

## TOPIC 3: THE LAW OF TREATIES

### SUMMARY OF PROCESS

- Definition of treaty – binding? Does VCLT apply?
- Was there capacity to enter into treaty?
- Conclusion of treaty – signature and ratification
- Application of treaty
- Reservations
  - o Definition, procedure
  - o Allowed?
  - o Acceptance/objections
  - o Effect of reservation
- Interpretation
- Invalidity – absolute or relative
- Termination and suspension

- Treaties: agreements between states (or states and international organisations) **binding** on parties and governed by international law
- Most important source of contemporary international law

### 1969 Vienna Convention on the Law of Treaties (VCLT)

- Main ‘treaty on treaties’
- Based on work of International Law Commission (ILC)
  - o ILC is specialist UN agency comprising of experts in IL tasked with progressive development and codification of IL
- VCLT is a very widely supported treaty BUT sometimes some parties to a multilateral treaty may not be a party of the VCLT
- Most aspects of VCLT is a codification/declaration of customary international law i.e. can be applied even to states not party to VCLT
- Provisions which are not declarations of customary IL may constitute evidence of emerging rules of international law

### Defining a treaty

- **VCLT Art 2(1)(a)**
  - o A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two/more related instruments and whatever its particular designation” (i.e. can be called whatever)
  - o Therefore, limitations:
    - VCLT only applies to treaties between states and in written form
- **VCLT Art 3**
  - o “This definition does not affect agreements between states and other subjects of international law or between those other subjects”
    - i.e. just because VCLT doesn’t apply, it does not mean they are not legitimate treaties
  - o This definition does not affect legal force of agreements not in written form
    - i.e. it is possible to have unwritten agreements and has no effect on legal force of unwritten agreements
- **Legal Status of Eastern Greenland (Denmark v Norway) (1933) PCIJ**
  - o Facts: concerned competing claims to sovereignty over parts of Greenland – Norwegian Foreign Minister had told Denmark it would not oppose sovereignty claim over Greenland
  - o Held Norway was bound by oral undertaking given to Denmark that it would not oppose its claim to sovereignty over Greenland
    - “As a result of the undertaking [by the Norwegian Foreign Minister], Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole”
    - Shows that oral statements by foreign ministers can give rise to legally binding obligations under IL

- Shows that unwritten treaties are legitimate however just won't be governed by VCLT – would be likely governed by customary IL
- May be embodied in one or several instruments and there are no form requirements
  - Maritime Delimitation and Territorial Questions (Qatar v Bahrain) (1994) ICJ
    - Facts: reliance on Minutes of Meeting for matter to be brought to ICJ which appeared to agree that if couldn't resolve dispute themselves, matter would be taken to ICJ
    - Question = were minutes just a record of discussion or did they go beyond this and constitute an international agreement
      - Held context of minutes showed they elaborated commitments to which parties had consented and therefore they constituted an international agreement
      - i.e. should be focused on parties' intention to be bound to determine whether or not what they have concluded is a binding agreement
- Unilateral declarations may also have a binding effect
  - Nuclear Tests Cases (Australia v France; NZ v France) (1974) ICJ
    - Facts: commitment given publicly by French president promising not to undertake any further atmospheric nuclear testing – nuclear testing was then done affecting Aus and NZ
    - 'An undertaking... if given publicly with an intent to be bound, even though not made within the context of international negotiations, is binding'
      - i.e. statement made by President, although not to any specific party, is binding
  - Note it is very rare a court will find that a unilateral statement will bind a state
    - Case Concerning Armed Activities on the Territory of Congo (New Application 2002) (2006)
      - ICJ found statement made by Rwandan Minister of Justice not binding as the statement was of an indeterminate nature with no precise time-scale for withdrawal
      - At most "it can be interpreted as a declaration of intent, very general in scope" [52]
- No requirement that a treaty involves 'consideration' and treaties can be one-sided – differs from contracts
- Some multilateral treaties provide a certain number of States must have ratified (or acceded) to treaty before treaty enters into force

