

CHAPTER 4

THE LAW OF TREATIES

The significance of treaties as a source of international law has already been discussed in Chapter 3. This chapter is concerned with the mechanics of treaties: how they are concluded, interpreted, observed, and terminated.

4.1 Introduction

Prior to 1969, the law of treaties consisted of customary rules of international law. Many of the rules relating to treaties between states were codified in the Vienna Convention on the Law of Treaties 1969 (VCT 1969) which was concluded on 23 May 1969 and entered into force on 27 January 1980, following receipt of the 35th ratification. The VCT 1969 is an early and important example of the codifying work of the International Law Commission. Additionally of interest is the Vienna Convention on Succession of States in Respect of Treaties 1978 (VCS 1978), concluded on 23 August 1978 and not yet in force, and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986 (VCIO 1986), concluded on 21 March 1986, also not yet in force. The VCIO 1986 repeats most of the substantive rules contained in VCT 1969 and applies to those treaties which involve international organisations. In this chapter reference will generally only be made to the relevant provisions of the VCT 1969. The VCT 1969 is not retroactive and only applies to treaties concluded after 27 January 1980. The rules of customary law still have an important role and it is important to decide the extent to which the Vienna Conventions codify existing customary law and the extent to which they introduce new rules of law. When studying the law of treaties it is therefore important to be clear as to which rules are contained in the various Vienna Conventions and which rules are to be found in international custom.

At its first session in 1949, the International Law Commission included the law of treaties in its provisional list of topics selected for codification.¹ The ILC then completed a special report on reservations to treaties in 1951,² and participation in general multilateral treaties.^{3, 4}

VIENNA CONVENTION ON THE LAW OF TREATIES⁵

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

1 (1949) *YBILC* at p 281.

2 (1951) *YBILC* ii at pp 125–131.

3 (1963) *YBILC* ii at pp 217–223.

4 See further on multilateral treaties UN Doc A/35/312. For ILC Draft Articles and commentary, see (1966) *YBILC* ii at pp 173–274. For VCIO Draft Articles see (1982) *YBILC* ii pt 2 at pp 9–77.

5 UKTS No 58 (1980), Cmnd 7964; 1155 UNTS 331; (1969) 81 ILM 679; (1969) 63 AJIL 875. The Convention entered into force on 27 January 1980.

Recognising the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all states, of non-interference in the domestic affairs of states, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I

INTRODUCTION

Article 1 Scope of the present Convention

The present Convention applies to treaties between states

Article 2 Use of terms

1 For the purposes of the present Convention:

- (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;⁶
- (b) 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty;

6 Article 2(1) VCIIO 1986 provides: 'For the purposes of the present Convention:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more states and one or more international organisations; or
- (ii) between international organisations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

- (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;
 - (d) 'reservation' means 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;
 - (e) 'negotiating state' means a state which took part in the drawing up and adoption of the text of the treaty;
 - (f) 'Contracting State' means a state which has consented to be bound by the treaty, whether or not the treaty has entered into force;
 - (g) 'party' means a state which has consented to be bound by the treaty and for which the treaty is in force;
 - (h) 'third state' means a state not party to the treaty;
 - (i) 'international organisation' means an intergovernmental organisation.
- 2 The provisions in paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them, in the internal law of any state.

Article 3 International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law, or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties.

Agreements not in writing may nonetheless be legally binding although not under the provisions of VCT – see *US v Gonzales* (1986) 80 AJIL p 653, where a telephone conversation created an arrangement with another government.

Article 4 Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after entry into force of the present Convention with regard to such states.

Article 5 Treaties constituting international organisations and treaties adopted within an international organisation

The present Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1 CONCLUSION OF TREATIES

Article 6 Capacity of states to conclude treaties

Every state possesses capacity to conclude treaties.

Article 7 Full powers

- 1 A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if:
 - (a) he produces the appropriate full powers; or
 - (b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.
- 2 In virtue of their functions and without having to produce full powers, the following are considered as representing their state:
 - (a) Heads of state, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
 - (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited;
 - (c) representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation or organ.

Article 8 Subsequent confirmation of an act performed without authorisation

An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorised to represent a state for that purpose is without legal effect unless afterwards confirmed by that state.

Article 9 Adoption of the text

- 1 The adoption of the text of a treaty takes place by the consent of all the states participating in its drawing up except as provided in paragraph 2.
- 2 The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the states present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10 Authentication of the text

The text of a treaty is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the states participating in its drawing up; or
- (b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11 Means of expressing consent to be bound by a treaty

The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12 Consent to be bound by a treaty expressed by signature

- 1 The consent of a state to be bound by a treaty is expressed by the signature of its representatives when:
 - (a) the treaty provides that signature shall have that effect;
 - (b) it is otherwise established that the negotiating states were agreed that signature should have that effect; or
 - (c) the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
- 2 For the purposes of para 1:
 - (a) the initialing of a text constitutes a signature of the treaty when it is established that the negotiating states so agreed;
 - (b) the signature *ad referendum* of a treaty by a representative, if confirmed by his state, constitutes a full signature of the treaty.

