

Observance and Application of Treaties

Once treaties enter into force, they must be observed and applied by the parties. Observance and application of treaties are subject to certain established principles and rules.

1. Observance of Treaties

The Latin principle “*Pacta Sunt Servanda*”, which means that treaties shall be observed, is the fundamental principle of the customary law of treaties and the very foundation of International Law. This principle is included in the Preamble and Article 26 of the 1969 Vienna Convention on the Law of Treaties, which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Another long-standing principle of customary international law included in Article 27 of the Convention is that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

According to these two principles, the parties to a treaty are under a duty to observe the treaty in good faith, and a duty not to invoke its internal law as justification for failure to perform the treaty.

2. Application of Treaties

Under the Vienna Convention on the Law of Treaties, the application of treaties is subject to the following rules:

1. Non-Retroactivity of Treaties

The Vienna Convention provides that the provisions of a treaty, unless a different intention appears from the treaty or is otherwise established, do not bind a party to it in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with regard to that party. The general rule here is that a treaty does not operate retroactively; any fact, action or situation must be assessed in the light of the rules of law that are contemporary with it, not of the provisions of the subsequent treaty, unless a contrary agreement so provides.

(2) Territorial Scope of Treaties

The Vienna Convention provides that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect to its entire territory. This is a general rule, but it is possible for a State to stipulate that the treaty will apply only to part of its territory.

(3) Application of Successive Treaties Related to the Same Subject Matter

Sometimes, it happens that a party to a treaty subsequently enters into another treaty related to the same subject matter, and that the provisions of the two treaties are inconsistent; or it happens that the other party or parties to the second treaty may or may not also be parties to the first treaty. These situations raise certain problems which need to be resolved. Article 30 of the Vienna Convention lays down the rules which constitute the general guide to be followed in resolving such problems. It is still possible, however, for the parties themselves to resolve the raised problems by their mutual agreement.

Under Article 30, the rights and obligations of States parties to successive treaties related to the same subject-matter shall be determined in accordance with the following rules:

- a. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
- b. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
- c. When the parties to the later treaty do not include all the parties to the earlier one:
 - i. as between States parties to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty;
 - ii. as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

In case of treaties concerning the same subject-matter and having incompatible provisions, the presumption is that the later treaty prevails over the earlier treaty. A treaty may provide expressly that it is to prevail over subsequent incompatible treaties; this is the case of Article 103 of the Charter of the United Nations which stipulates that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Furthermore, a particular treaty prevails over other treaties if it includes peremptory norms of general international law (*jus cogens*), i.e. norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character.

1. Treaties and Third States

The Latin principle “*pacta tertiis nec nocent nec prosunt*”, which means that a treaty creates neither right nor obligation for third States (not parties to the treaty) without their consent, is a general principle which constitutes part of the customary international law. The reasons for this principle can be found in the fundamental principles of the sovereignty and independence of States, which contemplate that States must consent to rules before they can be bound by them. This principle is codified in article 34 of the 1969 Vienna Convention on the Law of Treaties as a general rule corollary of the principle of consent and of the sovereignty and independence of States. However, this Convention states certain exceptions to this general rule.

First, the Convention provides that an obligation may arise for a third State from a provision of a treaty if the parties to the treaty intend the provisions of the treaty to be the means of establishing the obligation, and the third State expressly accepts that obligation in writing. In such a case, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third States, unless it is established that they have agreed otherwise.

Second, the Convention provides that a right may arise for a third State from the provision of a treaty if the parties to the treaty intend the provision to accord that

right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto, unless the treaty provides otherwise. In such a case, the right may not be revoked or modified by the parties to the treaty if it is established that the right has not been intended to be revoked or modified without the consent of the third State. In exercising such a right the third State is required to comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. Third, the Convention provides that a rule of a treaty may become binding upon a third State if it becomes a part of customary international law.

An example of a treaty imposes obligation upon non-party State is the 1815 agreement concerning the neutralization of Switzerland. The apparent examples of rules which are binding upon third States as customary international law are the rules of the 1899 and 1907 Hague Conventions concerning land warfare, and the principles stated in Article 2 of the Charter of the United Nations, especially those related to the peaceful settlement of disputes and the prohibition of resorting to threat or use of force. As far as rights conferred upon third States by a treaty are concerned, there are many treaties containing provisions in favor of third States (*pactum in favorem tertii*). Examples of such treaties are the 1919 Treaty of Versailles which contains provisions in favor of Denmark and Switzerland, and the 1888 Constantinople Convention which contains provisions guaranteeing freedom of passage for ships through the Suez Canal.

Interpretation of Treaties

Interpretation of treaties is the most frequent focus of disputes arising with regard to treaties. Because language is not a perfect means for expressing legal rules, ambiguities and uncertainties in treaty-texts are common phenomena. Thus interpretation of treaties has been a major task in International Law. Obviously the parties to a treaty have competence to interpret a treaty, but other entities may perform such a task. The treaty itself may confer competence on an *ad hoc* tribunal, an international organ, or the International Court of Justice

(ICJ). The Charter of the United Nations is interpreted by the organs of the United Nations, which may request advisory opinions from the ICJ.

Interpretation of treaties is a rational process of clarifying and elucidating the meaning of unclear and ambiguous treaty provisions. Its purpose is to ascertain in good faith the intention of the parties. It is governed by numerous principles and rules developed by international tribunals, publicists, organs of international organizations and diplomatic practice. Though, there is no coherent and mandatory system of rules of treaty interpretation in International Law.

The 1969 Vienna Convention on the Law of Treaties, however, lays down certain fundamental rules and guidelines for treaty interpretation. It contains specific provisions concerning general rules of treaty interpretation, supplementary means of interpretation, and interpretation of treaties authenticated in two or more languages.

1. **General Rules of Treaty Interpretation**

The first general rule for treaty interpretation provided by the Vienna Convention is that “[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.” This rule is the textual approach of treaty interpretation.

The context of a treaty for the purpose of interpretation comprises, in addition to its text, including its preamble and annexes, any agreement and instrument related to it and made in connection with its conclusion. Together with the context of a treaty, should be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of International Law applicable in relations between the parties.

The second general rule for treaty interpretation provided by the Convention is that “[a] special meaning shall be given to a term if it is established that the parties so intended.” This is the “intention of the parties” approach of treaty interpretation.

However, there are other established approaches of treaty interpretation not provided for in the Vienna Convention on the Law of Treaties. Among these approaches is “the principle of effectiveness” which involves the interpretation of the terms of a treaty in a way that will render the treaty most effective and useful. This principle is of particular importance in the interpretation of multilateral treaties establishing international organizations.

2. Supplementary Means of Interpretation

The Vienna Convention provides that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”, when the meaning resulting from the application of the above general rules needs to be confirmed, or when the interpretation according to the said general rules leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.

3. Interpretation of Treaties Authenticated in Two or More Languages

In case of a treaty authenticated in two or more languages, as often happens with multilateral treaties, the Vienna Convention provides that when a comparison of the authentic texts discloses a difference of meaning which the application of the provided general rules and supplementary means of interpretation does not remove, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” Nevertheless, the Convention provides that the treaty may provide or the parties may agree that, in such a case, a particular text shall prevail.