

WEEK 4: TREATIES

4.1 Scope of VCLT application

Does the VCLT apply?

Is this a treaty for the purposes of the VCLT?

- 'Treaties' as defined in the VCLT
 - Article 2(1)(a): '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 does not apply to oral agreements but might be able to use VCLT as reflective of custom
 - "Terminology is not a determinant factor as to the character of an international agreement or undertaking." (*South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), ICJ (1962))
- Treaties concluded by States which are **party to the VCLT**
 - VCLT Article 34: "A treaty does not create either obligations or rights for a third State without its consent."
 - "... a treaty only creates law as between the States which are parties to it." (Certain German Interests, PCIJ (1926))
- Treaties **concluded after its entry into force**
 - VCLT Article 4
 - VCLT Article 84
 - 27 January 1980 for original parties i.e. parties who ratified VCLT between 1969-1980
 - Non-original parties: enter into force 30 days after they expressed their consent to be bound by it

Application of the VCLT or rules on treaties under customary international law

Might use VCLT as reflective of customary international law even if VCLT does not apply to this instrument as a treaty

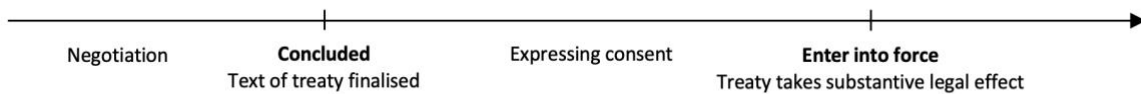
- VCLT Preamble + VCLT Article 3
 - Does not override rules on customary international law that exist in relation to treaties
- E.g. *The Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), ICJ (1997)
 - VCLT did not apply because of the timing but was noted that the provisions in the VCLT that it was hoping to apply were actually reflective of custom and so could be referred to on that basis
- Elements – **Does the VCLT apply as reflective of customary law?**
 - Where the treaty **pre-dates** the VCLT's **entry into force**
 - Where one of the States is **not party to the VCLT** (or not party on the relevant date)
 - Where the instrument in question **does not meet the VCLT definition** of 'treaty' in Article 2(1)(a)
 - This applies '[f]or the purposes' of the VCLT only (see art 2(1)(a))
 - The concept of 'treaty' under customary international law is broader than the VCLT definition

4.2 Application and Interpretation of Treaties

Capacity to Conclude Treaties

- Capacity to conclude treaties is enjoyed by all States (Article 6)
- Negotiation (Articles 7 and 8)
 - Individuals possessing **full powers** (Article 7) have the capacity to conclude a treaty on behalf of their state
 - Article 2(c): a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.
 - Certain individuals are just presumed to have full powers (both in the VCLT and also as reflected in customary international law) whereas others (e.g. lower level diplomats) might need to produce a special instrument designating their capacity to conclude the treaty on behalf of the state
 - “every Head of State is presumed to be able to act on behalf of the State in its international relations” (*Bosnian Genocide Case*, ICJ (2002))
 - Presidents and Ministers of Foreign Affairs
 - State could **subsequently confirm** that the act of that individual was undertaken on their behalf if the state did not get full powers for the individual who concluded the treaty initially (Article 8)

Expressing Consent to Conclusion and Entry into Force of Treaties



- Has the State express consent to be bound by the treaty?
- VCLT Article 11: Means of expressing consent to be bound by a treaty
 - Signature – Article 12
 - Common process after a negotiation: all states will gather around and the individuals with full powers will at that point sign the treaty as a way of expressing the states consent to what is in the treaty
 - States often would make that signature subject to ratification, acceptance or approval (i.e. person with full powers signs the instrument and acknowledges what was negotiated but will need verify it back in state before giving consent)
 - Exchange of instruments – Article 13
 - Ratification, acceptance, or approval – Article 14
 - Treaty is brought back to the domestic system
 - President or Parliament will go through a process of considering what the outcome of the negotiations has been and will determine whether to ratify the treaty
 - Entity with full powers will go back to the other treaty parties (depository for the treaty) and will deposit the instrument of ratification once decision is made
 - Accession – Article 1
 - State has not been involved in negotiations but later decides to be a party
 - Accedes to what has been negotiated and agreed by other states

- Did not require the parties to reach an actual agreement through negotiations; just a genuine attempt to negotiate (para. 158-159)
- Found no attempts at negotiations i.e. ICJ was unable to exercise its jurisdiction under Article 22 because of the **precondition** of the party's consent to refer disputes under that clause have **not been fulfilled**

