

Topic 3: Law of Treaties

Most of the provisions of 1969 Vienna Convention on the Law of Treaties (VCLT) are customary international law (meaning that non-parties are still bound by most of its provisions and that the VCLT applies to treaties concluded before its establishment *note that the VCLT does not apply but it reflects customary law).

- Here, although [state] is not a party to the VCLT, its provisions largely reflect customary rules of treaty law, which means that the latter will apply to [state] given its non-party status. Accordingly, the content of the provisions may apply as custom to treaties outside the scope of the VCLT.
- The relationship between treaties and custom is often one of complementarity. For instance, in *Military and Paramilitary Activities in and against Nicaragua (1986)*, the ICJ held that the prohibition on the use of force continued to exist in customary law and had not been displaced by art 2(4) of the UN Charter.

Does the VCLT apply to this treaty?

For the purposes of the application of the VCLT, 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 (Art 2(1)(a)). It is important to note that this definition does not affect the legal force of other agreements (art 3).

- *Written*: VCLT only applies to *written* treaties (Art 2(1)(a)). Although the VCLT does not apply to oral agreements, such a fact does not affect their legal force (Art 3) and they are still binding as a matter of customary international law – akin to how Norway was bound by its oral undertaking given to Denmark that it would not oppose Danish sovereignty over Greenland (Legal Status of Eastern Greenland (1933)).
- *Governed by international law*: the agreement must be governed by international law to constitute a VCLT treaty. Thus, a 'treaty' is not entered into if governed by domestic law or that is a political rather than a legal agreement (eg a non-binding memorandum of understanding).
- *Between States*: VCLT only applies to written treaties between states (Art 3), and does not include treaties between states and other subjects. In relation to oral treaties, given many of the VCLT provisions reflect customary law, the substance of the VCLT provisions will apply as customary international law to oral treaties.
- *Form*: There is no strict requirement as to the form of the treaty and it may be embodied in several instruments provided the objective intention of the parties pointed in that direction – akin to how the Agreed Minutes of a meeting between Qatar and Bahrain (not merely provided an account of discussions but) enumerated legally binding commitments (such as to submit disputes to the jurisdiction of the ICJ) and therefore constituted a treaty (Qatar and Bahrain (1994)). What matters is the objective intention of the parties as discerned from the text*.
- *Designation*: an international agreement constituting a treaty depends not on its name but on whether it create international obligations.
- Pursuant to the rule of non-retrospectivity, the VCLT only applies to treaties concluded after the VCLT's entry into force for the states concerned (Art 4) – akin to how the VCLT did not apply in *Gabčíkovo-Nagymaros Project* insofar that the treaty was entered into in 1977 but Hungary and Czechoslovakia only became parties to the VCLT in 1987 (Gabčíkovo-Nagymaros Project (1997)). However, many of the provisions reflect customary law and thus the content of the provisions may apply as custom to treaties outside the scope of the VCLT.

- Although very narrow as a doctrine, the **unilateral declarations** of states can bind them – **akin to how the French President's public declaration that France would cease atmospheric nuclear testing in the south Pacific was found to be binding** (Nuclear Tests (1974)). See above*. Also see estoppel.

Treaty Negotiation and Conclusion

- *Authorised State Rep:* A state representative must be duly authorised to express consent of their state to be bound (Art 7) **although even an unauthorised act can subsequently be validated by the state (Art 8)**. Per Art 2(1)(c), full powers 'means 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'.
 - Here, [Head of State/Government, Foreign Minister, Head of Diplomatic Mission] signed the treaty, and they are assumed to be authorised to do so without the need to produce full powers (Art 7(2)).
 - Here, given that [signer] is not a head of state/government, etc (art 7(2)), they are not assumed to be authorised to sign on behalf of their state and therefore must show full powers (Art 7(1)(a)) unless it appears the state dispensed with this requirement (art 7(1)(b)).
- Upon the finalisation of negotiations, the treaty is adopted by consensus or by a relevant majority (Art 9) and must be authenticated per treaty provisions (Art 10).
- *Registration:* After the treaty has entered into force it must be transmitted to the UN Secretariat for registration and publication (Art 80(1)). Registration of treaties are required in order for parties to be able to rely upon them before UN organs (though a lack of registration does not affect validity) (Art 102 UN Charter; Qatar v Bahrain (1994)).

