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THE LAW OF TREATIES

Treaty: “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’: VCLT art 2(1).

- Treaty, convention, agreement, covenant, statute, protocol

Vienna Convention on the Law of Treaties 1969 (entered into force 27 January 1980) (‘VCLT’)

A multilateral treaty, binds states regardless of whether they have signed it

- Using as a treaty; if a state has signed it and the treaty it is being applied to came into force after the VCLT
- Using as custom; does not have retrospective effect, VCLT art. 4

Binding Agreements Outside the VCLT

- o *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] PCIJ Reps Ser A/B No 53
- Oral undertakings
Promise by Norwegian foreign Minister to Danish foreign Minister at Paris Peace Conference 1919 Denmark would not object to Norway’s claim over Spitzbergen if Norway accepted Denmark’s claim over Greenland
PCIJ accepted this was a binding agreement
- o *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [1994] ICJ Reps 112
- Writings of uncertain intent
Third party recording – was binding
Exchange of letters between Heads of State can form a binding treaty obligation
Minutes of a meeting between foreign Ministers can form a binding agreement
- o *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Reps 3
- Writings of uncertain intent
Press release – not binding
Communiqué issued after meeting of Prime Ministers not a binding agreement

LEGAL EFFECTS OF A TREATY

Consent to be Bound by a Treaty

- o Signature
- VCLT art. 12
- VCLT art. 18
In the lag time between signing and ratification, art. 18 provisions apply (governed by core object and purpose)
States are ‘obliged to refrain from acts which would defeat the object and purpose of a treaty’ after they have signed it, unless they subsequently make clear an intention not to become a party
- o Ratification
- VCLT art. 14
Acceptance or approval (the local community get to see before it is ratified; public say)
- o Accession
- For parties who have not signed the treaty after it has entered into force
- o Entry into force
- VCLT art. 24
As specified in the treaty

Further Legal Effects

- *Pacta Sunt Servanda*
- VCLT art. 26
‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’
- Treaty Obligations
Prevail over customary international law except for *jus cogens*
- VCLT art. 34
Bind only the parties except by consent of another state (but, with consent, states involved can give privilege to a third, uninvolved party)
- VCLT art. 35
Express consent to an obligation
- VCLT art. 36
Presumed (rebuttable) consent to a right
- VCLT art. 27
Cannot be avoided on the basis of domestic law
- VCLT art. 28
Are prospective only, forward-looking
- VCLT art. 29
Apply to all of a state’s territory, unless the contrary is specified
- VCLT art. 30
Supersede (replace) obligations under earlier treaties between the same parties

TREATY INTERPRETATION

- Basic principle
- *Golder v United Kingdom* 1975 ECHR Ser A No 18, 14. ‘the process of interpretation is a unity.’
‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ VCLT art 31(1):
- *Ordinary meaning*
- *In their context*
- *In the light of its purpose*
- *Holistic interpretation*
No test has precedence over the other
- Context
- VCLT art. 31(2) (a) and (b)
agreements between parties relating to concluding the treaty:
any instrument that was made by one or more parties in connexion with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty
factors to context; object and purpose
- Additional relevant matter
- VCLT art. 31(3) (a) and (b), (Hall interpretation of article 27(3) of UN Charter)
subsequent agreement between the parties (and practice establishing agreement) regarding its interpretation
- VCLT art. 31(3) (c) and special meaning in 31(4)
relevant rules of international law applicable between the parties

Supplementary Means of Interpretation

Where there is ambiguity, supplementary means of interpretation are allowed

- VCLT art. 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

- Limited resources
- Preparatory work of the treaty
- Circumstances of its conclusion to
- *Travaux préparatoires*
- Official record of a negotiation

Invalidity of Treaties

Invalidly consenting to be bound to a treaty

- VCLT art. 45(b)
Requires prompt action on becoming aware
Only in limited circumstances
- VCLT art. 46(1)
Manifest violation of a provision of internal law of fundamental importance
- VCLT art. 47
Violation by representative of restriction of authority notified to other negotiating states
- VCLT art. 48
Error of fact forming an essential basis of consent to be bound
- VCLT art. 49
fraud
- VCLT art. 50
corruption
- VCLT art. 51
Coercion of a representative
- VCLT art. 52
Coercion of a state by illegal use of force

A breach of a *jus cogens* (all states must obey) obligation

- VCLT art. 53
'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character e.g. prohibition against genocide, apartheid etc.
'A treaty is void if ... it conflicts with a peremptory norm of general international law'
if at conclusion, void immediately: art 53
- VCLT art. 64
if later, void upon emergence of new rule
- Examples:
Breaching a ban on the use of force
Committing a criminal act under international law
Committing slavery, piracy, genocide (killing), torture, apartheid (racial separation)
Self-determination (*East Timor, Israeli Wall*), aggression, racial discrimination (*Barcelona Traction*)

Erga Omnes Partes

obligations/rights that everyone is entitled to (toward all)

- *Barcelona Traction*

‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State ... By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’

- Not identical concepts
- All *jus cogens* obligations are likely to be owed *erga omnes*
- *Erga omnes* obligations could arise independently (including from treaty provisions)

