

Concept of treaties

Law of treaties

Autumn 2022, SSIR

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Outline

- Treaties as agreements
- Treaties under the VCLT
- VCLT and regulation of treaties
- Formalism in treaties
- Case study

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Treaties as agreements

- Position under customary law
- A treaty is a written agreement

Treaties as agreements

- An agreement is a consensual bond, express or tacit, between two or more subjects of international law, designed to produce legal effects, and governed by international law.

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- Article 27 of the UN Charter:
 1. Each member of the Security Council shall have one vote.
 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members ; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

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Treaties under the VCLT

- Customary law:

Treaties are written agreements. An agreement is a consensual bond, express or tacit, between two or more subjects of international law, designed to produce legal effects, and governed by international law.

- VCLT, Art. 2(1)(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;

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- Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations 1986, Art. 1:

The present Convention applies to:

- (a) treaties between one or more States and one or more international organizations, and
- (b) treaties between international organizations.

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- Treaty between state A and state B
- Treaty between state A and international organisation C
- Treaty between state B and armed group D
- Treaty between international organisation C and armed group D
- Treaty between international organisation C and international organisation E

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VCLT and regulation of treaties

- 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 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

...

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

...

5. For the purposes of paragraphs 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 twelve 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 26. "PACTA SUNT SERVANDA"

Every treaty in force 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.

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Formalism in treaties

- Aegean Sea Continental Shelf Case (Greece v. Turkey, 1978 ICJ Reports 39 (¶ 96):

On the question of form, the Court need only to observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement

Formalism in treaties

- Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility), 1 July 1994, 1994 ICJ Reports 112, 120:

24. The 1990 Minutes refer to the consultations between the two Foreign Ministers of Bahrain and Qatar, in the presence of the Foreign Minister of Saudi Arabia, and state what had been "agreed" between the Parties. In paragraph 1 the commitments previously entered into are re-affirmed (which includes, at the least, the agreement constituted by the exchanges of letters of December 1987). In paragraph 2, the Minutes provide for the good offices of the King of Saudi Arabia to continue until May 1991, and exclude the submission of the dispute to the Court prior thereto. The circumstances are addressed under which the dispute may subsequently be submitted to the Court. Qatar's acceptance of the Bahraini formula is placed on record. The Minutes provide that the Saudi good offices are to continue while the case is pending before the Court, and go on to say that, if a compromise agreement is reached during that time, the case is to be withdrawn.

Formalism in treaties

- Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility), 1 July 1994, 1994 ICJ Reports 112, 121-2:

25....Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.

...

27. The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement.

Formalism in treaties

- Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, 2010 ICJ Reports 14, 53::

132...

In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, exchange of information and follow-up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River.

This Group . . . is to produce an initial report within a period of 180 days.”

Formalism in treaties

- Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, 2010 ICJ Reports 14, 53::

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay River, with “the group [having] to produce an initial report within a period of 180 days”.

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- Relevant facts and issue
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- ¶ 31:

Kenya's declaration, in its relevant part, provides that:

“the Republic of Kenya . . . accepts, in conformity with paragraph 2 of Article 36 of the Statute of the International Court of Justice until such time as notice may be given to terminate such acceptance, as compulsory ipso facto and without special Agreement, and on the basis and condition of reciprocity, the jurisdiction over all disputes arising after 12th December, 1963, with regard to situations or facts subsequent to that date, other than:

1. Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement.”

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- Customary law
- Is the MoU a treaty? ¶ 42:

an international agreement concluded between States in written form and governed by international law constitutes a treaty...The MOU is a written document, in which Somalia and Kenya record their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter

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- Authority of Somali representative? ¶ 43:

The Court observes that the Prime Minister of the Transitional Federal Government of Somalia signed, on 6 April 2009, full powers by which he “authorized and empowered” the Somali Minister for National Planning and International Co-operation to sign the MOU. The MOU explicitly states that the two Ministers who signed it were “duly authorized by their respective Governments” to do so. The Court is thus satisfied that, as a matter of international law, the Somali Minister properly represented Somalia in signing the MOU on its behalf.

Case study: Maritime Delimitation in the Indian Ocean (Somalia/Kenya), ICJ decision on preliminary objections

- Ratification requirement under Somali law?

45....The Court notes that the MOU provides, in its final paragraph, that “[t]his Memorandum of Understanding shall enter into force upon its signature” and that it does not contain a ratification requirement. Under customary international law as codified in Article 12, paragraph 1 (a), of the Vienna Convention, a State’s consent to be bound is expressed by signature where the treaty so provides.

46. In his letter of 4 February 2014 to the Secretary-General of the United Nations, the Foreign Minister of Somalia stated that the Kenyan representatives present for the signing of the MOU had been informed orally by the Somali Minister who signed it of the requirement that it be ratified by the Transitional Federal Parliament of Somalia. Kenya denies that such a communication took place and there is no evidence to support Somalia’s assertion. Indeed, any such statement by the Minister would have been inconsistent with the express provision of the MOU regarding its entry into force upon signature. The Court also notes that the full powers, dated 6 April 2009, by which the Prime Minister of the Transitional Federal Government of Somalia “authorized and empowered” the Minister to sign the MOU, give no indication that it was Somalia’s intention to sign the MOU subject to ratification.

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- ¶ 47:

In light of the express provision of the MOU that it shall enter into force upon signature, and the terms of the authorization given to the Somali Minister, the Court concludes that this signature expressed Somalia's consent to be bound by the MOU under international law.

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