#### The capacity to enter into a treaty

- Only states, international organisations and other international entities with capacity to enter into treaties may be parties who can enter into treaties
  - Texaco v Libya (1977)
    - Corporations (since they are not international legal persons) may not be parties to a treaty
    - Although may be parties to contract with states under which international law is the applicable law i.e. can be part of international contracts
- VCLT Art 7 = Heads of State, Heads of Government (PM's), Ministers of Foreign Affairs, heads of diplomatic missions may enter treaties without producing 'full powers'
  - This group simply by virtue of their position have the authority to enter into treaties without having to produce any instrument called 'full powers' which establishes/reflects their power to enter into treaties under domestic law
  - Case Concerning Armed Activities on the Territory of the Congo (DRC v Rwanda) (2002) ICJ
    - What about a high-ranking government representative?
    - Facts: whether Rwandan Minister of Justice can make statement that was binding on Rwanda
    - With increasing frequency in modern international relations, other persons representing a State in specific fields may be authorised by that State to bind it by their statements in respect of matter falling within their purview - e.g. for holders of technical ministerial portfolios exercising powers in their field of competence

#### Concluding a treaty

- Two-step process; signature followed by ratification
  - It is the ratification which makes the treaty binding
  - Period between signature and ratification allows domestic law to be put in order
  - Although this is general approach to sign and ratify; it is possible for state to condense those two acts into one act of accession
- When does a treaty enter into force?
  - VCLT Art 24(2) says a treaty enters into force generally when treaty says it does

- If silent, presumption that it enters into force when all negotiating states have consented to be bound
- Succession of new states to existing treaties
  - o [Application of the Genocide Convention \(1996\) ICJ](#) per Weeramantry J
    - Question = whether new states arising from former Yugoslavia automatically succeeded to obligations under Genocide Convention
    - “When it comes to human rights treaties which result in no loss of sovereignty or autonomy of the state but are merely in line with general principles of IL flowing from inherent human dignity and form the foundation of the UN Charter, there is a presumption that the new states succeeds automatically to those pre-existing human rights treaties”
- Treaties can be amended by agreement between parties through separate treaty (‘protocol’) – rules governing amendments set out in Art 39-41 VCLT

## Registration and application of treaties

- [UN Charter Art 102 \(also VCLT Art 80\)](#)
  - o States must register treaties with the UN (to prevent secret diplomacy and promote availability of treaty texts)
  - o Treaties not registered cannot be relied upon before UN organs e.g. ICJ (but are still binding)
- [VCLT Art 18](#) – effect of a treaty that is **signed but not ratified**
  - o A state which has signed a treaty are under an obligation to refrain from acts which would defeat the object and purpose of the treaty
    - i.e. not bound as though it were a party however should not act to undermine the treaty
  - o Since treaties can take years to enter into force, provision is important because obliges states to not defeat object and purpose of treaty in time between signature and treaty entering into force
- [VCLT Art 26](#)
  - o “Every treaty in force is binding upon the parties to it and must be performed in good faith”
    - Good faith obligation is called *pacta sunt servanda*
  - o [Nuclear Tests Case \(Australia v France\)](#)
    - “one of the basic principles governing creation... of legal obligations, whatever their source, is the principle of good faith” [46]
- [VCLT Art 27](#)
  - o States party to a treaty may not invoke provisions of domestic law as a justification for failing to perform a treaty
- [VCLT Art 28](#)
  - o Treaties do not apply retrospectively – unless there is an intention to apply retroactively
- [VCLT Art 29](#) – deals with geographic reach of treaties
  - o Treaties apply throughout the territory of the states party to it (unless there is a contrary intention)
- [VCLT Art 30](#) – interaction between earlier and later treaties
  - o Later treaties prevail over earlier treaties
    - Earlier treaties only apply to extent its provisions are compatible with later treaty
  - o Applies even where not all parties to earlier treaty are party to later treaty
  - o [UN Charter 103](#) – UN Charter prevails over any treaty incompatible with it
    - Reflects constitutional character of UN Charter
- [VCLT Art 34](#)
  - o A treaty is binding only on the parties to the treaty – treaties cannot impose obligations or create rights for third states in the absence of their consent (*pacta tertiis nec nocent nec prosunt*)
    - Reflects consent based nature of IL
  - o Note that it is possible for a treaty or treaty provision to become customary international law – if this happens then this customary norm will apply to non-parties: [Art 38 VCLT, North Sea Continental Shelf Cases \(1969\) \(ICJ\)](#)
    - Court acknowledged that it is possible treaties can become customary law and this custom may become binding

## Reservations to treaties

### Definition of reservation

- [VCLT Art 2\(1\)\(d\)](#)

