

02 and 03 Sources of Public International Law

Article 38 of the *Statute of the International Court of Justice* ('ICJ') is 'generally regarded as a complete statement of the sources of international law' (*Ure v Cth*).

- (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international **custom**, as evidence of a general practice accepted as law;
 - (c) the **general principles** of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as **subsidiary** means for the determination of rules of law.

38(1)(a) Treaties are binding agreements between states or international organisations which are governed by international law; the main source of contemporary international law eg. UN Charter – 'fundamentally norm creating' → CIL.

- Largely governed by the 1969 *Vienna Convention on the Law of Treaties* ('VCLT') entered in 1980 – which applies unless the particular treaty provides otherwise. Most provisions are customary ie. declaratory of CIL.
- **Definition:** '[An] international agreement concluded **between the States in written form and governed by international law**, whether embodied in a **single instrument or in 2 or more related instruments** and whatever its particular designation' (VCLT Art 2(1)(a)).
 - a. VCLT Art 3: treaty does not apply, unless it is a treaty *between states* ie. multilateral or bilateral. Not applicable to treaties *between states and international organisations*. Corporations cannot enter into treaties → recognised as 'international contracts' instead (*Texaco v Libya*).
 - b. Governed by international law
 - i. Treaty is not formed if states choose to enter into an agreement that is **governed by domestic law**, or is a **political** rather than **legal agreement**.
 - ii. In determining whether an **agreement is intended**, look to the subjective and objective test. ICJ tends to follow the objective approach while other tribunals have favoured a more subjective test.
 1. **Objective:** considers the text of the agreement to be the sole determinant (*follow this in exam*). Look at the specific terms and circumstances in which it was drawn up – if drafted in very general language, they will not be binding (**Oil Platforms**).
 - i. Do the terms merely record a meeting (account of discussion)? Not binding.
 - ii. Do they enumerate the commitments to which Parties have consented? Binding.
 2. **Subjective:** consider the parties' intentions to be relevant.
 - c. May be embodied in one or several instruments (e.g. an exchange of notes) and there are no requirements as to form: **Maritime Delimitation and Territorial Questions (Qatar v Bahrain)**.
 - i. What matters most is the *objective intention of parties*.
 - ii. International law does not impose any special or strict requirements on form: "Whether a statement is made *orally or in writing* makes no essential difference" (**Nuclear Tests Cases**).
 - iii. Joint communique, exchanges of letters, and minutes of meetings can be considered treaties if they create international rights and obligations, and otherwise satisfy VCLT Art 2(1)(a).

Facts	Dispute related to competing sovereignty claims over islands, shoals and maritime areas between the 2 states. The issue was whether the ICJ had jurisdiction to decide the case – the basis of jurisdiction revolved around whether exchanges of letters between the Heads of each State, by which it was agreed to submit the dispute to the Court, were 'treaties' thus binding in international law.
Analysis	"Minutes are not a simple record of a meeting... they do not merely give an account of discussions and summarise points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. <u>They thus create rights and obligations in international law for the Parties. They constitute an international agreement.</u> "
Conclusion	Minutes, like the exchange of letters, constituted an international agreement creating rights and obligations for the Parties.

- d. If a treaty is established → means parties consented to ICJ's jurisdiction.

- Note that **unilateral declarations** may also have a **binding legal effect**; a State can be legally bound under international law even though it has acted unilaterally through its representatives.
 - "An undertaking of this kind, if **given publicly with an intent to be bound**, even though not made within the context of international negotiations, is binding": **Nuclear Tests Cases (Australia v France; New Zealand v France)**.