Lack of a Necessary Third Party

- Necessary third-party rule aka the monetary gold principle
 - Procedural barrier to the admissibility of a claim before an international court or tribunal where an **indispensable third-party is absent**
- *Monetary Gold*
 - **FACTS**: Italy had asserted a right to access Albanian gold, which was held by France, UK and US.
 - **HELD**: Albania was a necessary third-party and case could not be decided in their absence
 - Interests of Albania would be the **very subject matter** of the decision that the court was being asked to issue
 - Albania had not been joined as party to the proceedings
 - Claim was **inadmissible** because it could not determine the rights and interests of Albania without Albania itself being present to defend its rights and interests
- *Certain Phosphate Lands in Nauru*
 - Reiterated *Monetary Gold* principle where the interests of a third state are the **very subject matter** of the decision to be rendered, then it will be inappropriate for the Court to issue a decision if the third party is not present
- NB Articles 62 and 63 of the ICJ Statute (on intervention)

Other Grounds for Lack of Jurisdiction and Inadmissibility

- Mootness
 - A situation where the court might decline to hear a case if rendered moot by subsequent events.
 - i.e. by the time of the hearings or the decision of the court, the decision is no longer necessary because it has been **overtaken by events**
- Extinctive Prescription
 - Situation in which there has been an **unreasonable lapse of time** in which the applicants could have presented the claim but did not
 - Length of time means that the **rights** of the respondent and the capacity for it to defend itself in the proceedings is somehow **impaired**
 - Maybe vital evidence in that time is likely to have been lost.
 - Or maybe relevant people are no longer available to attest to what happened at the alleged breach
- Time bars
 - Might be imposed under treaties
 - E.g. treaty might say: any dispute about a given matter can be referred to ICJ **within two years** of the fact of the alleged breach coming to the attention of the applicant states
- Waiver
 - Court would interpret the **failure to file a claim** on the part of an applicant state as an implied waiver of the claim.
 - By not taking action for a very long time, the state is prevented from taking that action in circumstances where its conduct indicates a waiver of its right to make a claim.

- Lack of a legal interest
 - Typically an **issue of admissibility** because it goes to the propriety of the court hearing a given claim
 - Links to state responsibility
 - ASR Articles 42 and 48 which refer to situations in which a state has a legal interest or right to invoke an alleged breach of international law
 - Article 42 concept of the injured state.
 - E.g. if a state falling outside of that definition under ASR Article 42 or 48 tried to file a claim before the court, the court might actually declare that it is not an **injured state** and therefore it does not have a legal interest and cannot see the court
- Appropriate forum/comity/rules against parallel proceedings
 - Grounds to find a lack of jurisdiction or admissibility because the claim has been filed in another forum
 - Parts of the dispute may end up before multiple courts or tribunals so court rules that the claim is inadmissible because another court is actively considering it or has maybe even decided it

ICJ Advisory Jurisdiction

- Capacity under Article 96 UN Charter and Article 65 ICJ Statute to give advisory opinions on certain legal questions that are referred to it, particularly by organs of UN
- GA and SC can request an advisory opinion on **any legal question** by the court
- Certain other organs of UN and specialist agencies can request advisory opinions on legal questions **within the scope of their activities**
 - Have to be **authorised by GA** to make requests
- Not to determine a dispute BUT to **issue recommendations** about how international law should be interpreted and applied to potentially resolve disputes in the future
 - Non-binding
- E.g. World Health Assembly requested an advisory opinion from the Court in 1996 on the following question: Would the use of nuclear weapons by a state in war or other armed conflicts be a breach of its obligations under international law, including the World Health Organisation Constitution?
 - Court determined that that question was **not within the scope** of the WHO and its activities
 - WHO's scope of activities was limited only to the health effects of the use of nuclear weapons
 - Question asked was a legal question
 - i.e. question being posed by the World Health Assembly was not within the scope of its activities and therefore **declined to issue** an advisory opinion
- Issue of propriety
 - Capacity for court to issue advisory opinions is **discretionary** (*Western Sahara Advisory Opinion*)
 - Court **may** give an advisory opinion on any legal question (ICJ Statute Art 65)
 - Will accept requests for advisory opinions unless there are persuasive reasons or compelling reasons to reject (*Western Sahara Advisory Opinion*)
 - Emphasised that just because a legal question also has political ramifications would not be sufficient to reject a request to give advisory opinion
 - But one example of where it might decline to provide an advisory opinion is where there is a state that is **closely involved** in the matter that is being assessed through the advisory opinion and that state has **not given consent** for the court to determine the given matters within that request