

VIENNA CONVENTION ON THE LAW OF TREATIES

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Conference on the Law of Treaties

Historical Context

By the middle of the twentieth century the customary international law of treaties had grown to a fairly comprehensive body of rules. In view of that, the International Law Commission placed it at its first session, in 1949, among the topics suitable for codification and appointed James Brierly as Special Rapporteur. He resigned in 1952 and two of his successors, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, each of whom had started the work anew, the second moreover with a different approach, were elected to the International Court of Justice before they could finish their work. The last Special Rapporteur, Sir Humphrey Waldock, appointed in 1961, oriented the work again towards the preparation of draft articles capable of serving as a basis for an international convention. His six reports enabled the Commission in 1966 to submit a final draft to the General Assembly and to recommend that the Assembly convene an international conference to conclude a convention on the subject. By resolution 2166 (XXI) of 5 December 1966, the General Assembly endorsed the recommendation in principle and in the following year decided to convene the first session of the conference in 1968 and the second session in 1969, in Vienna.

Significant Points in the Negotiating History

The United Nations Conference on the Law of Treaties was the last great codification conference that successfully used voting as its working method and could adopt the draft articles by substantial majorities. The final text of the convention was accepted by 79 votes to 1, with 19 abstentions. This achievement was helped by two circumstances. On the one hand, the customary law covering the more technical side of treaty-making was, except for minor details, practically undisputed. In respect of the potentially more controversial chapter concerning the termination of treaties, on the other hand, many States had achieved a moderate position by balancing, in view of unknown future eventualities, the wish to escape a treaty obligation against the wish to have it kept.

Summary of Key Provisions

Article 1 restricts the application of the Convention to (written) treaties between States, excluding treaties concluded by international organizations. In other respects, the first four parts of the Convention codify previously existing customary law with a few modifications due to progressive development.

A conspicuous example of the latter is reservations. The Convention follows the Advisory Opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (I.C. J. Reports 1951, p. 15) and prohibits reservations which are incompatible with the object and purpose of the treaty to which they relate (article 19 (c)). But the provision does not clarify the status of a reservation that infringes the prohibition, which gives rise to conflicting interpretations of the effect of objections made to such reservations. A related problem arises from the

definition of a reservation (article 2, paragraph 1 (d)) which seems to imply that reservations must indicate the provision or provisions to which they relate (“...to exclude or to modify the legal effect of *certain* provisions”, emphasis added), which raises doubts about the admissibility of so-called “across-the-board-reservations” (i.e. reservations which make the implementation of treaty obligations subject to their compatibility with domestic or some religious law) without providing a conclusive answer. Both controversial issues are now under study by the International Law Commission under the topic “Reservations to treaties”.

Another result of progressive development is the rule of interpretation in article 31, which establishes, *inter alia*, the object and purpose of a treaty and the latter’s context as guidelines of interpretation. These are teleological elements which militate against a narrow literal construction of treaty texts. It is noteworthy that the International Court of Justice stated in the Judgment on the *Arbitral Award of 31 July 1989* that “...[a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties...may in many respects be considered as a codification of existing customary international law...” (*I.C.J. Reports 1991*, pp. 69-70, para. 48). Yet, it is not clear whether the Court was of the opinion that the custom had existed *before* the Vienna Convention and had been codified in it, or that it had been generated by it and was by now “existing”.

Part V of the Convention deals with the invalidity, termination and suspension of the operation of treaties. It is the key part of the Convention. The relevant customary rules had evolved from isolated instances of State practice or unconnected arbitral or judicial pronouncements. It was the International Law Commission that gave this incoherent material a systematic structure.

The grounds of invalidity of treaties or termination are either taken from among the general principles of law (error, fraud), or adapt these to situations particular to international law, like the corruption of a representative (article 50), or the coercion of a representative (article 51), or of a State by the threat or use of force (article 52). The most far-reaching development of the law was the introduction of the concept of *jus cogens* into positive international law in articles 53 and 64. It has become relevant outside the scope of the law of treaties as a major element in the construction of modern international law.

