

Amendment and Modification of Treaties

Although amendment and modification of treaties are two processes share a common aim which is an alteration or revision of a treaty, they are two separate processes accomplished by different manners and subject to different rules and conditions. Amendment relates to a formal alteration or revision of certain treaty provisions or the treaty as a whole, affecting all the parties to that treaty. Modification relates to an alteration or revision of certain treaty provisions as between particular parties only. Thus the 1969 Vienna Convention on the Law of Treaties deals with these two processes in separate articles.

1. Amendment of Treaties

The Vienna Convention refers to three manners to accomplish amendments to treaties. The first manner is that a treaty may be amended by agreement between the parties. In such a manner, the rules described by the Vienna Convention which are related to the conclusion and entry into force of a treaty will be applied.

The second manner is that a treaty may be amended in accordance with the procedure laid down in the treaty itself. Multilateral treaties, particularly those establishing international organizations, normally provide detailed procedure for amendments. The Charter of the United Nations, for example, lays down in Articles 108 and 109 the procedure for its amendments and revision. Under these Articles such amendments or revision shall take effect when adopted and ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council.

The third manner is that a treaty may be amended in accordance with the basic rules of procedure described by the Vienna Convention. The Vienna Convention specifies that any proposed amendment must to be notified to all contracting States. All contracting States shall have the right to participate in the decision as to the action to be taken in regard to such proposal, and in the negotiation and conclusion of any agreement for the amendment of the treaty. Every State entitled to become a party to the treaty is also entitled to become a party to the treaty as amended. The amendment will not bind any State already a party to the original

treaty which is not a party to the amending agreement. Any State which becomes a party to the treaty after the entry into force of the amending agreement, unless it intends otherwise, is considered as a party to the treaty as amended in relation to parties bound by the amending agreement, and as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

2. Modification of Treaties [35]

The Vienna Convention provides that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if one of two conditions is fulfilled. The first condition, if “the possibility of such a modification is provided for by the treaty.”[36] The second condition, if “the modification in question is not prohibited by the treaty” and provided it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation, and “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purposes of the treaty as a whole.”[37] The Vienna Convention requires, however, that unless in the first mentioned case or if the treaty provides otherwise, the parties in question must notify the other parties of their intention to conclude the agreement and of the modification to the treaty.

Termination and Suspension of the Operation of Treaties

Despite the general rule that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith,” the Vienna Convention provides that a treaty may be terminated, denounced, withdrawn from or

suspended. The Convention provides that the termination of a treaty, its denunciation, the withdrawal of a party or the suspension of its operation “may take place only as a result of the application of the provisions of the treaty or of the present Convention.” The applicable rules to such instances, provided by the Convention are as such:

1. Termination of a Treaty

Termination of a treaty means the end of the operation of a treaty, resulting in depriving all the parties of all the rights, and in releasing them from performing further obligations, under the treaty. Under the Vienna Convention termination of a treaty or the withdrawal of a party may take place either in conformity with the provisions of the treaty, or at any time by consent of all the parties after consultation with the other contracting States. Actually, most of the modern treaties contain provisions for their termination or for the withdrawal of a party. A treaty may provide that it shall come to an end automatically after a certain time, or at the occurrence of a particular event. A treaty may give a party a right to withdraw from it after giving a certain period of notice.

Where a treaty does not contain any provision regarding its termination and does not provide for denunciation or withdrawal, it will not be subject to the denunciation or withdrawal, unless it is established that the parties intended to admit such a possibility, or such a right is implied by the nature of the treaty. In such cases, however, a party must give at least twelve months’ notice of its intention to denounce or withdraw from the treaty.

The Convention specifies the reasons for terminating a treaty. First, a treaty may be terminated by the conclusion of a later treaty related to the same subject-matter, if it appears that the matter is to be governed by that treaty or the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. Second, a treaty may be terminated as a consequence of its breach. A material breach of a treaty which consists in either a repudiation of the treaty not permitted by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty entitles the other parties to terminate the treaty. Third, a treaty may be terminated by the impossibility of performance

resulting from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. Forth, a treaty may be terminated when a fundamental change of circumstances occurs with regard to those existing at the time of the conclusion of that treaty. Fifth, a treaty may be terminated by reason of the severance of diplomatic or consular relations between parties to the treaty. However, such event does not affect the legal relations established between the parties except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty. Finally, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm terminates.

As regard the consequences of termination of a treaty, the Convention provides that unless the treaty provides otherwise or the parties agree otherwise, the termination of a treaty releases the parties from any further obligation to perform the treaty; however, it does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. Suspension of the Operation of a Treaty

Suspension of the operation of a treaty means the making of a treaty temporary inoperative in regard to either all or a particular party. Under the Vienna Convention, suspension of the operation of a treaty, like termination, may take place either according to the provisions of the treaty or at any time by consent of all the parties. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporary and as between themselves alone if “the possibility of such a suspension is provided for by the treaty,” or “the suspension in question is not prohibited by the treaty” and provided it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligation,” and “is not incompatible with the object and purposes of the treaty. However, unless the treaty provides otherwise, the parties in question must notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend. Treaties sometimes provide for the possibility of suspension of the entire treaty or some of its provisions in particular circumstances.

