

SECTION D

Law of Treaties



A Critical Look at the Law of Treaties: Giving Recognition to Informal Means of Treaty Adaptation

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Introduction

Treaties form a crucial part of the regulatory framework of international law. This, in turn, highlights the central importance of the 1969 Vienna Convention on the Law of Treaties (VCLT)¹ – the “Treaty on Treaties.”² Discussions on key topics of the law of treaties – ranging from reservations, to the status of *lex specialis* regimes, to treaty interpretation – have been on the rise in recent years, stirred further by debates on the fragmentation of international law.³ These discussions are also spurred by the fact that the VCLT does not (comprehensively) deal with certain treaty topics or distinctions, which, in light of present-day developments, require a deeper understanding, and are coming under increased scrutiny.

The present chapter will first consider the nature of the VCLT regime, and what – if anything – is “wrong” with the international law of treaties as enshrined in the Convention. It will then turn to the question of the extent to which the VCLT provides for the necessary processes and distinctions relating to one particularly crucial topic, namely, treaty adaptation. Treaties must help strike an adequate balance between stability and legal certainty on the one hand, and flexibility and adaptability of the law on the other. They must be able to undergo modernization and evolve in line with new policies, technological advancements, and emerging international institutions and actors, to continue fulfilling their purpose over time. Treaty adaptation thus allows for the effective regulation of international relations.

Finally, the chapter will look at one mechanism for treaty adaptation in particular: the process of tacit treaty modification by subsequent practice.

¹ Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

² R.D. Kearney and R.E. Dalton, “The Treaty on Treaties” (1970) 64 *American Journal of International Law* 495.

³ International Law Commission, “Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006) [Fragmentation Report].

This process was originally included in the draft articles of the International Law Commission (ILC), submitted at the 1968–1969 UN Conference on the Law of Treaties in Vienna. The reasons for the ultimate deletion of the provision from the final articles now constituting the VCLT, and the significance of this decision for international law in general, will be discussed in the ensuing sections.

A Critical Look at the VCLT Regime

The Nature of the VCLT Regime

The 1969 Vienna Convention is regarded as a major accomplishment,⁴ the result of decades of work on the law of treaties by the ILC, and prolonged debates at the 1968–1969 Conference in Vienna. It largely embodies customary international law: many of its provisions codified existing customary law at the time of drafting, while others have since crystallized into customary law. In fact, there has still to be a case in which the ICJ does not find that a VCLT provision reflects customary international law.⁵

The Convention was designed with flexibility in mind: “the intelligence of the Convention’s drafting has enabled states to continue or modify their practice without distorting or departing from the rules of the Convention.”⁶ Indeed, many VCLT provisions constitute default rules that often refer back to the treaty in question,⁷ or defer to what the parties have “otherwise agreed” or “otherwise intended.”⁸ This residual character leaves states with a wide margin of discretion.

The drafters of the Vienna Convention chose to focus on the “treaty as instrument, not as obligation”⁹ – in other words, a choice of form over function.¹⁰ Accordingly, the VCLT regulates, *inter alia*, the conclusion and

4 See e.g. M. Kohen, “La codification du droit des traités: quelques éléments pour un bilan global” (2000) 106 *Revue Générale de Droit International Public* 577.

5 A. Aust, *Modern Treaty Law and Practice* 2nd edn (Cambridge University Press, Cambridge: 2007) 13.

6 *Ibid.*, 7.

7 See e.g. Arts. 16, 19–20, 22, 24–25, 30(2), 40–41, 44(1), 54–59, 70(1), 72(1) VCLT.

8 See e.g. Arts. 11, 22(3), 25, 28–29, 31(4), 37(1), 39, 44(1), 56(1)(a), 59, 70(1), 72(1) VCLT.

9 J. Klabbers, “Beyond the Vienna Convention: Conflicting Treaty Provisions” in E. Cannizzaro (ed) *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, Oxford: 2011) 192, 200.

10 See further S. Rosenne, “Bilateralism and Community Interest in the Codified Law of Treaties” in W. Friedmann *et al.* (eds) *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (Columbia University Press, New York: 1972) 202–227; C. Brölmann,

entry into force, application and interpretation, and modification and termination of treaties. However, it rarely deals with issues on the substance of treaty law, with only few exceptions.¹¹

Shortcomings in the VCLT: Perception or Reality?

The VCLT leaves certain crucial issues unaddressed or unresolved, a number of examples of which will be discussed below. These perceived shortcomings do not make the Convention deficient. Rather, they are the result of what the drafters considered could realistically be codified, and their awareness of the flexibility required in regulating certain aspects of treaty relations effectively.

Certain Issues Not Covered by the VCLT

The VCLT in no way sets out to deal with all aspects of the law of treaties. For instance, the aforementioned focus on form over substance deliberately limits its scope and subject matter. Nor does the Convention apply to all treaties – for one thing, its scope is limited from the outset by the fact that it covers only international agreements concluded in written form¹² and between states.¹³

The VCLT does not deal with the increasing role of non-state actors and institutions in the treaty-making process,¹⁴ although such developments can arguably be “read into” pertinent VCLT provisions such as Article 31(3) (b).¹⁵ Another issue absent from the Convention is the application and implementation of treaties in national law – and justifiably so, given that this depends on the specific constitutional and other provisions of each state.¹⁶

“Law-Making Treaties: Form and Function in International Law” (2005) 74 *Nordic Journal of International Law* 383.

11 See e.g. Arts. 53, 64 (on *jus cogens* norms) and 18–20, 31, 33, 41, 58 (on “object and purpose”).

12 Art. 2(1)(a) VCLT.

13 Arts. 1 and 2(1)(a) VCLT. See further M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden: 2009) 55. But see Art. 3(c) VCLT and Art. 73 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (1986).

14 See e.g. D.B. Hollis (ed), *The Oxford Guide to Treaties* (OUP, Oxford: 2012) Chs. 3–6.

15 Cf. International Law Commission, “Report of the International Law Commission on the Work of its 65th Session” (2013) UN Doc. A/68/10, para. 38 (Conclusion 5).

16 See e.g. D.B. Hollis *et al.* (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden: 2005).

Moreover, the VCLT does not resolve questions such as the effects of impermissible reservations.¹⁷ Nor does it clarify the relation between the law of treaties and the law on state responsibility – in fact, the Convention expressly excludes matters of state succession, state responsibility, and outbreak of hostilities from its coverage by means of Article 73 VCLT. Compliance and enforcement are rarely addressed, with tangential exceptions, such as Article 60 VCLT on termination as a consequence of breach, which in turn is limited to “material” breaches. But this too is the product of the ILC’s “obviously deliberate approach” to protect the integrity and stability of treaty relations by refraining from giving “greater precision” to such notions or from prescribing ways to remedy their consequences.¹⁸ Generally, this approach makes sense, given, *inter alia*, the VCLT’s deliberate focus on form over substance. These highly sensitive issues have been left instead to customary law, or to be resolved on an *ad hoc* basis. Some of them have also been taken up by the ILC for further study.¹⁹

The Employment of Vague Terms and Provisions

Aside from matters absent from its provisions, the VCLT contains many elusive notions, for instance “object and purpose,”²⁰ a term that is inherently context-dependent. It also contains many vaguely formulated provisions, such as Article 18 (“acts which would defeat the object and purpose of a treaty”)²¹ or Article 31(3)(c) (“any relevant rules applicable in the relations between the parties”).²² These represent the “necessary byproduct” of what is also one of the Convention’s most celebrated characteristics: the flexible nature of its rules, “frequently drafted so that States may contract around them or choose from among a list of available options.”²³

The Convention’s treatment of matters of great practical importance, such as reservations and treaty conflicts,²⁴ has been deemed unsatisfactory,

17 See Arts. 19–23 VCLT.

18 S. Rosenne, *Breach of Treaty* (Grotius, Cambridge: 1985) 123–124.

19 See e.g. International Law Commission “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (1999) UN Doc. A/56/10, Ch. V.

20 See e.g. I. Buffard and K. Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?” (1998) 3 *Austrian Review of International and European Law* 311.

21 P. Palchetti, “Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?” in Cannizzaro, note 9 at 25.

22 C. McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 *International & Comparative Law Quarterly* 279, 281.

23 D.B. Hollis, “Introduction” in Hollis, note 14 at 3.

24 Klabbers, note 9 at 192–194.

and led to further study by the ILC.²⁵ With regard, for example, to the latter issue, treaty regimes have become more intricate and intertwined as a result of the continuous expansion of international law in recent decades. This has led to a higher incidence of clashes between successive and parallel treaty regimes, as well as between treaty law and customary law.²⁶ According to Koskenniemi's Fragmentation Report to the ILC, the Vienna Convention "provides the normative basis – the 'tool-box' – for dealing with fragmentation"; thus, it should also provide the basis for an "international law of conflicts" containing "collision-rules" that take account both of the needs of coherence and contextual sensitivity."²⁷ Yet Article 30 VCLT has been criticized for providing little guidance on conflicts between treaties that differ in subject matter and membership, and which cannot be resolved through harmonious interpretation.²⁸

However, this shortcoming may not have been foreseen at the time of drafting of the VCLT, when treaty conflicts were not as common.²⁹ Moreover, given the horizontal nature of the international legal system, "things could hardly be otherwise."³⁰ It may be better to settle such normative clashes on a case-by-case basis, leaving room for "flexible and responsive politics,"³¹ and "taking into account all affected interests," than by means of fixed, homogenous rules.³² Indeed, the ILC seems to have "preferred a provision that would enable States to restate their treaty claims in legal terms to one that would definitively decide the outcomes of treaty conflict."³³ Therefore, this "deficiency" in the Convention with regard to treaty conflicts, as with many others, reflects a deliberate choice as to what could be realistically and usefully codified, in contrast to what is best left outside the realm of conventional law.

25 See e.g. International Law Commission "Guide to Practice on Reservations to Treaties" (2011) II(2) Yearbook of the International Law Commission.

26 See further e.g. M.A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge: 2012).

27 Fragmentation Report, note 3 at para. 250.

28 See e.g. I. Sinclair, *The Vienna Convention on the Law of Treaties* 2nd edn (Manchester University Press, Manchester: 1984) 138.

29 Klabbers, note 9 at 195.

30 Ibid., 205.

31 J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, Cambridge: 2009) 90.

32 Klabbers, note 9 at 205.

33 S. Ranganathan, "Between Philosophy and Anxiety? The Early International Law Commission, Treaty Conflict and the Project of International Law" (2013) 83 *British Yearbook of International Law* 82, 86.

Even certain essential elements of the Convention – such as its Articles 31 and 32 on interpretation, arguably the Convention's most important provisions³⁴ – have been called into question. The “General Rule” in Article 31 VCLT undoubtedly reflects customary international law,³⁵ but interpretations differ as to the precise application of its structure.³⁶ Nevertheless, Article 31 has been hailed as a “masterpiece of precise drafting,”³⁷ combining the major means of interpretation into one single provision – a flexible approach considered to enhance rather than undermine its value

It may well be that international courts have occasionally employed these provisions as a “fig leaf” behind which they have hidden whatever result of interpretation they wished to achieve in the first place. But this cannot call into question the value of Articles 31 and 32. [...] The ‘General Rule’ provides the interpreting agency with considerable flexibility, enabling it in particular to adapt the various means of interpretation to the type of treaty (bi- and multilateral treaties, human rights treaties, etc.). This flexibility would nevertheless not appear to erode the legal certainty which *jus scriptum* is intended to provide.³⁸

Precisely due to this flexibility, the interpretation articles in the VCLT posited the President of the Vienna Conference to declare that “the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties.”³⁹

Distinctions between Types of Treaties and Treaty Obligations

Lastly, the VCLT does not differentiate sufficiently between treaty types. It rarely distinguishes between bilateral versus multilateral treaties.⁴⁰ It also fails

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- 34 M.E. Villiger, “The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission” in Cannizzaro, note 9 at 122.
 - 35 First declared by the ICJ in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *ICJ Reports 1994*, 6, para. 41.
 - 36 Villiger, note 34 at 118–119; J.-M. Sorel and V. Boré Eveno, “Article 31 (1969)” in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (Oxford University Press, Oxford: 2011) 804, 810–811.
 - 37 Villiger, note 34.
 - 38 *Ibid.*, 121–122.
 - 39 Official Records of the United Nations Conference on the Law of Treaties, 2nd Session (1969) UN Doc. A/Conf.39/11/Add.1, 59 para. 77.
 - 40 See e.g. Arts. 40–41, 58, 60(1) VCLT. Certain provisions, such as those on reservations, relate by their very nature only to multilateral treaties, though the Convention does not state so expressly.

adequately to take account of the special character of treaties constitutive of international organizations,⁴¹ treaties establishing objective regimes,⁴² or so-called “law-making” treaties,⁴³ to which different rules may apply.⁴⁴

Regard should also be had to the distinction between treaties that are “bilateralizable” or “reciprocal” in nature, and those that set up “non-reciprocal” obligations,⁴⁵ i.e. obligations “independent of any expectation of reciprocity or performance on the part of other parties,”⁴⁶ which is often the case with human rights and humanitarian law treaties.⁴⁷ These are also qualified as “integral” obligations, since every breach undermines the position of all the other parties.⁴⁸ Non-reciprocal treaties operate differently from reciprocal ones, carrying implications for the application of VCLT rules.⁴⁹ For the most part, the Convention follows only the traditional, reciprocal model.⁵⁰ Only in rare cases does it take into account special types of treaties or non-reciprocal obligations.⁵¹ There is also no mention in the VCLT of obligations *erga omnes* or *erga omnes partes*.⁵² The present author thus agrees with the Fragmentation Report with regard to the fact that “the VCLT gives insufficient recognition to special types of treaties and the special rules that might go to interpret and apply them,” and that guidelines are needed on how VCLT provisions “might give recognition to the wide variation of treaty types and [their] normative implications.”⁵³

On the other hand, the fact that such distinctions are absent from the Convention is partly due to the aforementioned focus of the drafters on form

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- 41 See e.g. C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishers, Oxford: 2007). But see Arts. 5, 20(3) VCLT.
 - 42 See e.g. F. Salerno, “Treaties Establishing Objective Regimes” in Cannizzaro, note 9 at 225.
 - 43 Fragmentation Report, note 3 at para. 250.
 - 44 See e.g. A.D. McNair, “The Functions and Differing Legal Character of Treaties” (1930) 11 *British Yearbook of International Law* 100.
 - 45 See e.g. International Law Commission, “Third Report on the Law of Treaties” by Mr. G.G. Fitzmaurice, Special Rapporteur (1958) II *Yearbook of the International Law Commission* 41–45; ILC, “Third Report on State Responsibility” by Mr. James Crawford, Special Rapporteur (2000) UN Doc. A/CN.4/507, 44–48 paras. 99–108; ILC, “Report of the International Law Commission on the Work of its 65th Session” (2013) UN Doc. A/68/10, para. 16.
 - 46 Fragmentation Report, note 3 at paras. 311–312.
 - 47 Ibid., para. 250.
 - 48 Crawford Third Report, note 45 at 47.
 - 49 Brölmann, note 10 at 5.
 - 50 Salerno, note 42, text to fn. 112, citing C. Chinkin, *Third Parties in International Law* (Clarendon Press, Oxford: 1993).
 - 51 See e.g. Arts. 20(3), 60(2)(c), 60(5) VCLT. See also Fragmentation Report, note 3 at para. 311.
 - 52 Crawford Third Report, note 45 at 46–47.
 - 53 Fragmentation Report, note 3 at para. 251.

over function, eliminating the need to differentiate between treaties based on their substance; for instance, “integral” treaties do not differ form-wise from other treaties.⁵⁴ It would also not have been feasible to include a complete typology of treaties in the VCLT – debates and uncertainties still abound in relation to most such distinctions – although a higher degree of contextual sensitivity in the Convention in this regard might have been useful. In most cases, however, the VCLT seems sufficiently flexible. Through devices such as the principle of effectiveness implicit in Article 31, it can accommodate differences in interpretive approaches to special categories of treaties, such as those constituting international organizations or dealing with human rights.⁵⁵

It is easy to see that the VCLT does not comprehensively tackle all key issues in the law of treaties, especially those concerning developments that have emerged since its inception. Most of these perceived shortcomings do not reflect deficiencies in the Convention itself, but are the result of practical impediments, and the often-diffuse nature and horizontal structure of international law. Nonetheless, certain issues such as informal adaptation processes require deeper exploration in light of the silence of the Vienna Convention.

The Need for Increased Flexibility and Adaptation: Going beyond the Framework of the VCLT

The creation of obligations in the international system is a complex, fluid process. Treaties must undergo transformation and modernization in line with developments in state practice to maintain their relevance. They must also be adapted to redress shortcomings and ineffective compromises by the drafters. However, formal treaty amendment procedures – as specified in individual treaties, or, by default, in the rules on amendment and modification provided in Part IV VCLT, Articles 39–41 – can be extremely cumbersome if not altogether unworkable in practice,⁵⁶ especially in the case of multilateral regimes that span a wide membership with highly divergent interests.⁵⁷ Even treaty

54 Brölmann, note 10 at 6.

55 B. Çali “Specialized Rules of Treaty Interpretation: Human Rights” in Hollis, note 14 at 525.

56 See e.g. M.J. Bowman, “The Multilateral Treaty Amendment Process – A Case Study” (1995) 44 *ICLQ* 540; C. McLachlan, “The Evolution of Treaty Obligations in International Law” in G. Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, Oxford: 2013) 69, 71.

57 Cf. A.D. McNair, *The Law of Treaties* (Clarendon Press, Oxford: 1961) 534; Sorel and Boré Eveno, note 36 at 807.

regimes with a small number of parties such as NAFTA can prove extremely difficult to amend by formal means.⁵⁸ But change is inevitable, even if it must take place by means other than those prescribed in formal procedures – “*pacta sunt servanda* cannot rule out change.”⁵⁹ In fact, “rigidity in amendment rules can incentivize informal tracks of constitutional change.”⁶⁰ In light of the failure in the VCLT to provide for the necessary distinctions and processes relevant to treaty adaptation, account must be taken of other modalities for treaty change not dealt with under its framework.

Beyond the Scope of the VCLT: Informal Mechanisms for Treaty Adaptation

Treaties contain numerous explicit and implicit mechanisms to deal with change; formal amendment is only one of them.⁶¹ The “lawmaking effects” of dispute settlement bodies, for one, constitute an important source of treaty adaptation.⁶² In particular, a specialized judicial system can develop detailed rules of interpretation, even modification, specific to a given treaty regime. One can take as an example the dynamic approach adopted by the European Court of Human Rights in relation to the European Convention on Human Rights.⁶³

An increasingly discussed “in-built” mechanism for treaty adaptation is evolutionary interpretation, rooted in the VCLT provisions on “ordinary meaning” and “object and purpose” (Article 31(1)), and “relevant rules of international law” (Article 31(3)(c)). This interpretive approach allows external norms to be read into the treaty, and permits far-reaching changes to be made to its provisions, without leaving the confines of the text; thus, it never amounts to actual

58 A.M. Feldman, “Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement” (2009) 41 *New York University Journal of International Law & Policy* 655, 656.

59 M.E. Villiger, *Customary International Law and Treaties* 2nd edn (Kluwer Law International, The Hague: 1997) para. 332.

60 J. Arato, “Treaty Interpretation and Constitutional Transformation” (2013) 38 *Yale Journal of International Law* 289, 355.

61 See e.g. I. Buga, “Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction” in D.R. Rothwell *et al.* (eds) *Oxford Handbook on the Law of the Sea* (Oxford University Press, Oxford: 2015 *forthcoming*).

62 See e.g. A. v. Bogdandy and I. Venzke, “Beyond Dispute: International Judicial Institutions as Lawmakers” (2011) 12 *German Law Journal* 979.

63 See e.g. G. Letsas, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer” (2010) 21 *European Journal of International Law* 509.

modification.⁶⁴ The same can be said of the doctrine of implied powers – another example of “dynamic” interpretation – in the context of treaties establishing international organizations: it allows new terms to be “read into” the treaty text, “not in order to modify it...but in order to give effect to what they agreed by becoming parties to the constitutional treaty.”⁶⁵ Moreover, the ambiguous nature or vague formulation of certain treaty provisions generally facilitates flexibility and regime interaction, leaving room for maneuver for instance in order to avoid conflicts with external norms – though it cannot go beyond the limits of the text of the treaty.

Treaties may also come to be informally adapted through the practice of conferences or meetings of the states parties, such as in the context of multilateral environmental agreements,⁶⁶ or “treaty bodies” that sometimes play a dynamic interpretive role in the UN human rights system, such as the Human Rights Committee in relation to the International Covenant on Civil and Political Rights.⁶⁷ They impact the meaning of treaty provisions by issuing e.g. interpretive recommendations and resolutions. This is especially pertinent in light of the aforementioned growing role of non-state entities in treaty-making. A similar process has been identified in the context of the Law of the Sea Convention (LOSC) with regard to the Meeting of States Parties (SPLOS).⁶⁸ Certain SPLOS decisions, clearly intended to alter the application of LOSC provisions,⁶⁹ were formulated in the shape of interpretations to avoid the

64 R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford: 2008) 243; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, Oxford: 2008) 291.

65 K. Skubiszewski, “Implied Powers of International Organizations” in Y. Dinstein (ed) *International Law at a Time of Perplexity* (Martinus Nijhoff, Dordrecht: 1989) 855, 856–7.

66 Bowman, note 56 at 544; R.R. Churchill and G. Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law” (2000) 94 *American Journal of International Law* 623; A. Wiersema, “The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements” (2009) 31 *Michigan Journal of International Law* 231.

67 See e.g. K. Mechlem, “Treaty Bodies and the Interpretation of Human Rights” (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 920–921; G. Ulfstein, “Treaty Bodies and Regimes” in Hollis, note 14 at 428, 436–437.

68 See I. Buga, “Subsequent Practice and Treaty Modification” in M.J. Bowman and D. Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, Cambridge: 2014) Ch. 13 (forthcoming).

69 See e.g. SPLOS, *Decision regarding the Date of Commencement of the Ten-Year Period for Making Submissions to the Commission on the Limits of the Continental Shelf Set out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea*, Doc. SPLOS/72 (29 May 2001).

impression of modifying the Convention.⁷⁰ The LOSC also contains a number of other effective “in-built” adaptation mechanisms, such as its system of “rules of reference.”⁷¹

Informal treaty change can moreover be effectuated by means of subsequent agreements such as protocols or implementation agreements. One oft-quoted example is the 1994 Agreement relating to the Implementation of Part XI LOSC, “carefully drafted to avoid any clear indication that what states were doing was amending Part XI of the Convention.”⁷² Nevertheless, it clearly amounts to modification by subsequent agreement.⁷³ Certain controversial interpretations issued by the NAFTA Free Trade Commission may provide another example of modification disguised as interpretation, going beyond Article 31(3)(a) VCLT.⁷⁴

Beyond the Limits of Interpretation in the VCLT: Treaty Modification through Subsequent Practice

Among these informal adaptation mechanisms, an essential process unaccounted for in the Vienna Convention is the possibility of treaty modification by subsequent practice. Especially where certain mechanisms discussed in the previous section, such as evolutionary interpretation and implied powers, in addition to formal amendments, fail to go far enough in facilitating adaptation, subsequent practice can serve as a powerful tool for change – even if uncertainty remains as to the exact parameters within which it operates.⁷⁵

According to Article 31(3)(b) VCLT, there “shall be taken into account, together with the context...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

70 See e.g. A.G. Oude Elferink, “Current Legal Developments: Meeting of States Parties to the UN Law of the Sea Convention” (2008) 23 *International Journal of Marine and Coastal Law* 769, 770, 777.

71 See further B. Oxman, “Tools for Change: The Amendment Procedure” in *Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the UNCLOS* (UN 2003) 195.

72 J. Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, Cambridge: 2011) 92.

73 See e.g. L.D.M. Nelson, “The New Deep Sea-Bed Mining Regime” (1995) 10 *International Journal of Marine and Coastal Law* 189, 192–193; T. Scovazzi, “Evolution of International Law of the Sea” (2000) 286 *Recueil des Cours* 39, 125; Y. Tanaka, *The International Law of the Sea* (Cambridge University Press, Cambridge: 2012) 33, 178–184.

74 See e.g. *Methanex Corp. v. United States*, Second Opinion of Professor Sir Robert Jennings, Q.C. (6 Sept. 2001) 8 available at <<http://www.naftaclaims.com/commission.htm>>.

75 See further Buga, note 68.

interpretation.” Thus, subsequent practice is first of all a well-established interpretive tool. Second, and most significantly, subsequent practice can diverge from the treaty to such an extent that it can no longer be said to constitute an act of interpretation, but rather, in effect, an act of *modification*.⁷⁶ This process has long been acknowledged in the case law⁷⁷ and doctrine.⁷⁸ Third, subsequent practice can potentially lead to the emergence of a new, supervening rule of customary international law.⁷⁹

The VCLT does not elaborate on the effects of subsequent practice exceeding the scope of Article 31(3)(b).⁸⁰ Nor does it provide guidance on determining the point at which the “switch” from interpretation to modification occurs – a fundamental yet notoriously tricky distinction in the operation of subsequent practice.⁸¹ This is complicated further by the fact that states are reluctant to admit that their practice amounts to anything more than interpretation,⁸²

76 The term “modification” is used here to denote a *tacit* or *informal* change in treaty provisions, as the counterpart to *formal* treaty amendment. The ILC also preferred this term during the drafting of the VCLT in relation to the deleted article on “modification of treaties by subsequent practice” – see ILC, “Draft Articles on the Law of Treaties” (1964) II YBILC 198, Art. 68, and (1966) II YBILC 182, Art. 38.

77 See e.g. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep 2009, 213, para. 64; *Air Transport Services Agreement between the United States of America and France* (1969) 38 ILR 182, 249–259; *Taba Arbitration (Egypt/Israel)* (1988) 27 ILM 1421, paras. 209–210, 235; *Delimitation of the Border between Eritrea and Ethiopia*, Award of 13 April 2002, 25 UNRIAA 110, paras. 3.6–3.10; ECtHR, *Soering v. UK* Appl. No. 14038/88), Judgment of 7 July 1989, paras. 103–104; ECtHR, *Al-Saadoon and Mufdhi v. UK* Appl. No. 61498/08), Judgment of 2 March 2010, para. 119.

78 To name just a few: F.G. Jacobs, “Varieties of Approach to Treaty Interpretation” (1969) 18 *International and Comparative Law Quarterly* 318, 332; M. Akehurst, “The Hierarchy of Sources of International Law” (1975) 47 *British Yearbook of International Law* 273, 277; Sinclair, note 28 at 138; J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, Cambridge: 2003) 50; Aust, note 5 at 265; U. Linderfalk, *On the Interpretation of Treaties* (Springer, Dordrecht: 2007) 168; Gardiner, note 64 at 243–245; Feldman, note 58; Villiger, note 13 at 429; J. Arato, “Subsequent Practice and Evolutive Interpretation” (2010) 9 *Law & Practice of International Courts and Tribunals* 453, 464.

79 See e.g. Akehurst, note 78 at 275–276; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, Oxford: 1994) 132–133, 145–147.

80 This is one of the reasons that led the ILC to engage in further exploration of the subject – see most recently ILC, “Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation” by Georg Nolte, Special Rapporteur (2014) UN Doc. A/CN.4/671.

81 See e.g. Linderfalk, note 78 at 168.

82 See e.g. I. Voicu, *De l'interprétation authentique des traités internationaux* (Pedone, Paris: 1968) 89; Orakhelashvili, note 64 at 105.

and tribunals are hesitant to recognize it expressly⁸³ (with important exceptions⁸⁴). Instead, they prefer to portray it as merely interpretive practice, or turn to other adaptation mechanisms.⁸⁵ Thus, the issue lies not only in the silence of the Vienna Convention, but also the factors that impede the identification and acknowledgment of the process of treaty modification through subsequent practice.

Interestingly, a provision on modification by subsequent practice was included in the draft articles on the law of treaties by the ILC.⁸⁶ In its final version, the article read

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.⁸⁷

In the ILC deliberations, most members agreed with the substance of the provision.⁸⁸ The discussions related primarily to its overly general formulation,⁸⁹ and to finding a suitable place for it in the draft articles, given its overlap with the provisions on interpretation by subsequent practice (now Article 31(3)(b) VCLT),⁹⁰ formal amendment,⁹¹ and subsequent customary law.⁹² But these discussions hardly cast doubt on the underlying principle of modification by subsequent practice.⁹³ The same problems concerning overlap⁹⁴ and lack of

83 S.D. Murphy, "The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties" in Nolte, note 56 at 82, 87.

84 See the examples at note 77 above.

85 See text to notes 64 and 65 above. See also e.g. *Costa Rica v. Nicaragua*, note 77.

86 See further ILC, "Third Report on the Law of Treaties" by Sir Humphrey Waldock (1964) II Yearbook of the International Law Commission 61–62; "Sixth Report on the Law of Treaties" by Sir Humphrey Waldock (1966) II Yearbook of the International Law Commission 87–91; UN Conference on the Law of Treaties, 1st Session (1968) UN Doc. A/CONF.39/C.1/SR.37, paras. 57–59, 66 [37th meeting] and A/CONF.39/C.1/SR.38, paras. 28, 48, 55 [38th meeting].

87 See note 76 above on the former draft articles 68 and 38.

88 See e.g. (1964) I Yearbook of the International Law Commission 318, paras. 45, 49.

89 (1966) I(2) Yearbook of the International Law Commission 112, para. 3. See also Waldock Third Report, note 86 at 61 para. 32.

90 See e.g. Waldock Sixth Report, note 86 at 87; (1966) I(2) YBILC 165 paras. 26–27.

91 See e.g. (1966) I(2) Yearbook of the International Law Commission 113 paras. 9, 12, 16; 165–168 paras. 31, 37, 55, 61.

92 See e.g. Waldock Third Report, note 86 at 62 para. 33.

93 Villiger, note 59 at paras. 306–307, 310.

94 See e.g. 37th meeting, note 86 at paras. 57, 59, 66; 38th meeting, note 86 at paras. 28, 48.

specificity⁹⁵ were raised in 1968 at the Vienna Conference in relation to the draft article. Also due to concerns that it might circumvent domestic treaty approval procedures⁹⁶ or lead to uncertainty,⁹⁷ states were reluctant to codify the process of modification by subsequent practice in the Convention. As noted by Special Rapporteur Waldock, the Commission could have accorded more attention to the provision and drafted it with higher precision to alleviate such concerns, had it not been for harsh time constraints.⁹⁸

The article's ultimate deletion at the UN Conference in Vienna was primarily due to practical considerations.⁹⁹ These could hardly be said to call its underlying principle into question.¹⁰⁰ Thus, the process of modification by subsequent practice was left to operate beyond the realm of the Vienna Convention.

Of course, it is likely that even if the draft article on modification by subsequent practice had been included in the Convention, "we would still be struggling with its underlying interpretative 'riddles.'"¹⁰¹ The process does not easily lend itself to formal codification, with cross-cutting effects that vary widely depending on the context and type of treaty regime. For instance, the effects of subsequent practice are easier to accept in the bilateral treaty context,¹⁰² but much more limited in relation to "non-reciprocal" treaty provisions such as those contained in human rights treaties.¹⁰³ This is due, *inter alia*, to the "absolute" nature of these provisions, and the need to protect third party beneficiaries upon whom they confer important rights.¹⁰⁴ As stated, the Vienna Convention does not offer sufficient guidance on distinguishing between different treaty types to aid in determining their implications for subsequent practice.

95 37th meeting, note 86 at paras. 60–62; 38th meeting, note 86 at para. 15.

96 37th meeting, note 86 at paras. 63, 68; 38th meeting, note 86 at paras. 1, 17, 21, 36, 41, 43.

97 38th meeting, note 86 at paras. 31, 40–42.

98 *Ibid.*, para. 55.

99 ILC, "Report of the International Law Commission on the Work of its 62nd Session" (2010) UN Doc. A/65/10, para. 352. See also Voicu, note 82 at 94.

100 See e.g. D.W. Greig, *Intertemporality and the Law of Treaties* (The British Institute of International and Comparative Law, London: 2001) 90, 118; T. Gazzini, "Interpretation of (Allegedly) Self-judging Clauses in Bilateral Investment Treaties" in M. Fitzmaurice *et al.* (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, Leiden: 2010) 239, 251.

101 A. Bianchi, "Law, Time, and Change: The Self-Regulatory Function of Subsequent Practice" in Nolte, note 56 at 133, 136.

102 See e.g. Murphy, note 83 at 92.

103 See text to notes 45–47 above.

104 See e.g. F. Pocar, "Some Remarks on the Continuity of Human Rights and International Humanitarian Law Treaties" in Cannizzaro, note 9 at 278, 279.

The effects of informal modification through subsequent practice must be deduced with caution and due regard to context, since the balance between stability and change falls differently per type of treaty obligation.¹⁰⁵ In this sense, subsequent practice is a double-edged sword: its elusive nature may lead to uncertainty, but can also facilitate greater coherence and effectiveness by increasing treaty adaptability in ways that are unfeasible through formal amendment procedures, or even through other informal adaptation mechanisms. To tap into this latter potential, the effects of subsequent practice on the development of treaty law require further exploration to compensate for the silence of the VCLT, and enhance the ability to assess treaty obligations and the expectations triggered by their application in practice.

Conclusion

The regulatory framework set out in the VCLT may contain a number of significant gaps, one of which is its failure to distinguish between different treaty types and their various implications for treaty adaptation. Due to the difficulties encountered in practice with regard to formal amendment procedures, treaty adaptation and modification often take place by means of an array of informal mechanisms.

Modification by subsequent practice is only one such adaptation mechanism – a process that is both highly effective and elusive at the same time. However, the lack of express recognition of this process in the articles of the VCLT – and the wariness of states and judicial bodies to address it in practice – does not undermine its significance, as highlighted also by the Convention's drafting history. Rather, it serves as a warning that the effects of subsequent practice – and indeed of informal adaptation mechanisms in general – must be analyzed carefully and placed in their proper context.

It would be unwarranted to conclude that something is “wrong” with the approach and system of rules prescribed in the VCLT based on these perceived deficiencies. Most of these “deficiencies” are inherent in the nature and structure of the international legal system, and the processes that shape its development. Certain issues require a high degree of flexibility and contextual sensitivity, for which the Convention successfully allows. Some of the issues deliberately left unaddressed or unresolved provide a platform to engage in further exploration of treaty adaptation processes, and sufficient room for maneuver to reconcile their effects within the VCLT framework.

105 See e.g. J. Brunnée, “Treaty Amendments” in Hollis, note 14 at 347, 351.