- A “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude/modify the legal effect of certain provisions of the treaty in their application to that State”
  - Reservation will have effect of modifying treaty obligation for that particular state
  - This is different from a mere ‘interpretative declaration’ – a statement as to the meaning a state ascribes to the treaty or treaty provision
- VCLT has sophisticated set of rules applying to reservations to ensure treaties are generally upheld and not completely undermined by reservations
- VCLT regime only relevant to multilateral treaties
  - A reservation in a bilateral treaty is a counter offer

‘Status’ of a declaration – whether a reservation or interpretive declaration

- [Bellios v Switzerland 1988](#)

- Status of declaration depends on assessment of what it seeks to achieve (intent) which is made by interpreting the text of the declaration and its legal effect
- If effect is to make state’s acceptance conditional upon acceptance of declaration → reservation
- If merely offering interpretation of treaty → interpretive declaration

Procedure for making reservation

- [VCLT Art 23](#) – reservation, a rejection of a reservation, a withdrawal of a reservation must be in writing

Whether reservation is allowed

- [VCLT Art 19](#)

- Reservations to treaties are allowed, unless;
  - (a) reservation is prohibited by the treaty (e.g. Rome Statute of the ICC), or
  - (b) treaty provides only specified reservations are allowed, not including the reservation in question,
  - (c) in other cases, if the reservation is incompatible with the object and purpose of the treaty (compatibility test)

- Opposability approach (up to parties to determine which reservations are/aren’t allowed) vs.
- Permissibility approach (objective test whether reservation is objectively consistent with object and purpose of the treaty)
- Effect of impermissible reservation
  - Traditional view = impermissible reservation vitiates (erases) consent of the state to the treaty as a whole and therefore is not a party to the treaty – [Reservations to Genocide Convention \(1951\)](#)
  - Emerging view = impermissible reservation itself is null and void and can be severed by the party’s agreement to be bound by the treaty such that the state is bound by the treaty without the protection of the reservation: [ILC Guide to Practice on Reservations to Treaties, Guideline 4.5.3](#)
    - i.e. disregard the reservation
    - Presumption that author of invalid reservation consents to being bound, unless party expresses contrary intention
    - Used especially for human rights treaties
  - Note VCLT is silent as to effect of an impermissible reservation

Acceptance/objections to reservations

- [VCLT Art 20](#)

- Even if reservations allowed, other parties may accept/object (for any reason)
- (1) No acceptance required if reservation expressly authorised by treaty
- (2) Acceptance required if appears from small number of parties and object/purpose of application of treaty in entirety is an essential condition of consent of the parties
- (4) in other cases
  - (a) acceptance of reservation by another contracting state means that the reserving state is a party in relation to that other accepting state
  - (b) objection by another contracting state does not prevent its entry into the treaty itself (unless objective state says so) – simply means that objecting state is not bound by reservation
  - (c) an act expressing a state’s consent to be bound by the treaty and containing a reservation is effective as soon as one other contracting state accepts the reservation
- (5) unless treaty otherwise provides, reservation considered to be accepted by a state if no objection raised within 12 months

Effect of reservations

- Previous approach – absolute integrity (promoting uniformity of treaty obligations)
  - o If a state makes a reservation, all other parties must expressly accept it, otherwise reserving state is not a party
- Current approach – compatibility (promoting universality of treaty participation – promoting membership and limiting circumstances in which states may be excluded)
  - o Where a state has made a reservation, which has been objected to by some parties but not others, it is nonetheless a party to the convention if the reservation is compatible with the object and purpose of the Convention s
  - o i.e. reservations create a series of bilateral treaties between reserving states and other states which are dependent on how each State has reacted to the reservation
- **VCLT Art 21** – legal effect of reservations and objections
  - o (1) A reservation established in accordance with Articles 19,20 and 23
    - (a) modifies for reserving state in its relations with that other party, the provisions of the treaty to which the reservation relates to the extent of the reservation, and
    - (b) modifies those provisions to the same extent for that other party in its relations with the reserving state
  - o (2) The reservation does not modify the provisions of the treaty for the other parties to the treaty

#### Interpretation of treaties

- Various conceptual approaches – some are similar to approaches to statutory interpretation and constitutional interpretation
  - o Textual – formal adherence to terms of treaty
  - o Restrictive – deference to / prioritising state sovereignty
  - o Teleological – to give effect to object and purpose of treaty
  - o Effectiveness – to ensure treaty regime as effective as possible