The procedure for asserting one of the grounds of invalidity or termination has gained recognition in practice beyond the Convention since this part of customary law had been most lacking in precision. The International Court of Justice observed in the *Gabčíkovo-Nagymaros Project* case in this respect: “...[a]rticles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith” (*I.C.J. Reports 1997*, p. 66, para. 109).

Article 66, which provides for the judicial settlement, arbitration or conciliation of disputes arising from the application of the rules in Part V of the Convention, establishes in subparagraph (a) the mandatory jurisdiction of the International Court of Justice in disputes involving *jus cogens*, unless the parties agree to submit the dispute to arbitration. This unique feature, which was not proposed by the International Law Commission but originated in the Conference, is motivated by the intention to concentrate the jurisdiction over such disputes in a single organ in order to avoid the fragmentation of *jus cogens* by competing jurisdictions. The adoption of the “package deal” (A/CONF. 39/L. 47/Rev.1),

which contained, *inter alia*, the jurisdictional clause, by 61 votes against 20, with 26 abstentions in plenary was, nonetheless, only secured by the great prestige of the leader of the Nigerian delegation to the Conference and Chairman of its Committee of the Whole, Taslim O. Elias (later Judge and President of the International Court of Justice), who was the moving spirit behind the package deal. The package deal also included a declaration inviting the General Assembly of the United Nations to consider issuing invitations under article 81 of the Vienna Convention to States not members of the United Nations, the specialized agencies or parties to the Statute of the International Court of Justice to become parties to the Convention so as to ensure the widest possible participation. The declaration was an attempt to satisfy the socialist States which, at the time, tried to obtain admission to international conferences and multilateral treaties for the (then) German Democratic Republic, and had pursued that aim unsuccessfully throughout the Vienna Conference against the opposition of the Federal Republic of Germany, backed by the West. Although the attempt to insert a formula providing for universal participation in the Convention was not successful, and the socialist States had voted also against the package deal because they objected to its other part, the jurisdictional clause, the declaration may nevertheless have allowed them to abstain from voting against the adoption of the Convention as a whole and thus secured a convincing majority (many abstaining States have in the meantime acceded to the Vienna Convention, among them the Russian Federation on 29 April 1986).

However, as might be expected, article 66, or at least its subparagraph (a) became the subject of reservations, mainly by (former) socialist States, some of which have in the meantime been withdrawn. Other States objected to such reservations and excluded in response the application of articles of the Convention which were inextricably linked to the jurisdictional clause (i.e., provisions in Part V to which the procedural provisions relate) in relations between them and the reserving States. Determining the applicable provisions and the appropriate jurisdiction in a relevant case may thus be rather complicated, and it should be noted that until now no case involving a treaty that allegedly conflicted with a peremptory norm of international law has been brought before the International Court of Justice.

Influence of the Instrument on Subsequent Developments

The Vienna Convention on the Law of Treaties is in force since 27 January 1980 and has 108 parties (as of 15 December 2008). The International Court of Justice has in several cases referred to it without examining whether the litigants were parties to the Convention. In the *Gabčíkovo-Nagymaros Project* case the Court observed: “[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law” (*I.C.J. Reports 1997*, p. 38, para. 46). The Court’s opinion, together with the relatively high number of parties to the Convention, suggests that the instrument states the current general international law of treaties. This is also confirmed by the fact that its substantive provisions were by consensus copied into the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Related Materials

A. Jurisprudence

International Court of Justice, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15.

International Court of Justice, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, p. 53.

International Court of Justice, *The Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

B. Documents

Report of the International Law Commission on the work of its first session, 12 April 1949 (A/CN.4/12 and Corr. 1-3, reproduced in *Yearbook of the International Law Commission, 1949*, vol. I, Part One, Chapter II).

Report of the International Law Commission on the work of its eighteenth session, 4 May - 19 July 1966 (A/CN.4/191, reproduced in *Yearbook of the International Law Commission, 1966*, vol. I, Part One, Chapter II).

General Assembly resolution 2166 (XXI) of 5 December 1966 (International conference of plenipotentiaries on the law of treaties).

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C. Doctrine

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