Facts	AU and NZ brought proceedings against France arising from nuclear tests conducted by France in the South Pacific. Before the Court could hear the case in full merits, French authorities indicated France would no longer conduct atmospheric nuclear tests.
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Analysis	• “When it is the <u>intention of the State making the declaration that it should become bound according to its terms</u>, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.” • <u>“Nothing in the nature of <i>quid pro quo</i> nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect ... the general nature and characteristics of these statements are decisive for the evaluation of legal implications”.</u>
Conclusion	Due to France’s statements, the claims of AU and NZ no longer had any purpose and the Court no longer had to decide the issues in the case. • France’s public announcement conveyed its intention effectively to terminate these tests. • “The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States.” • “The objects of these statements are clear and they were addressed to the international community as a whole ... constitute an undertaking possessing legal effect.”

1. Have parties **ratified** the VCLT at the time of signing? – 1969: VCLT adopted and opened into signature; 1980: entered into force, 2018: ratified. If the treaty is concluded *before 1980*, state that ‘VCLT codified CIL (Nicaragua) and its provisions can still be referenced as a reflection of international custom’.
 - a. Yes → VCLT applies.
 - b. No → same principles apply in custom. If state is not a party to the VCLT: ‘*Though XXX is not a party to the 1969 VCLT, principles of the VCLT would still apply since it is large considered to be a codification of CIL (Nicaragua; North Sea Continental Shelf).*
2. Is the agreement **written**?
 - a. Yes → VCLT applies.
 - b. No → same principles apply in custom.
 - Possible to have an oral agreement; since most of the VCLT is custom, its rules would apply to oral agreements: **Legal Status of Eastern Greenland (Denmark v Norway)**.

Facts	Norway occupied Eastern Greenland in 1931, claiming it was <i>terra nullius</i> , while Denmark insisted that Danish sovereignty existed all over Greenland from 1721 when Denmark and Norway were one State.
Conclusion	Denmark had a valid title to Eastern Greenland. Norway was bound by an oral undertaking given to Denmark that it would not oppose its claim to sovereignty over Greenland: “[A]s 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, and a <i>fortiori</i> to refrain from occupying a part of Greenland.”