Termination and Suspension

- Through consent by other states art 54 (termination), 57 (suspension)
- Unilateral denunciation (criticism) and withdrawal art 42, 56
- Material breach
repudiation (denial, rejection), violation of provision essential to object and purpose art 60 - high threshold (*Hungary v Slovakia*) ICJ 1997
- Impossibility – once you sign a treaty, it is binding, very hard to get out of art 61 – high threshold
- Fundamental change in circumstances art 62 (*Gabcikovo-Nagymaros project (Hungary v Slovakia)*) ICJ (Hungary tried to get out of treaty as before treaty was created)

Reservations

‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’: VCLT art 2(1)(d)

Purpose: Promote broad agreement to multilateral treaties by allowing for some modifications for each State party

Permissible unless:

- Prohibited by the treaty
- The treaty provides that only specified reservations, which do not include the reservation in question, may be made
- incompatible with the object and purpose of the treaty: VCLT art 19 (c) see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion. (1951)

Subject to:

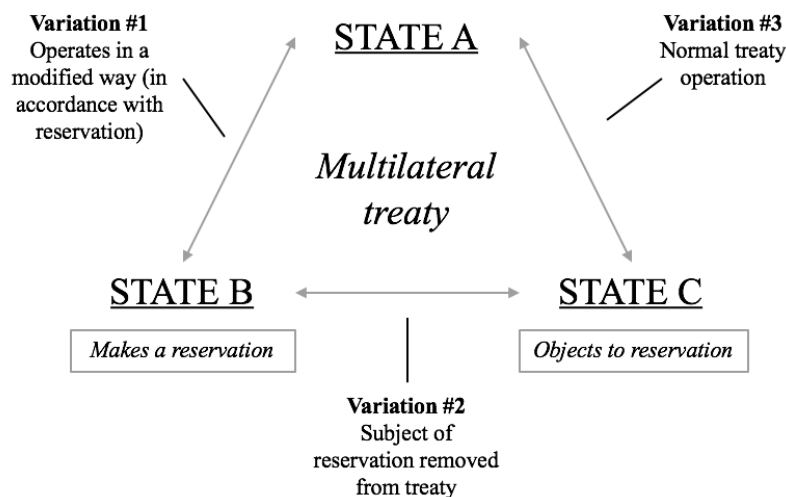
- Acceptance of and Objection by another State party (have 12 months to do so) VCLT art. 20 (4)
- Legal effects of reservations and of objections to reservations, VCLT art. 21(1)
- See also Tacit acceptance set forth in Vienna Convention Article 20(5)
- May be withdrawn, VCLT art 22
- General comment no 24 by the Human Rights Committee (not hard law), aim was to establish a special approach to reservations for Human Rights Treaties; this has not been accepted by some states
- States can make reservations to human rights treaties

Issues

- Uncertainty around the legal effects of an invalid reservation
- Approaches have been described as
‘permissibility’ 19(c) – if reservation is incompatible with object and purpose is invalid. There are problems with this approach e.g. - it is not as straightforward as it may appear. State practice.

or ‘opposability’ doctrine – but see article 20(4)(b) and generally this doctrine is problematic in terms of application especially for human rights treaties.

- Given this uncertainty and pressures around treaty integrity (particularly with Human Rights Treaties) there is an emergence of the ‘severability’ doctrine. See for example - General Comment no 24 by the Human Rights Committee and ILC ‘Guide to Practice on Reservations to Treaties’ (2011) UN Doc A/66/10,
- This doctrine is not stated in the VCLT and not yet CIL. There are differing opinions on the applicable, appropriateness of the doctrine. It has been described as *lex ferenda*



General Principles

Article 38(1) (c) of the ICJ Statute

- A Court must have jurisdiction to hear a case, which it may determine for itself
- No-one should be a judge in their own cause
- A breach of the law involves an obligation to make reparation
- Parties to a contract should act honestly and in good faith
- Estoppel
- *res judicata*
- No party can take advantage of their own wrong

Soft Law

‘guidelines of conduct... which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics.’

Peter Malanczuk (ed), *Akehurst's Modern Introduction to Public International Law* (7th rev ed, 1997) 54.

Means by which soft law can become hard law

- Through state practice
- Evidence of *opinio juris*
- Acceptance as a treaty interpretation art 31(3)

Subsidiary Means

Judicial decisions

- No *stare decisis*
- No common law reasoning
- However, still judicial decisions

Still frequently referred to

Can, where evidence is provided to support the conclusion reached provide an important source of evidence (e.g. by assembling relevant state practice and *opinio juris*)

be a persuasive guide to the legal significance of that evidence (e.g. by showing how those elements were weighed in a previous case)

Writing of learned publicists

Process

1. When was the treaty signed and ratified?
 - Applying the VCLT as a treaty or as custom
 - Before 1980 → Customary International Law
 - After 1980 → Treaty Law
 - Cannot use as a treaty under art. 4 if the treaty being analysed came into force after the VCLT; as it does not have retrospective effect.
 - If the VCLT entered into force after the protocol, it must be applied as custom.
2. Is there a treaty?
 - Agreement between states, look for things like *treaty, agreement, convention, protocol*
3. Level of obligation
 - Signature and/or ratification?
 - If only signed: subject is only bound by the object and purpose of the treaty (art 18 VCLT)
 - If signed and ratified: *Pacta sunt servanda*, full obligation (art 26 VCLT)
4. Interpretation
 - Use treaty interpretation under VCLT art 31(1)
 - mention *Golder* united approach to treaty interpretation (below)
- 4.1 Any reservations?
- 4.2 Termination or suspension of treaty?
5. Advice
 - Conclude interpretation with a definitive answer