and normative patternment. The latter lies at the heart of Constitutive Negotiation because the knowledge and proper management of treaty-patterned elements constitute the pillars around which the Constitutive Negotiation process is unveiled. Correspondingly, the knowledge and appropriate use of organizational and textual techniques and practices, variably applied in all negotiation phases, creatively contribute to the progress of negotiation and the consensus-building of the ICI treaty relation.

Finally, Chapter 5 develops the Renegotiation phase of the international negotiation process as a structured intra-institutional process of revisionary governance of an operating treaty regime. It reinforces its relational resilience, indicating the ingrained "negotiability" of its normative force. Renegotiation builds on the structural and procedural characteristics and the treaty-patternment approach of Constitutive Negotiation, and employs the same techniques, while it properly integrates some methodical elements of the diagnostic level of Prenegotiation. It is

initiated by an institutionally provided regime action prescribed in the amendment clause of the treaty. The Secretariat, operating as an institutional guardian of the regime, is endowed with institutional due diligence relating to the conferential renegotiation body, the report of the proposed amendments identifying the zone of renegotiation, institutional diplomacy, and the diplomatic conference for the adoption of treaty amendment or its replacement. The contextuality of the revisionary negotiation encompasses a particular internal context of reference, generated by the institutional life of the treaty regime (derivative context). The morphological patternment of Renegotiation refers to the textual negotiating technique applied to the amendment of the text pattern of the treaty. Alternatively, it may take the form of replacement as a result of a collective decision shaped by negotiation, of a multifactorial basis. "Withdrawal" or "denunciation" hardly constitute alternatives to Renegotiation because of relational and contextual considerations; they may, however, be used as an intermediate strategy to trigger Renegotiation. Renegotiation may also refer to the declarative components of a treaty regime, such as actions plans, leading to their "refinement" or "reassessment." In some cases, Renegotiation may develop in the twilight zone between Constitutive Negotiation and Renegotiation when related to the development of the underdetermined aspects of a particular treaty, undergoing subtle structural transformations and producing new negotiating techniques.

All in all, the theoretical voice of this book is tuned to provide an interdisciplinary, international law-based account for an international negotiator on how to be involved not only effectively but also perceptively and in perspective in the phased international negotiation process between and among states and relevant non-state actors constructing ICI. Through this process and offering a "legislative view" of international law, this book reveals why it matters to understand the horizontal normativity of international ordering, especially when positivist thinking does not seem to be an appealing option.