Expressing Consent to be Bound and Entry into a Treaty

States usually enter into treaty by firstly providing its signature to express its willingness to continue the treaty-making process and thereafter ratifying it to indicate consent to be bound.

- States can express their consent to be bound by a treaty by 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed' (Art 11).
 - **Period between signature and ratification allows domestic law to be put in order.**
 - What happens if a state signs by does not ratify a treaty (e.g. like the US did with the Rome Statute)? The VCLT stipulates that if you sign a treaty (subject to ratification), you aren't bound by it but you must refrain from any act that would defeat the object and purpose of the treaty (Art 18). This does not apply if the State expresses an intention not to be bound (e.g. like the US did for the Rome Statute).

Entry into force: A treaty enters into force generally whenever the treaty stipulates (Art 24(1)). If silent, there is a presumption that it enters into force when all negotiating states have consented to be bound (Art 24(2)). A treaty enters into force for a specific party when the treaty has entered into force generally *and* they have consented to be bound.

Observance of Treaties

Every treaty in force is binding upon the parties to it and must be performed by them in good faith – *pacta sunt servanda* (Art 26 VCLT), which is a 'fundamental principle of treaty law' (Gabčíkovo-Nagymaros Project (1997)).

- *Domestic Law No Excuse:* States parties to a treaty may not invoke domestic law as a justification for failing to perform a treaty (Art 27). **See below too for cases****
- *Third Parties:* Treaties do not impose obligations or create rights for third states in the absence of their consent (Art 34).

- *Effect of Treaties Signed but not Ratified:* A state which has signed a treaty must refrain from acts which would defeat the object and purpose of the treaty (Art 18). See above**

Application of Treaties

- *Non-Retroactivity:* unless otherwise intended by parties, a treaty does not apply to acts, facts or situations which occurred or existed before the treaty came into force for those parties (Art 28).
- *Territorial Application:* A treaty is binding on a state in relation to its entire territory (including its airspace and territorial waters) unless the parties intended differently (art 29).
- *Successive Treaties:* Pursuant to art 30, the general rule is that in relation to successive treaties between states on the same subject, the later treaty applies (the earlier treaty will also apply but only to the extent that it is compatible with the later treaty).

Reservations to Treaties

- A state may wish to join a treaty but not want to accept a particular provision and so the function of reservations is that the state becomes bound by the treaty but only to the extent that they agreed to be bound.
- Reservations involve a conflict between the desire to preserve the integrity of the treaty and to ensure that all parties are equally bound by its obligations, and the goal of securing widespread participation in treaties.

A reservation refers to 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 or to modify the legal effect of certain provisions of the treaty in their application to that State' (Art 2). Here, [qualification] may be construed as a reservation (as opposed to a mere interpretative declaration) insofar that it purports to [modify/exclude the legal effect of the agreement by [allowing the unilateral cessation of participation] (art 2).

- Different from a mere '*interpretative declaration*' (a statement as to the meaning a state ascribes to the treaty).
- VCLT rules relevant only to multilateral treaties (as a reservation in a bilateral treaty is effectively a counter-offer).

Is the reservation permissible pursuant to Art 19?

Reservations to treaties are allowed *unless* the reservation is prohibited by the treaty or the reservation is incompatible with the object and purpose of the treaty (Art 19; Reservations to Genocide Convention). 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 *raison d'être* of the treaty (ILC Guide to Practice on Reservations).

However, [party against reservation] may argue that the reservation is incompatible with the object and purpose of the treaty insofar that the agreement is premised on [the equal and continuous contribution of all parties to the project] (art 19; Reservations to Genocide Convention (1951)). Arguably, by [allowing for the unilateral cessation of participation] this affects the essential element of the treaty that is necessary to its general tenor and thus impairs the *raison d'être* of the treaty (ILC Guide to Practice on Reservations).

- *Consequences of an impermissible reservation:* The ILC Guide to Practice on Reservations to Treaties makes clear that an impermissible reservation is null and void and the state will be bound by the treaty without the benefit of the reservation, unless it has clearly made its consent to be bound conditional upon the reservation (Guideline 4.5.3). Originally, the traditional view is that impermissible reservations vitiate consent of the state to the treaty as a whole, and it is not a party (Reservations to Genocide Convention (1951)).
- Proceed to below section regarding acceptance/objection**.

Situations Involving Acceptance or Objection to Reservations (Art 20)

If the reservation is permissible, the issue of acceptance/objection arises.