#### Key rules of treaty interpretation

- Good faith
  - o **VCLT Art 31(1)** – “treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”
- Context
  - o **VCLT Art 31(2)** – context means, in addition to text, any agreement relating to the treaty between all parties
- Subsequent agreement/practice and applicable international law
  - o **VCLT Art 31(3)** There shall also be taken into account
    - (a) any subsequent agreement between parties regarding the interpretation of the treaty
    - (b) any subsequent practice which establishes the agreement of the parties regarding interpretation
    - (c) any relevant rules of international law applicable between parties
- Supplementary means of interpretation
  - o If at end of process, still uncertainty or lack of clarity of meaning of treaty provision, **VCLT Art 32**:
    - Recourse may be had to supplementary means of interpretation, including preparatory work done in negotiation of treaty (*travaux préparatoires*) when the interpretation according to **Art 31**:
      - (a) leaves the meaning ambiguous or obscure or
      - (b) leads to a result which is manifestly absurd or unreasonable

#### Interpretation of treaties – examples

- **Territorial Dispute Case (Libya v Chad) (1994) ICJ**
  - o ICJ bound to apply treaty provision if clear as to intention of parties
    - i.e. if treaty provision is clear as to the intention of the parties, it is not a matter for the court to look behind that intention
- **Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (2009) ICJ**
  - o A treaty provision which limits the sovereign powers of a state must be interpreted like any other provision of a treaty i.e. in accordance with the intention of the parties as reflected in the text

- Generally adhere to original meaning of provisions but parties may intend that context of provisions evolve, in which case may apply current meaning
- [China Measures Affecting Imports of Automobile Parts \(2008\) WTO AB \(i.e. World Trade Organisation Appellate Body\)](#)
  - VCLT applies to interpretation of WTO agreements
  - Context of Art 31(2) is broad but does not only fall within scope of formal boundaries of Art 31(2) (i.e. not limited) but must also have some pertinence/connection to the language being interpreted that helps the interpreter determine the meaning of the language
- [Oil Platforms \(Iran v US\) \(2003\) ICJ](#)
  - Interpretation of a 1955 treaty must take into account relevant rules of contemporary international law, including the prohibition on the use of force
    - i.e. interpretation of old treaties must take into account relevant rules of contemporary IL

#### Invalidity of treaties

- Several circumstances in which a treaty may be void *ab initio* (absolute invalidity) or voidable (relative invalidity)
  - *ab initio* meaning from the beginning
- A treaty will be void *ab initio* (**absolute invalidity**)
  - Where there has been coercion of state representatives or the state itself (through threat or use of force contrary to UN Charter) – [VCLT Arts 51 and 52](#)
  - Where treaty is in conflict with a peremptory norm of international law (*jus cogens* norm) – [VCLT Arts 53 and 64](#)
- A treaty will be voidable (**relative invalidity**)
  - Where consent involved a manifest violation of a rule of internal law of fundamental importance e.g. a Constitutional rule – [VCLT Art 46](#)
    - See Case Concerning the Territorial and Maritime Disputes (Nicaragua v Colombia) (1962)
  - Where there is an error of fact which formed essential basis of consent to be bound – [VCLT Art 48](#)
    - [Temple of Preah Vihear \(Cambodia v Thailand\) \(1962\)](#)
      - Dispute of territorial sovereignty over temple
      - Court considered discussions between parties – in history of discussions, there was a map used by parties which set out boundary – Thailand argued map embodied a material error of fact and relied upon error which vitiates consent to be bound
      - Court held against Thailand – a plea of error cannot be allowed if the party advancing it contributed by its own conduct to the error or could have avoided it
      - Having regard to history of map making, Thai authorities were put on notice making it impossible to plea error
  - Where a statute is induced to conclude a treaty as a result of the fraudulent conduct of another negotiating state – [VCLT Art 49](#)
    - Note no example of where this has been established in an international court or tribunal