Under the Convention, a treaty may be suspended by the following circumstances:

- 1) the conclusion of a later treaty related to the same subject matter, if it appears from the later treaty or otherwise established that such was the intention of the parties;
- 2) a material breach of a treaty which consists in either a repudiation of the treaty not permitted by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty;
- 3) the temporary impossibility of performing a treaty; or
- 4) a fundamental change of circumstances occurs with regard to those existing at the time of the conclusion of that treaty.

Suspension of the operation of a treaty releases the parties from any further obligation to perform the treaty during the period of suspension; however, it does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its suspension.

Invalidity of Treaties

Invalidity of a treaty means nullity of a treaty or its particular provisions because of the existence or absence of certain circumstances or conditions affecting its legal status. Customary international law does not provide clear and acceptable rules governing validity or invalidity of treaties. The 1969 Vienna Convention on the Law of Treaties, however, provides some general rules on this matter. This Convention describes rules governing invalidity of treaties in general, grounds for invalidity of treaties, and consequences of the invalidity of treaties.

1. General Rules on Invalidity of Treaties [43]

The Vienna Convention on the Law of Treaties provides that “[t]he validity of a treaty or the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.” Under the Convention, a ground for invalidating (as well as for terminating, withdrawal from or suspending the operation of a treaty) may be invoked only with respect to the whole treaty, except where the ground relates solely to particular clauses which are separable and unessential, or relates to a material breach of a treaty by one of the parties. A State cannot invoke a ground for invalidating (as well as for terminating, withdrawal from or suspending the operation of a treaty) if, after becoming aware of the fact, it expressly agreed that the treaty is valid or remains in force, or it, by reason of its conduct, may be considered as having acquiesced in the validity of the treaty or in its continuance in force or in operation.

2. Grounds for Invalidating Treaties

The Vienna Convention specifies the following grounds for invalidating treaties:

- 1) Manifest violation of a provision of fundamental importance of State’s internal law regarding competence to conclude treaties: A violation is manifest “if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” [46]
- 2) Lack of the State’s representative appropriate full powers. [
- 3) Excess of authority by the representative: [

Such an excess will be a ground to invalidate a treaty if the specific restriction imposed by the State upon its representative to express its consent to be bound by the treaty was notified to the other negotiating States prior to his expressing such consent.

- 4) Error: [

A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation mistakenly assumed by that State to exist at the time when the treaty was concluded, and that fact or situation forms

an essential basis of its consent to be bound by the treaty. If the State in question contributed by its own conduct to the error or if it was put on notice of a possible error, it is not allowed to invoke such an error as a ground for invalidating its consent. An error relating only to the wording of the text of a treaty does not affect its validity.

5) Fraud: [

A State may invoke the fraud as invalidating its consent to be bound by the treaty if it has been induced to conclude that treaty by the fraudulent conduct of another negotiating State.

6) Corruption of a representative of a State: [

A State may invoke the corruption of its representative as invalidating its consent to be bound by the treaty if the expression of its consent has been procured through the corruption of its representative directly or indirectly by another negotiating State.

7) Coercion of a representative of a State: [

Acts or threats directed personally against a representative of a State as an individual in order to procure the expression of a State's consent to be bound by a treaty render such expression of consent without any legal effect.

8) Coercion of a State by the threat or use of force: [

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of International Law embodied in the Charter of the United Nations.

9) Conflict of the treaty with an existing and emerging peremptory norm of general International Law (*Jus Cogens*): [

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general International Law. If a new peremptory norm of general International Law emerges, any existing treaty conflicting with that norm becomes void and terminated.

Consequences of Invalidity of Treaties [55]

The consequences of invalidity of treaties vary according to the nature of the ground of invalidity. The Vienna Convention makes a distinction between void and voidable treaties. In cases of lack of full powers, coercion of a representative, coercion of a State and conflict with an existing and emerging of peremptory norm of general international law, the treaty is void, which means that the expression of consent of the State to be bound by the treaty is without any legal effect from the beginning (*ab initio*). In cases of violation of the internal law of the State, excess authority by the representative, error, fraud, and corruption of the representative, the treaty is probably voidable rather than void; the treaty is valid until the State claims that it is invalid. The State may invoke the ground to invalidate the treaty. However, this right may be lost for the following reasons: (a) if after becoming aware of the fact, the concerned State expressly agreed that the treaty is valid or remains in force or it, by reason of its conduct, may be considered as having acquiesced in the validity of the treaty or in its continuance in force or in operation; or (b) if the concerned State contributed by its own conduct to the error or was put on notice of a possible error.

The Convention provides that an invalid treaty is void and without any legal effect. If acts have nevertheless been performed in reliance on such a treaty, each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed. Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of invalidity of the treaty.

Procedures to be followed with Respect to Invalidity, Termination, Withdrawal from, or Suspension of the Operation of a Treaty

The Vienna Convention provides that a party invoking a ground to invalidate a treaty, terminate it, withdraw from it or suspend its operation, must notify, in writing, the other parties of its claim and give them time to make objections before it takes any action. If after the expiry of a period which shall not be less than three months from the receipt of the notification, no objection has been raised by any party, the party making the notification may carry out the measures it has proposed. If, however, objection has been raised by any party, the parties must seek a solution through the peaceful means indicated in Article 33 of the Charter of the United Nations.

If no solution is reached within twelve months, the dispute is to be submitted to a special conciliation commission set up under an annex to the Convention or, in

cases of dispute involving peremptory norms of general International Law to be submitted to the International Court of Justice (ICJ).