- *Reservations expressly allowed:* Here, given the treaty expressly allows reservations in [clause], no acceptance by other parties is required (unless the treaty provides otherwise) (art 20(1)).
- *Acceptance by all required:* Here, given the treaty has a small number of parties and the object and purpose of the treaty indicates that application of the treaty in its entirety is an essential condition of consent because [reason], acceptance by all parties will be required (art 20(2)).
- *Acceptance of reservation by one state:* Acceptance of a reservation by another contracting state makes the reserving state a party to the treaty in relation to the accepting state (Art 20(4)(a)).
- *Objection by one state:* An objection by another state to a reservation will not preclude entry into treaty between the objecting and reserving state unless a contrary intention is expressed by objecting state (Art 20(4)(b)).
- *No objection raised within 12 months:* Here, given no objection was raised by [other states] within 12 months, the reservation of [state] can be considered to be accepted (art 20(5)).

Effect of Reservation

Article 21 enumerates the legal effect of permissible reservations.

- If state A accepts state R's reservation – the treaty is modified between A and R (Art 21(1) and (2)).
- If state B objects to state R's reservation and says the treaty is not to apply – there is no treaty between them at all (Art 20(4)(b)).
- If state C objects to state R's reservation but does not say that the treaty is not to apply – the treaty applies but the provisions to which the reservation relates do not apply to the extent of the reservation (Art 21(3)). The parts affected by the reservation will not apply at all between the two states.

Interpretation of Treaties

- Pursuant to Art 31(1), a 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' includes the text of the treaty, the preamble and annexes and any agreements or other instruments emanating from the parties in connection with the conclusion of the treaty (art 31(2)). The evolutionary dynamic approach to interpretation rejecting originalism was affirmed in *Costa Rica v Nicaragua* (2009) – 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is of continuing duration, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'.
- *Subsequent Agreement/Practice:* Any subsequent agreement or practice between parties is to be taken into account when interpreting a treaty (Art 31(3)) – akin to how an evolutionary dynamic approach to interpretation was deployed to construe the contemporary meaning of commerce to encompass passenger transport in *Costa Rica v Nicaragua* (2009). Resolutions of international organisations can be such agreement/practice if supported by all parties – akin to how Australia's argument that the Whaling Convention should be interpreted pursuant to subsequent resolutions about the permissibility of lethal scientific research failed insofar that Japan did not support the international agreement (Whaling in the Antarctic Case (2014)).
 - Signing up to a new treaty/Convention is considered subsequent practice/agreement.

- *Other International Law rules*: an interpretation of this treaty shall take into account relevant rules of contemporary international law, including other treaties and customary law – *akin to how the ICJ interpreted the legality of the USA's use of force under art XX of the 1955 treaty in light of the UN Charter and contemporary international law* (Oil Platforms (2003)).
- *Supplementary means of interpretation*: if an interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable, then recourse may be had to supplementary means of interpretation (Art 32). *This includes preparatory works of a treaty (eg records of negotiation, drafts of treaty, conference records) and the circumstances of its conclusion.*

Impeaching Validity of Treaty

Given the principle of *pacta sunt servanda* enshrined in art 26, it is very difficult for a state to avoid or terminate its treaty obligations (Gabčíkovo-Nagymaros Project (1997)). However, [party seeking to avoid treaty obligation] would submit a treaty can be invalidated, terminated, suspended or withdrawn from in accordance with the VCLT (art 42).

Invalidity of Treaties

Relevantly, a treaty is void if:

