

### The Treaty as a Concept under IL

- VCLT □ adopted in May 1969 and entered into force in January 1980
- Treaty □ an international agreement governed by IL concluded by 2 or more international subjects with treaty-making capacity
- VCLT only applies to written treaties concluded between states, not international organizations
- Legal basis of a treaty obligation □ state consent (Art. 34 VCLT)
- Art. 26 VCLT □ treaty in force 'is binding upon the parties to it and must be performed by them in good faith'
  - *pacta sunt servanda*
- A state is obliged to comply with treaty-based obligations even if doing so requires breaching its national law
- Besides written treaties, oral agreements are also 'treaties' for the purpose of IL
  - o E.g. minutes, protocols, exchange of notes, memoranda of understanding, charter, conventions, covenants
  - o Anything with the intention to create rights and obligations under IL terms such as 'shall', 'rights', 'oblige', or 'must' (intention to make a binding document)
- Art. 102 UN Charter □ treaties and international agreements entered into by a UN member shall be registered with the UN Secretariat (indicates a belief that the parties have entered into a legally binding instrument)

### The Authority to Conclude a Treaty

- All states possess the legal capacity to conclude treaties but not all representatives of a state are considered competent to conclude a treaty on behalf of a state
  - o Heads of state, heads of government, and MOFA does not need to produce 'full powers'

### Treaties Between States and International Organizations

- International organizations also have treaty-making power □ UN and EU
- The Vienna Convention on the Law of Treaties between International Organizations or between States and International Organizations □ adopted in 1986

### Consent to be bound

- Art. 11 □ consent may be expressed by a signature, exchange of the instruments, ratification, acceptance, approval or accession 'or by other means if so agreed' (definitive signatures simply expressing consent by signature)
- Accession □ a state give its consent to be bound by a treaty already negotiated and signed by other states, or after the treaty has entered into force (Art. 15)
  - o Relevant in relation to multilateral treaties (human rights treaties) that gradually seek to expand the number of participating states
  - o Distinction between signature and ratification
    - Consent to be bound by a treaty through signature must be followed by a subsequent confirmation by the state that it intends to be bound by the treaty
    - Purpose of ratification □ to allow the signing state a period of time before it gives its binding consent (to seek approval of its national parliament or the general public through a referendum)

### Entry into Force – Obligations in the Interim Period

- A state is not legally bound by a treaty until the treaty enters into force (Art. 24)
    - o In bilateral agreements □ treaties enters into force when both parties sign the agreement
    - o In multilateral agreements □ may take a substantial amount of time to pass before it enters into force
    - o If it is not specified when it enters into force □ it will generally enter into force as soon as consent has been established for all the negotiating states
  - 'Interim period' states must act in good faith □ Art. 18
- 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.

### Validity

- Rules on invalidity are found on Art. 46-53, 64 VCLT. They illustrate that it's very difficult to successfully raise a claim of invalidity
- Predictability, stability and mutual trust dictate that once agreed and entered into, even seemingly 'unequal' or unreasonable treaties must be considered valid and legally binding
- First ground of invalidity: Art. 46
  - o A state can invoke the fact that its consent to be bound by a treaty was expressed in violation ('manifest and concerned a rule of its internal law of fundamental importance') of its internal law
  - o Must be distinguished from Art. 27, whereby a state may not invoke its internal law as a justification for not fulfilling a treaty-based obligation
- Second ground of invalidity: Art. 48 (error in the formation of treaties)
  - o Error can only be invoked if it 'relates to a fact or situation which was assumed to... exist at the time when the treaty was concluded' and if it 'formed an essential basis' of the consent expressed
  - o Error cannot be invoked by a state if the latter contributed by its own conduct to the error or the circumstances were such that the state should have noticed 'a possible error'
- Third ground of invalidity: Art. 49 (Fraud)
  - o Fraud as invalidating consent if it has been misled or 'induced to conclude a treaty'
  - o Art. 50: 'corruption of a representative of a state' may be ground for invoking invalidity
- Fourth ground of invalidity: Art. 51 (Coercion) - Expression of consent shall be without legal effect if it has been procured 'through acts or threat' directed against a state representative'
- Fifth ground of invalidity: Art. 52
  - o 'Treaty is void if its conclusion has been procured by the threat or use of force in violation of ... the UN Charter'
- Sixth ground on invalidity: Art. 53 (conflicts with Peremptory norms / jus cogens of general IL) content of treaty
  - o Read in conjunction with Art. 64 (conflicts with an emerging (new) peremptory norm)
  - o Concerns cases where a treaty was valid when concluded but subsequently becomes void due to the establishment of a new rule of jus cogens (e.g. slave trade)

### Interpretation (Art. 31,32)

- The intention of the parties is the key
- Art. 31(1): a treaty shall be interpreted 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
  - o Three elements: the text, its context and the object
- Art. 31(2): the 'context' includes not only the preamble but also annexes as well as agreements and instruments made by the parties in connection with the conclusion of the treaty
- Art. 31(a),(b): permits consideration of agreements and practice established subsequent to the adoption of the treaty if the subsequent practice is sufficiently clear and either expressly or tacitly accepted by all parties, it can take precedence over an otherwise fair and clear wording of the text in a treaty (can also modify content of treaty)

### Amendments and Modifications

- Subsequent practice in the application of a treaty can have the practical effect of modifying the content of the treaty if it has been consented to by the parties
- Art. 39: a treaty may also be formally amended by the specific agreement of the parties ('protocols')

- Art. 41: two or more parties to a multilateral treaty may conclude an agreement modifying the treaty between them

#### Termination and Withdrawal

- A treaty may come to an end and terminate if its purpose has been fulfilled or if it is clear that it is limited in time and that time has passed
- Art. 54, 57: a treaty also terminates in accordance with a provision in the treaty or by the consent of all the parties thereto
- Art. 56: a state may only denounce or withdraw from a treaty where the parties intended to permit such a possibility or where the right may be implied by the nature of the treaty (must give 12 months notice)
- A state may also terminate a bilateral treaty if the other state materially breaches its obligations under the treaty
  - o Material breach: a repudiation of the treaty not permitted by the VCLT or the violation of a provision that is essential to accomplishing the object and purpose of the treaty
  - o In multilateral treaties: other parties may unanimously decide to suspend the operation of the treaty in whole or in part or to terminate it either in relations between themselves and the defaulting state or as between all the parties
- Art. 61: a state may terminate or withdraw from a treaty if, due to the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'

Art. 62: the same may apply in cases of a fundamental change of circumstances (change was unforeseen at the time the treaty was concluded and the existence of the now changed circumstances 'constituted an essential basis of the consent of the parties to be bound by the treaty' and the 'effect of the change is radically to transform the extent of obligations still to be performed.'