Entry into treaty	Does not require ‘consideration’ and may be one-sided; can be unfair or achieved under duress. 1. Who can enter a treaty? A representative of a State has capacity to enter into treaties only where ‘full powers’ are produced (document issued by State authorising person to undertake a given treaty action – including signing): VCLT Art 7. a. Produces ‘appropriate full powers’: Art 7(1); or b. In virtue of their functions and without having to produce full powers, are considered as representing their State: Art 7(2). i. Heads of State, Heads of Government, Ministers of Foreign Affairs: Art 7(2)(a). ii. Heads of diplomatic missions: Art 7(2)(b). iii. Accredited representatives: Art 7(2)(c). iv. Holders of technical ministerial portfolios (Congo v Rwanda). c. If treaty is concluded by someone who does not fulfil the requirements of Art 7, the conclusion of the treaty does not have legal effect, unless afterward confirmed by that state: Art 8. • Does not include Minister for Defence, who will probably need to have produced ‘full powers’ for consent to be valid → if unclear, consent + treaty may be invalid. • Natural and legal person cannot enter into treaties – although they may be parties to a contract with a state or international organisation where the applicable law is international law. • Corporations may not be parties to a treaty, although may be parties to contract with states under which international law is the applicable law. 2. How to enter a treaty? a. Signature – expresses <i>willingness to continue the treaty-making process</i> (BUT, insufficient to <i>bind</i> parties). i. Treaty is ‘concluded’ when text is adopted/opened for signature – whichever is later. ii. Bilateral treaty is concluded when signed by both states. iii. After treaty is concluded, states can express their consent to be bound ‘by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed’: VCLT Art 11. iv. State that signs a treaty has no obligation to ratify it – but the signature has some limited legal consequences: VCLT Art 18.
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	b. Ratification – indicates <i>consent to be bound</i> (formal procedure to confirm a.) - Period between signature and ratification allows the state time to ensure that any necessary internal laws and policies are put in place before it becomes bound by the treaty. - Entering into a treaty is an Executive act in Australia – Parliament has no formal role. c. Accession (after treaty enters into force) – state becomes party to a treaty already negotiated and signed by other states; same effect as ratification. 3. When does a treaty enter into force? - If a state consented to be bound before the treaty comes into force, the state will be bound <u>when the treaty comes into force</u>. For a state that consents to be bound after the treaty has come into force, the state will be bound <u>when its consent to be bound takes effect, unless the treaty provides differently</u>: VCLT Art 24(1). - A treaty enters into force when the treaty says it does; if silent, there is a presumption that it enters into force when <u>all negotiating states have consented to be bound</u>: VCLT Art 24(2).
Registration & general principles	A treaty must be registered for it to be relied upon before UN organs (ie. ICJ): UN Charter Art 102; VCLT Art 80. • 'Pacta Sunt Servanda' – treaties in force are binding upon the parties and must be performed by them in good faith: VCLT Art 26. ◦ Reflects CIL and 'is a fundamental principle of treaty law'. ◦ Gabčíkovo-Nagymaros Project – ICJ applied this rule strictly and held that the treaty between Hungary and Slovakia <u>could not be terminated simply because both parties breached their obligations arising from it</u>: "This reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have <u>implemented in considerable measure and at a great cost over a period of years</u>, might be unilaterally set aside on grounds of reciprocal noncompliance." • Provisions of internal law are no justification for failing to perform a treaty: VCLT Art 27. ◦ Nicaragua v Columbia – before interpreting the treaty, the ICJ had to consider an argument by Nicaragua that the treaty was invalid for 2 reasons, both of which were rejected. - The Treaty was 'concluded in manifest violation of the Nicaraguan Constitution of 1911 that was in force in 1928.' - At the time the Treaty was concluded, Nicaragua was under military occupation by the US and was precluded from concluding treaties that ran contrary to the interests of the US, and from rejecting the the conclusion of treaties that the US demanded to conclude. • A state which has signed a treaty (ie. signatories) or expressed consent to be bound must refrain from acts which would defeat the object and purpose of the treaty: VCLT Art 18. ◦ Eg. if treaty requires objects to be returned then Art 18 would prohibit their destruction. ◦ This obligation does not give effect to the <i>treaty itself</i>; obligation ceases when a state makes clear its intention not to become a party to the treaty ie. 'unsigned'. • Can we apply a later treaty to interpret the first? ◦ When there are successive treaties on the same subject matter, the later treaty applies. The earlier treaty still applies – but only to the extent that it is compatible with the later treaty: VCLT Art 30. • Treaties do not impose obligations/create rights for third parties without their consent (ie. privity): VCLT Art 34. ◦ This does not preclude 'a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such.': VCLT Art 38.
At this point, determine the object and purpose of the treaty.	
Reservations	- Is it a reservation? '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). • Can only be made at the point when the state is consenting to be bound – no later. ◦ Thus, only relevant to <i>multilateral</i> treaties. ◦ In <i>bilateral</i> treaties, it would function as a counter-offer/continuing the negotiations. • Function so that states are only bound to the extent they agree to be bound. Effective reservation <u>removes the relevant provision from the treaty</u>. • Different from an 'interpretive declaration': statement declaring how a state interprets a particular provision (in multilateral treaties involving many states, the language of the treaty must be acceptable to all → words used are often someone general, hence the need felt by some states to clarify their understanding of certain provisions.) ◦ Eg. <u>"we understand crime to mean xxx as defined in our domestic legislation"</u> ◦ <u>VS. reservations, which more fundamentally alter the legal effects of a treaty.</u> - Is the reservation allowed? Yes, unless prohibited by the treaty or incompatible with the object and purpose of the treaty: VCLT Art 19; Reservations Advisory Opinion [1951] ICJ. - Test for incompatibility: 'A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the <i>raison d'être</i> of the treaty' – <i>ILC Guide to Practice on Reservations to Treaties</i>. [NOT ALLOWED ie. incompatible] If the reservation is impermissible, → consider grounds under treaty law for