1. [party against validity] would submit that the treaty is void insofar that the treaty's conclusion was procured by the threat or use of force by a State in violation of the UN Charter (Art 52). If established, the treaty is automatically vitiated (absolute invalidity).
2. [party against validity] would submit that the treaty is void insofar that it violates a rule of *jus cogens* and a peremptory norm of international law (arts 53, 64). If established, the treaty is automatically vitiated (absolute invalidity).
3. [party against validity] would submit that the treaty should be declared 'invalid' (and therefore their consent invalidated/vitiated) insofar that:
 - Their consent manifestly violated a rule of internal law of fundamental importance by [bypassing the constitutional requirement to obtain parliamentary approval], which was objectively evident (Art 46). However, [party for validity] would argue that a state cannot invoke the mere fact that its consent to be bound by a treaty was in violation of its internal law regarding competence to conclude treaties (Qatar v Bahrain (1994)) – the violation must be manifest and concern an internal law of fundamental importance. *Per art 46(2), a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*
 - *It could potentially be argued that this was a constitutional provision of fundamental importance and was objectively evident to Aneria and Belvor such that it invalidated Cresta's consent. However, a similar argument by Qatar failed in Qatar v Bahrain. A number of responses also cited the Case Concerning the Territorial and Maritime Dispute (Nicaragua v Colombia) (2007) where a similar argument was also unsuccessful (although for different reasons). Not voidable in this case as Nicaragua had treated the treaty as valid for over 50 years.*
 - There is an error in a treaty, which relates to a fact or situation which was assumed to exist at the time when the treaty was concluded and formed the essential basis of its consent to be bound (Art 48). However, this provision does not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error (Art 48(2)) – *akin to how Thailand had 'accepted without any independent investigation' the veracity of a map incorrectly indicating Cambodia having sovereignty over the Temple of Preah Vihear and therefore could not later plead*

error vitiating consent (Cambodia v Thailand (1962)). An error relating to the wording of the text of a treaty does not affect its validity (Art 48(3)).

- The state was induced to conclude a treaty by the fraudulent conduct of another negotiating state (Art 49).
- The expression of the state's consent has been procured through the corruption of its representative (art 50).
- The expression of the state's consent has been procured through the coercion of a state representative (art 51).

Consequences of invalidity

- If a treaty is invalid or contrary to a *jus cogens* norm, it is void and has no legal effect (art 69). If a multilateral treaty is found to have been invalid, the treaty is invalid only as between that state and the other parties; the treaty remains on foot for all other parties (art 69(4)). Prior acts done in good faith are generally unaffected (art 69).

Termination, Withdrawal and Suspension

- Termination= a treaty ceases to exist.
- Denunciation/withdrawal – a party withdraws from a treaty (and if it is multilateral it will continue to exist for other parties).
- Suspension – treaty remains on foot, but performance suspended for a time.

Internal grounds

Termination or suspension by express or implied agreement

Termination

- *Termination in accordance with treaty provisions*: A treaty will terminate in accordance with its provisions (art 54(1)).
- *Termination in accordance with consent*: A treaty will terminate in accordance with the consent of all parties (art 54(2)).
- *Termination due to subsequent treaty*: A treaty will be terminated where it is replaced by a later treaty between the same parties and on the same subject matter and the later treaty is intended to supersede the earlier (art 59).

Suspension

- *Suspension in accordance with treaty provisions*: The operation of a treaty in regards to all the parties or to a particular party may be suspended in conformity with the provisions of the treaty (art 57(1)).
- *Suspension in accordance with consent*: The operation of a treaty in regards to all the parties or to a particular party may be suspended or with the consent of all parties (art 57(2)).
- *Suspension of the operation of a multilateral treaty by agreement between certain of the parties only*: 2 or more parties to a multilateral treaty can agree to suspend the operation of a treaty between themselves if it is expressly permitted by the treaty (art 58(a)) or it is not prohibited by the treaty, provided suspension will not affect the rights and obligations of the other parties and suspension is not incompatible with the object and purpose of the treaty (art 58(b)).

Denunciation or withdrawal by express or implied agreement

- An individual party may denounce or withdraw from a treaty if (a) the treaty permits it (art 54(a)), all the parties consent (art 54(b)), the parties intended the possibility of denunciation or withdrawal (art 56(1)(a)) or such a right can be inferred from the nature of the treaty (art 56(1)(b)).
 - Unless otherwise specified, a party denouncing or withdrawing from the treaty under art 56 must give 12 months' notice (art 56(2)).
 - The denunciation/withdrawal of an individual party does not terminate a multilateral treaty, which remains on foot between all the other parties.

External Grounds

Material Breach: Relevantly, one ground which gives rise to the right to terminate/suspend a treaty is the commission of a material breach (art 60). [party seeking termination/suspension] would argue that [other parties conduct] in [conduct] amounts to a breach of [clause]. However, it is important to note that it must be a material breach, meaning an impermissible repudiation of the treaty or violation of a provision essential for achieving the object and purpose of the treaty (Art 60). This is/is not likely to be satisfied here given [reason].