Article 13 Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of states to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise established that those states were agreed that the exchange of instruments should have that effect.

Article 14 Consent to be bound by a treaty expressed by ratification, acceptance or approval

- 1 The consent of a state to be bound by a treaty is expressed by ratification when:
 - (a) the treaty provides for such consent to be expressed by means of ratification;
 - (b) it is otherwise established that the negotiating states were agreed that ratification should be required;
 - (c) the representatives of the state has signed the treaty subject to ratification; or
 - (d) the intention of the state to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
- 2 The consent of a state to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15 Consent to be bound by a treaty expressed by accession

The consent of a state to be bound by a treaty is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that state by means of accession;
- (b) it is otherwise established that the negotiating states were agreed that such consent may be expressed by that state by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that state by means of accession.

Article 16 Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a state to be bound by a treaty upon:

- (a) their exchange between the Contracting States;
- (b) their deposit with the depositary; or
- (c) their notification to the Contracting States or to the depositary, if so agreed.

Article 17 Consent to be bound by part of a treaty and choice of differing provisions

- 1 Without prejudice to Articles 19 to 23, the consent of a state to be bound by part of a treaty is effective only if the treaty so permits or the other Contracting States so agree.
- 2 The consent of a state to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18 Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2
RESERVATIONS

Article 19 Formulation of reservations

A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paras (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20 Acceptance of and objection to reservations

- 1 A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other Contracting States unless the treaty so provides.
- 2 When it appears from the limited number of the negotiating states and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

- 3 When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation.
- 4 In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
 - (a) acceptance by another Contracting State of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states;
 - (b) an objection by another Contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting state;
 - (c) an act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other Contracting State has accepted the reservation.
- 5 For the purposes of paras 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21 Legal effects of reservations and of objections to reservations

- 1 A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
 - (a) modifies for the 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.
- 2 The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
- 3 When a state objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation.

Article 22 Withdrawal of reservations and of objections to reservations

- 1 Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal.
- 2 Unless the treaty otherwise provides, or it is otherwise agreed:
 - (a) the withdrawal of a reservation becomes operative in relation to another Contracting State only when notice of it has been received by that state;
 - (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the state which formulated the reservation.

Article 23 Procedure regarding reservations

- 1 A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the Contracting States and other states entitled to become parties to the treaty.

- 2 If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving state when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
- 3 An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
- 4 The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3

ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24 Entry into force

- 1 A treaty enters into force in such manner and upon such date as it may provide or as the negotiating states may agree.
- 2 Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states.
- 3 When the consent of a state to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that state on that date, unless the treaty otherwise provides.
- 4 The provisions of a treaty regulating the authentication of its text, the establishment of the consent of states to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25 Provisions application

- 1 A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty itself so provides; or
 - (b) the negotiating states have in some other manner so agreed.
- 2 Unless the treaty otherwise provides or the negotiating states have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a state shall be terminated if that state notifies the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1

OBSERVANCE OF TREATIES

Article 26 *Pacta sunt servanda*

Every treaty is binding upon the parties to it and must be performed by them in good faith.

Article 27 Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

SECTION 2
APPLICATION OF TREATIES

Article 28 Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29 Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30 Application of successive treaties relating to the same subject-matter

- 1 Subject to Article 103 of the Charter of the United Nations, the rights and obligations of states parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
- 2 When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
- 3 When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
- 4 When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between state parties to both treaties the same rule applies as in para 3;
 - (b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.
- 5 Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a state from the conclusions or application of a treaty, the provisions of which are incompatible with its obligations towards another state under another treaty.

SECTION 3
INTERPRETATION OF TREATIES

Article 31 General rule of interpretation

- 1 A treaty shall be considered 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.
- 2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

- 3 There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- 4 A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order 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.

Article 33 Interpretation of treaties authenticated in two or more languages

- 1 When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
- 2 A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
- 3 The terms of the treaty are presumed to have the same meaning in each authentic text.
- 4 Except where a particular text prevails in accordance with para 1, when a comparison of the authentic text discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4

TREATIES AND THIRD STATES

Article 34 General rule regarding third states

A treaty does not create either obligations or rights for a third state without its consent.

Article 35 Treaties providing for obligations for third states

An obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing.

Article 36 Treaties providing for rights for third states

- 1 A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

- 2 A state exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37 Revocation or modification of obligations or rights of third states

- 1 When an obligation has arisen for a third state in conformity with Article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third state, unless it is established that they had otherwise agreed.
- 2 When a right has arisen for a third state in conformity with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third state.

Article 38 Rules in a treaty becoming binding on third states through international custom

Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognised as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39 General rules regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40 Amendment of multilateral treaties

- 1 Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
- 2 Any proposal to amend a multilateral treaty as between all the parties must be notified to all the Contracting States, each one of which shall have the right to take part in:
 - (a) the decision as to the action to be taken in regard to such proposal;
 - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
- 3 Every state entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
- 4 The amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement; Article 30, para 4(b), applies in relation to such state.
- 5 Any state which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that state:
 - (a) be considered as a party to the treaty as amended; and
 - (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41 Agreements to modify multilateral treaties between certain of the parties only

- 1 Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: