

LECTURE TEN

THE LAW OF CONTRACT AND TREATIES INTERNATIONAL TRANSACTIONS

International Law of Treaties

What is a Treaty ? I.C.L. Definition : A consensual engagement which subjects of International Law have made towards each other with an intent to create legal relations under International Law.

- Consensual Engagement.
- No need to be in writing : evidence of treaty :
- Must be entered with by subjects of International Law. (not a M/L company).
- Must be governed by International Law . cf. may be an agreement- e.g. contract under municipal law for goods and property ! Intention to create legal relations cf. a gentleman's agreement.
- Treaty - declaration - protocol etc. terminology is unimportant –they are all treaties.

Vienna Convention

- 1 Applies to treaties between STATES only (not other international institutions e.g. United Nations (But see Convention - March 1986 - vol. 25 I.L.M. p543 - treaty International Institutions to states).
- 2 Treaty needs a written agreement . governed by International Law. Whether in a single or several documents

Executive Agreements : United States especially . U.S. constitution. President needs by and with senate advice . must be two thirds approval of those present and voting.

Executive agreement. President can make them alone. Not recognised by constitution. Congress may authorise President. Implied powers to veto foreign relations . and armed forces

Initialling Authenticates the text . no binding effect.

Signing I.C.L. . Depends on intention of parties : presumption needs ratification . render compatible with domestic law.

Accession Indicates willingness to be bound - even if one has not signed.

Signature ad referendum Reserve right to refer back to one's government intention to be bound. No intention to be bound.

- 10 Authentication . Init. . sig. . S.A.D.
- 11 Bound by signature : ratification : acceptance : accession. Any instrument indicating an intention to be bound.
- 12 Consent - treaty - signature - if provided for by the parties intention - full powers of representative
- 18 Obligation not to defeat objects of treaty before entering into force - between signature subject to ratification - until it is clear one does not wish to be bound !

Period between Ratification - and entry into force a form of moratorium ! Imperfect Ratification : When there is a conflict between internal and International Ratification. : e. g. United States President ratifies without Senate consent ! I.C.L. position . presumption . one does not look behind ostensible authority of a Head of State : Has been suggested . a manifest failure to comply with Domestic rules International community cannot bona fide avail itself of the treaty !

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- 7 full powers document or if it appears from that state's practice to give authority and dispense with full powers

The following represent the State

- Heads of State (Government)
- Ministers of Government :
- Head of State : Has a Prime Minister such power ? Doubts in antiquity : clear under convention :
- Head of a Diplomatic Mission for the purpose of the treaty :
- Accredited state representatives.

- 46 Invalidity of treaty . Provisions of internal law

State may not invoke disparity of percentage of consent unless well known . and of fundamental constitutional importance . United States . Manifest . fundamental importance.

It is manifest - if clear to a state acting in good faith . re. United States yes . manifest. (Well known . President Wilson and League of Nations) . and fundamental sep. of powers in the United States.

Registration and Publication

Art 102 United Nations Charter (Article 18 League) to eliminate secret agreements Are unregistered treaties null and void ?

Art 102 is clear : can't cite a treaty before United Nations or I.C.J.

Omnis Conventio Intelligit :- Clausula rebus sic stantibus. Uncertain

1) 1941 . Second World War . United States not yet in war . Aiding Allies sought temporary suspension of loadline convention - re. plimsoll line Emergency

2) 1973 : Fisheries case : Iceland and United Kingdom

1959 : Attempt by Iceland to set 12 mile limit.

1961 : United Kingdom agreed to recognise 12 mile . Iceland agreed - if latter intended tend further and United Kingdom objected - agreed to refer to I.C.J. United Kingdom argued a quid pro quo. Iceland bound. Iceland claimed fundamental change in circumstances by technology growth - entitling them to break agreement : Refused by I.C.J.

Free zones case 1932 : existence of the rule questioned by the court.

Art 62 . convention : Negative formulation . presumption against it . Not unless there is the existence of circumstances essential to the agreement Radically changes future duties . unless it is the result of a breach by party invoking it

See also Articles 65 & 66 : Annex 1 . procedure

Interpretation of Treaties : Vienna

Background I.C.L. Scheme not rules of law. methodology : What are the objects & aims of treaty interpretation ? What means should be adopted ?

Aims !

- 1) to establish letter of law - legal interpretation.
- 2) to establish spirit of law - equitable interpretation -
- 3) to establish function of the treaty - function/theological? interpretation of law. -38-

Means !

- 1) Textual interpretation
- 2) Historical interpretation . negotiating record . preparatory work.
- 3) Subsequent conduct of the parties.

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Judge might choose or stress any two of these . therefore it is never clear what judge is trying to do . Best interpretation is consistent with all six

Legal interpretation . systematic . inconsistency etc. . logical interpretation extensive . restrictive . Sovereignty presumption, restrictive

The Object of the Vienna Convention is greater consistency.

Art 31 . General Rule . Article 32 . supplementary means of interpretation Historic approach . not a hierarchy of rules.

Art 31 Treaty : Interpretation : good faith, ordinary words in light of object (intention) and purpose.

Content : text : annex : agreements re. treaty : and also any subsequent agreements/practice/relevant files of I.C.L.

Article 32 Preparatory work : legislative record . to confirm meaning of Article 31 - or ambiguity - absurd - unreasonable result.

Article 33 Where a treaty in two or more languages, inconsistency . I.C.L. rule and principle of sovereignty and consent interpretation imposing lesser obligation . But Article 33 text in each language authoritative unless one given priority foreign language : Both equal : except where a text prevails when a comparison of texts - meaning which best reconciles object and purpose of treaty

Reservations. Bilateral Treaties : Should they be permitted in multilateral treaties ? Bilateral treaties. can't be a reservation must negotiate problems away.

Multilateral treaties . In practice - pre convention. Latin American states allowed states to make reservations - left to state to reserve - and other states to decide what they wished to do re. the reservation . No obligation on states to declare their attitudes

The Genocide Declaration

Was it possible to make reservations ? e.g. regarding jurisdiction.

I.C.J. advisory opinion and International Law Commission I.C.J. and I.L.C. opposing opinions. I.C.J. (Background - convention needed 20 signatories - NO reservations allowed several reservations made and objected to by others).

Court 7 - 5 providing the reservation compatible with object and purpose - O.K. parties . but objecting states not bound to recognise them as parties to the treaty (semble Latin American approach).

Reason courts took the view - traditionally . integrity of convention as adopted : i.e. NO reservations

1) Breaches of the Principle - state practice permits reservations.

2) General Rule only conventions with special characteristics. Did the Genocide Convention have special characteristics ? To work it needed as many signatures as possible regarding Eastern states there were problems with jurisdiction regarding alleged breaches : jurisdiction did not affect object and purpose! I.C.L. . Regarded I.C.J.'s opinion as contrary to I.C.L. G.A. instructed to follow the court . Later I.L.C. . recognised I.C.J.'s opinion : incorporating Articles 19 - 23 Geneva Convention : Quite precise and useful

Art 19 : May make restrictions . unless not allowed . 01 . specific . or if incompatible object and purpose.

Art 20 . Objections . restricted multilateral treaties . Reservations must be accepted by all parties : General Charters . Must be accepted by the General Body Reservations outside these . Reserving state becomes a party for any state that accepts the reservations : Objections do not stop treaty unless contrary intention specified by objecting state : reservation accepted if no objection within twelve months of notice of reservation

Art 21 : Straightforward. Likewise Articles 22 & 23.

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The Effect of Treaties on Third Parties

Avoid use of the phrase "law making treaty" All treaties make law. Usually used for large scale treaties . implies such treaties create rules for all, including non participants . But contrary to rules of contract and sovereignty . Privity Res inter alios Acta : Pacta tertiss nec nocent nec prosunt

A rule may be derived from treaty and become part of I.C.J. . e.g. Treaties on the law of the sea. No reservation allowed. Nations do not sign but adopt domestic legislation supporting large parts of it. If enough states do so - I.C.L. emerges - state practice - binding .but not because of the treaty .but rather because of I. C. L.

Confirmed 1926 P.C.I.J. 1922 P.C.I.J. Free zones case

Art 34 : No third party duties . needs consent.

Art 35 Obligations . in treaty . if intended and the third state accepts – expressly - IN WRITING

Art 36 Rights . If parties intend . and the third state assents thereto will be presumed - unless express contrary indications.

Art 38 Nothing precludes a rule in a treaty becoming binding via I.C.L.

Effect of Coercion on Validity of Treaty

Art 51 coercion of an individual/representative - by threats - no validity.

Art 52 coercion of the state by force : Hague Conference . tendency to make force illegal - and treaties resulting from force suspect.

Art 52 : Void if procured by threat or use of force in violation of the principles of I.C.L. embodied in charter of United Nations.

Vienna conference : Problems : what is meant by use of threat or force - African states - should be wide - e.g. cutting off aid - so see I.C.L. for a definition of any.

Scope of the provision : original text : no reference to principles of U.L.C. international law embodied in United Nations to indicate the rule reflected prohibition of use of force pre United Nations charter. Compare Article 4 . clear convention not retro active.

If one could show that I.C.L. against force applied at the time of making a treaty - it would be void.

FURTHER READING

Schwarzenberger & Grown : Manual Ch6

Schwarzenberger : Volume 1 Ch23 to 30

Sinclair : The Vienna Convention on the Law of Treaties 2nd ed 1984

McNair : The Law of Treaties 1961

Harris : Ch 10

Vienna Convention on the Law of Treaties Brownlie Documents p123

ILC Law of Treaties Draft articles & commentary 61 AJIL 1967 p255 & ILC Year Book 1966 p187

Vienna Convention on Succession of States in Respect of Treaties 22.8.78 17 ILM 1978 p1488

Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986 XXV ILM 1986 p543

German Interests in Polish Upper Silesia PCIJ 1926 Green p533 Free Zones Case PCIJ 1925 Green 2nd Ed p808

Interpretation of Peace Treaties ICJ Reports 1950 p65 Green p567 Reservations to the Convention on Genocide ICJ Reports 1951 p15 Green p573