#### Termination and suspension of treaties

- Rules of VCLT concerning termination and suspension of treaties are part of customary international law - [Gabcikovo-Nagymaros Case \(1997\) ICJ](#)
- 'Internal grounds' for terminating
  - [VCLT Arts 54 and 57](#) – treaty itself allows termination (i.e. previously agreed mechanism for termination in treaty) or parties consent to terminate
- 'External grounds' for terminating – VCLT allows treaty to be terminated
  - [VCLT Art 56](#) – if treaty contains no provision regarding termination, denunciation or withdrawal, then it is not subject to denunciation or withdrawal unless it is established that the parties intended to allow it or it is implied by the nature of the treaty
    - Nothing prevents all parties to consensually agreeing
    - It is saying unless treaty has term, it is not subject to unilateral actions of termination
  - [VCLT Art 60](#) – **material breach** – if a state party to a treaty is in breach of a provision of a treaty that is essential to the accomplishment of the object and purpose of the treaty, then that can constitute a material breach which enables other parties to invoke breach as grounds for termination of treaty or suspension of its operation in whole/part, [South West Africa Advisory Opinion \(1971\) \(ICJ\)](#)

- Mere breach of treaty does not give other parties right to terminate
  - VCLT Art 61 – supervening impossibility of performance – impossibility of performing treaty as basis for terminating or withdrawing from treaty if impossibility has resulted from the permanent disappearance/destruction of an object indispensable for the performance of that treaty
    - Very rare – e.g. two states enter treaty in relation to shared river and production of hydroelectricity – if river dries up and parties cannot perform obligations, parties may terminate treaty and be relieved of obligations
    - Cannot invoke impossibility of performance if party itself breaches treaty - [Gabcikovo-Nagymaros Case \(1997\) ICJ](#)
  - VCLT Art 62 – fundamental change of circumstances – unforeseen change of circumstances that radically transforms the obligations to be performed under treaty, then treaty can be terminated, [Fisheries Jurisdiction Case \(1973\) \(ICJ\)](#)
    - Exception = land/sea boundaries are permanent – fundamental change of circumstances cannot be invoked for terminating/withdrawing from treaty relating to boundaries
    - Plea of fundamental change of circumstances can only be applied in the most exceptional circumstances - [Gabcikovo-Nagymaros Case \(1997\) ICJ](#)
- Suspension
  - VCLT Art 57 – possible to suspend operation of treaty for period time as alternative to complete termination
- Severing treaty provision
  - VCLT Art 44 – treaty provision may be severed from rest of treaty in certain circumstances
- Process for termination set out in Art 65-68
- [Gabcikovo-Nagymaros Case \(Hungary v Slovakia\) \(1997\) ICJ \(Danube Dam Case\)](#)
  - Involved questions of treaty law, state responsibility, succession of states and international environmental law
  - Facts: arose from disagreement over joint project between Hungary and Czechoslovakia to construct series of locks and dams along shared stretch of Danube under 1977 treaty – Hungary several decades later suspended work on project due to strong domestic opposition on environmental grounds – Czechoslovakia investigated unilateral alternative i.e. proceed with project by itself – Hungary sought to terminate 1977 treaty
  - Czechoslovakia dissolved → Slovakia and Hungary agreed to submit dispute to ICJ
  - Questions
    - Was Hungary entitled to suspend and abandon the works
    - Was Slovakia entitled to proceed unilaterally i.e. disregard 1977 treaty
    - What were the legal effects of Hungary's purported termination of the treaty
  - Court held
    - Rules of VCLT concerning termination and suspension of treaties are part of customary international law
    - Roles and limits of treaty law and law of state responsibility are distinct
      - Treaty law deals with entering into / interpretation of / termination of treaties
      - State responsibility deals with consequences of breaching international law (including treaties)
    - 1977 Treaty contained no internal grounds for termination – no provision in treaty – therefore must look to external grounds – terminate according to limited grounds set out in VCLT
    - Cannot invoke impossibility of performance if party itself breaches treaty – precluded Hungary from relying upon it
    - Plea of fundamental change of circumstances can only be applied in the most exceptional circumstances – this case is not of such exceptionality – nothing had radically changed in obligations of the parties
    - Hungary not entitled to invoke Slovakia's breach of treaty for termination – at that time no breach had taken place yet i.e. too premature
    - Slovakia's decision to proceed unilaterally was due to Hungary's breach therefore Hungary by its own conduct prejudiced its right to terminate the treaty
      - No evidence of material breach at the relevant time by Slovakia enabling Hungarian termination

- Although both Hungary and Slovakia failed to comply with the treaty, this reciprocal conduct did not bring the treaty to an end nor justify its termination
  - There would be “disturbing implications for treaty relations for treaty relations and the integrity of the rule *pacta sunt servanda*” if were to conclude treaty that was in force may be unilaterally set aside on grounds of reciprocal non-compliance
- Held treaty remained on foot and parties were bound