Situations involving Breach

1. *Material Breach of Bilateral Treaty:* A material breach of a bilateral treaty committed by one party entitles the other party to terminate or suspend the treaty (art 60(1)) – **akin to how Hungary unsuccessfully argued its termination was justified on the basis that Czechoslovakia had breached the 1977 treaty by adopting Variant C (Gabčíkovo-Nagymaros Project (1997)). This failed insofar that such a breach occurred after Hungary purported to terminate the treaty.**
2. *Material Breach of Multilateral Treaty:* A material breach of a multilateral treaty entitles the other parties to terminate or suspend the treaty (in whole or in part) provided they are acting unanimously (art 60(2)). They may do so in between all the parties (art 60(2)(a)(ii)) or only between the defaulting state and other parties (art 60(2)(a)(i)).
3. *Breach Specially Affecting State:* Certain parties may be specially affected by a breach and they can suspend (not terminate) the treaty (in whole or in part) as between that state and the defaulting state (art 60(2)(b)). For instance, where a breach of a treaty on the prevention of oil pollution results in damage to the beaches and marine life of that party.
4. *Radical Change of Position due to Breach:* any party (other than the defaulting party) can suspend (not terminate) a treaty if a material breach radically changes the position of every party with respect to the further performance of its obligations under the treaty (art 60(2)(c)). For instance, a material breach of a disarmament treaty would usually mean the defaulting state was re-arming or failing to dispose of existing weapons and thus the other states would be entitled to suspend it to re-arm too.
 - Inapplicability in relation to humanitarian treaties: the above does not apply to ‘provisions protecting the human person’ contained in treaties of a humanitarian nature (art 60(5)).

Impossibility (ensure the change has happened and is not premature):* [party seeking invalidation of treaty] may argue that performance of the treaty has become impossible because an object indispensable for the execution of the treaty has permanently disappeared or been destroyed because [reason] and therefore can terminate, withdraw or (indeed suspend if the impossibility is temporary) (Art 61) – **akin to how Hungary unsuccessfully argued its termination was justified on the basis of impossibility because the ‘object’ had disappeared, namely the legal regime of there being an economic joint investment disappeared (Gabčíkovo-Nagymaros Project (1997)).** However, [party for validity of treaty] would submit that impossibility cannot be relied on by a party if it is the result of a breach (of any international obligation) by that party and here, [party seeking invalidation caused the impossible conditions] (art 61(2)) – **akin to how Hungary could not rely on impossibility to justify its termination because its own conduct in failing to carry out its works under the 1977 treaty caused the disappearance of the economic joint investment (Gabčíkovo-Nagymaros Project (1997)).**

Rare in practice. The ILC suggests as examples ‘the submergence of an island, the drying up of a river’ where these are essential to the performance of the treaty.

Fundamental Change of Circumstances (ensure the change has happened and is not premature):* [party seeking invalidation of treaty] may argue that there has been a fundamental change of circumstances since the treaty was concluded which was not foreseen by the parties in the form of [political conditions] and therefore can terminate/suspend or withdraw from the treaty (Art 62) – **unlike how Ireland unsuccessfully claimed fundamental change of circumstances on the basis of**

an alteration of fishing techniques (UK v Ireland (1973)) OR akin to how Hungary unsuccessfully argued its termination of the 1977 treaty was justified on the basis of the profound political and economic changes and changes in environmental knowledge and law since the conclusion of the treaty (Gabčíkovo-Nagymaros Project (1997))

- Firstly, the circumstances as they existed at the time the treaty was concluded must have been an essential basis of consent (art 62(1)(a)) – unlike how the ICJ found that the political and economic situation in 1977 was not an essential basis of the parties' consent to be bound to the 1977 treaty (Gabčíkovo-Nagymaros Project (1997)).
- Secondly, the change must not have been foreseen (art 62(1)) – unlike how the ICJ found the environmental changes were not unforeseen when entering the 1977 treaty (Gabčíkovo-Nagymaros Project (1997)).
- Thirdly, the change must radically transform extent of obligations still to be performed (art 62(1)(b)).
- Fourthly, the change must not have been caused by a breach (of any international obligation) by the party claiming the ground (art 62(2)(b)).

Consequences of termination

- If treaty is terminated, the parties are released from further obligations but rights, obligations and legal situations created under the treaty are unaffected (art 70).
- If treaty is suspended, the parties must not do anything to obstruct the resumption of the operation of the treaty (art 72).