International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 7, The Law of Treaties

Question 1. *Suppose a State files a reservation to a treaty and another State, that is a to that treaty, objects to the reservation but does not consider it contrary to the object and purpose of the treaty. What would be the legal situation between the reserving and the objecting State?*

That fact that a single State objects to a reservation filed by another State does not in itself mean that the reserving State cannot be regarded as a party; it is only when the reservation is contrary to the object and purpose of the treaty that such a situation would occur (*Reservations to the Genocide Convention* advisory opinion). As such, the reserving State would in principle be a party, as this is not such a situation.

The question concerns the asymmetrical situation that arises when there is a combined reservation and objection and the distinction between 'hard' and 'soft' objections. When a State files a 'hard' objection, usually on the basis that a reservation is impermissible. the objecting State does not regard the reserving State as a party to the treaty. Conversely, a 'soft' objection does not affect other States that accept the reservation, which means that the combined effect of a reservation and a soft objection is that there are asymmetrical treaty relations: the reserving State will have a different obligation vis-à-vis the objecting State than in relation to non-objecting States.

Precisely this situation arose in the *Anglo-French Continental Shelf* arbitral award, where France had lodged a statement to which the United Kingdom had objected. The statement was determined to constitute a reservation to Article 6 of the Treaty on the Continental Shelf by the arbitral Tribunal. The UK's objection, however, was

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'soft'. The Tribunal concluded that in such cases, the reservation would not be severed, that the provision as a whole was excluded between the two parties to the extent of the reservation (see Art 21(3) VCLT). However, vis-à-vis non-objecting States parties, the reservation would apply. The best answers will identify correctly that this creates a degree of asymmetry in treaty relations, and is perhaps the reason why certain treaties (eg UNCLOS or the Rome Statute of the ICC) prohibit reservations altogether.

Question 2. '*A government minister may sign treaties and potentially bind the State in areas falling within their competence.' Assess this statement critically.*

It is true that Heads of State, Heads of Government and Foreign Ministers may sign a treaty and express the consent of a State to be bound (Article 7(2) VCLT; see also *Application of the Genocide Convention (Bosnia v Yugoslavia),* preliminary objections, and *Legal Status of Eastern Greenland*). What of other ministers, for example a Minister of Finance in relation to central banking, or a Minister of Agriculture in relation to phytosanitary standards? These can produce 'full powers' that show that they are accredited by a State's government to negotiate and conclude a treaty, or express its consent to be bound (see e.g. *Armed Activities in the Congo (Congo v Rwanda)* and *Maritime Delimitation in the Indian Ocean*). What is more, under Article 8 VCLT a State may, through ratification or a similar act of consent, 'confirm' the act of a minister that did not possess full powers but signed a treaty.

Question 3. '*Under the law of treaties, there are so many grounds for States to back out of treaty obligations that they make a mockery of the rule* pacta sunt servanda.' *Do you agree?*

It is true that *Pacta sunt servanda* is likely not a rule of *jus cogens*, and there are several objections to it. However, such a sweeping statement would require some nuance. Students would be well served first by identifying the VCLT grounds for terminating or suspending treaty obligations:

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- If the treaty provides for it, or all States parties consent (Arts 54, 57)
- If a treaty does not provide for it but it is proved that parties intended for it (Art 56)
- If all the parties sign a new treaty on the subject and thus terminate the earlier treaty (Art 59)
- One party has committed a 'material breach' that is invoked by other parties (Art 60)
- Abiding by the treaty has become 'impossible' due to the permanent disappearance or destruction of an indispensable object (Art 61)
- There have been unforeseen and 'fundamental changes of circumstances' such that the obligations are 'radically' transformed (Art 62)

Students would note that in the first three cases, termination or suspension are essentially derived from the consent of the parties; it is in the last three cases where a State may unilaterally invoke a reason for suspension or termination of a treaty. However, the threshold for all three such grounds is very high. In relation to material breaches, which are rooted in the reciprocity of treaty obligations, only a breach of an essential obligation that is central to the treaty will suffice (*Namibia*). The 'impossibility' of respecting obligations only applies in extreme factual scenarios, such as total disappearance of an object not due to the fault of the party invoking it. Finally, 'fundamental change of circumstance' cannot be used, for example, if a relationship between parties changes significantly, but only in extreme circumstances (*Gabčíkovo-Nagymaros Project)*. Only in the ECJ's *Racke* judgment did a major international court uphold a plea of fundamental changes, and that was in relation to the outbreak of an internal armed conflict in Yugoslavia.

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