

UNITED STATES : TRANSMITTAL OF VIENNA CONVENTION OF THE LAW OF TREATIES TO U.S. SENATE*
[November 22, 1971]

LETTER OF TRANSMITTAL

THE WHITE HOUSE, November 22, 1971.

To the Senate of the United States:

I am transmitting herewith, for the advice and consent of the Senate to ratification, the Vienna Convention on the Law of Treaties signed for the United States on April 24, 1970. The Convention is the outcome of many years of careful preparatory work by the International Law Commission, followed by a two-session conference of 110 nations convened under United Nations auspices in 1968 and 1969. The conference was the sixth in a series called by the General Assembly of the United Nations for the purpose of encouraging the progressive development and codification of international law.

The growing importance of treaties in the orderly conduct of international relations has made increasingly evident the need for clear, well-defined, and readily ascertainable rules of international law applicable to treaties. I believe that the codification of treaty law formulated by representatives of the international community and embodied in the Vienna Convention meets this need.

The international community as a whole will surely benefit from the adoption of uniform rules on such subjects as the conclusion and entry into force of treaties, their interpretation and application, and other technical matters. Even more significant, however, are the orderly procedures of the Convention for dealing with needed adjustments and changes in treaties, along with its strong reaffirmation of the basic principle *pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith. The provisions on judicial settlement, arbitration and conciliation, including the possibility that a dispute concerning a peremptory norm of international law can be referred to the International Court of Justice, should do much to enhance the stability of treaty relationships throughout the world.

I am enclosing the report of the Secretary of State, describing the provisions of the Convention in detail.

The Vienna Convention can be an important tool in the development of international law. I am pleased to note that it has been endorsed by the House of Delegates of the American Bar Association and I urge the Senate to give its advice and consent to ratification.

RICHARD NIXON.

(Enclosures: (1) Report of the Secretary of State. (2) Copy of the Convention.)

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LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, October 18, 1971.

THE PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Vienna Convention on the Law of Treaties, adopted on May 23, 1969 by the United Nations Conference on the Law of Treaties, and signed for the United States on April 24, 1970. I recommend that you transmit it to the Senate for advice and consent to ratification.

The Convention sets forth a generally agreed body of rules to govern all aspects of treaty making and treaty observance. It is the product of two sessions of a 110-nation Conference on the Law of Treaties convened in Vienna under United Nations auspices from March 21 to May 24, 1968 and from April 9 to May 23, 1969.

The Treaties Conference took as the basis of its work draft articles drawn up by the International Law Commission in the course of eighteen years of work. At its first session in 1949 the Commission had selected the law of treaties as a priority topic for codification. Growing support for a written code of international treaty law came not only from newly independent States that wished to participate in such an endeavor, but from many older States that favored clarification and modernization of the law of treaties. As a result the General Assembly (XXI) of the United Nations in 1966 unanimously adopted resolution 2166 (XXI) convening the Law of Treaties Conference.

The Treaties Convention which emerged from the Vienna Conference is an expertly designed formulation of contemporary treaty law and should contribute importantly to the stability of treaty relationships. Although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.

The Convention sets forth rules on such subjects as conclusion and entry into force of treaties, the observance, application, and interpretation of treaties, and depositary procedures. More importantly, it contains impartial procedures for dealing with disputes arising out of assertions of invalidity, termination and suspension of the operation of treaties, thus realizing a basic United States objective: The Convention consists of eight parts. Procedures for handling most important disputes are contained in an Annex. The major provisions of the Convention are as follows:

PART I—INTRODUCTION

The Convention applies to treaties between States (Article 1) but only to treaties concluded after the entry into force of the Convention with regard to such States (Article 4).

* Reproduced from Vienna Convention on the Law of Treaties, Message from the President of the United States, Senate Executive I (92nd Congress, 1st Session) of November 22, 1971. The Vienna Convention on the Law of Treaties appears at 8 T.L.M. 679 (1969). 1

"Treaty" is defined as an international agreement concluded between States in written form and governed by international law; whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2). Thus it applies not only to formal treaties but to agreements in simplified form, such as exchanges of notes. Article 2 also defines other terms used in the Convention, but specifies that the Convention's use of terms is "without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

Although the Convention does not apply to unwritten agreements or to agreements concluded by or with international organizations, it asserts that the legal force of such other agreements or the application to them of any of the rules of international law to which they are subject independently of the Convention is not affected (Article 3).

The non-retroactivity feature (Article 4) is of substantial importance because it avoids the possibility of reopening old international disputes. This is especially true with regard to long-standing boundary disputes.

PART II—CONCLUSION AND ENTRY INTO FORCE OF TREATIES

The rules in this part are primarily technical. Section 1 relates to such matters as Full Powers or other evidence of authority; adoption and authentication of texts; and the means of expressing consent to be bound by a treaty (Articles 7-17).

Article 18 sets forth rules governing the obligation of States not to defeat the object and purpose of a treaty prior to its entry into force. That obligation is limited to (a) States that have signed a treaty or exchanged ad referendum instruments constituting a treaty, until such time as they make clear their intention not to become a party, and (b) States that have expressed consent to be bound, pending entry into force and provided such entry into force is not unduly delayed. This rule is widely recognized in customary international law.

Part 2 of Section II sets forth the rules on reservations to treaties (Articles 19-23). The articles reflect flexible current treaty practice with regard to multilateral treaties as generally followed since World War II. The earlier traditional rule on reservations had been that in order for a State to become party to a multilateral treaty with a reservation the unanimous consent of the other parties was required. That rule has given way in practice to a more flexible approach, particularly after the International Court of Justice in 1951 handed down its Advisory Opinion on Reservations to the Genocide Convention. The Court's opinion in the case stated, "The reserving State can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention." The compatibility rule has been incorporated in Article 19 of the Convention. It applies in those cases where the reservation is not expressly excluded by the terms of the treaty.

The right of other States to object to a reservation and to refuse treaty relations with the reserving State is maintained in Article 20. That article also provides the practical rule that a reservation is considered to have been accepted by a State that fails to object either within twelve months after being notified thereof or by the date on which it expresses its own consent to be bound, whichever is later.

Section 3 of Part II governs entry into force of treaties and provides for their provisional application, pending entry into force, if such application has been agreed.

PART III—OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

The articles in Section I relating to observance of treaties are of cardinal importance. The foundation upon which the treaty structure is based is the principle *pacta sunt servanda*, expressed in Article 26 as follows:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

The most significant action of the Law of Treaties Conference with respect to this part was the defeat of an attempt by some States to weaken the article by use of such expressions as "Every valid treaty" or "Treaties which have been regularly concluded." Phrases such as these might have encouraged States to assert a right of non-performance or termination before any claim of invalidity had been established. The article was adopted in the twelfth plenary meeting without a dissenting vote.

Article 27 on internal law and observance of treaties restates the long-standing principle of customary international law that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The rule is consistent with United States practice over many years in declining to accept provisions of internal law as justifying nonperformance by a State of its treaty obligations to the United States. At the same time the article does not change the way in which the effect of a treaty within the framework of domestic law is determined. In explaining its vote in favor of Article 27, the U.S. Delegation observed:

"There is a hierarchy of differing legal rules in the internal legislation of most States. Constitutional provisions are very generally given primacy. Statutes, resolutions, and administrative provisions, all of which may be authoritative, may have different weights. Treaty provisions, when viewed as internal law, necessarily have to be fitted into that hierarchy.

"Each State is entitled to determine which legal formulation has greater internal authority in case of conflict among internal enactments. Article 27 in no way abridges that right . . ."

The articles of Section 2 contain rules on the non-retroactivity of treaties, their territorial scope and the difficult problem of application of successive treaties dealing with the same subject matter. Article 30 lays down a set of principles to determine priorities among inconsistent obligations. In essence it provides that (a) if a treaty states it is subject to another treaty, the other treaty governs; (b) as between parties to one treaty who become parties to a second, the second governs on any point where it is incompatible with the first; (c) if some parties to the first are not parties to the second, and vice versa, the first governs between a party to both and a party only to the first; the second governs between a party to both and a party only to the second.

The articles of Section 3 on interpretation of treaties emphasize the importance of the text in the interpretative process. Article 31 requires that a treaty "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." Context is narrowly defined as comprising, "in addition to the text, including its preamble and annexes", related agreements made by all the parties and instruments made by less than all the parties but accepted by all as related to the treaty. Elements extrinsic to the text which are to be taken into account are limited to subsequent agreements between the parties, subsequent practice establishing agreement, and relevant rules of international law.

Article 32 allows recourse to 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Five articles in Section 4 deal with treaties and third States. Article 34 sets forth the traditional rule that a treaty does not create either obligations or rights for a third State without its consent. Subsequent articles provide that a third State must expressly consent to treaties creating obligations for it, whereas it would be assumed to assent to a treaty giving it rights, unless the treaty otherwise provides. Article 37 provides for revocation or modification of obligations or rights of third States, and Article 38 prevents the preceding articles from barring a rule set forth in a treaty from becoming binding on a third State as a customary rule of international law.

PART IV—AMENDMENT AND MODIFICATION OF TREATIES

Articles 39-41 lay down rules for amending and modifying treaties. Article 40 provides needed clarification in the case of multilateral treaties. It safeguards the rights of parties to participate in the amending process by requiring notification to all parties of any proposed amendment and by specifying their right to participate in the decision to be taken on the proposal and in the negotiation and conclusion of any amendment. The right to become party to the new agreement is also extended to every State entitled to become a party to the treaty.

PART V—INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Part V sets forth the grounds on which a claim may legitimately be made that a treaty is invalid or subject to termination, denunciation, withdrawal, or suspension. It deals with such grounds as error, fraud, coercion, breach, impossibility of performance, fundamental change of circumstances, and conflict with a peremptory norm of international law (*jus cogens*).

At the same time it contains a variety of safeguards to protect the stability of the treaty structure. Article 42 subjects all challenges of the continuing force of treaty obligations to the rules of the Law of Treaties Convention. The termination of a treaty, its denunciation or suspension, or the withdrawal of a party may take place only as a result of the application of the provisions of that treaty or

the Convention. Article 43 specifies that a State that sheds a treaty obligation does not escape any obligation to which it is subject under international law independently of the treaty.

Article 44 deals with separability of treaty provisions. It permits separability with respect to certain grounds of invalidity where the ground relates solely to particular clauses and where certain criteria as to feasibility and equity are met. Included in such criteria, as a result of a United States proposal, is the requirement that "continued performance of the remainder of the treaty would not be unjust."

Article 45 is a rule of "good faith and fair dealing" that will protect against ill-founded efforts to avoid meeting treaty obligations. A State may not claim that a treaty is invalid if, after becoming aware of the facts, it expressly agrees that the treaty is valid or is to remain in effect or if (and this would be the case arising most often) it is considered to have acquiesced, by reason of its conduct, in the validity of the treaty or its maintenance in force or effect.

In dealing with the invalidity articles in Section 2 of Part V (Articles 46-53), the chief concern of the United States Delegation was to assure that the grounds of invalidity were stated as precisely and objectively as possible and that there would be procedural or institutional mechanisms to guard against spurious claims of treaty invalidity.

The first of the grounds for invalidity, the effect of a limitation of internal law upon competence to conclude treaties, is stated in Article 46. It provides that a State may not invoke, as invalidating its consent to be bound, the fact that its consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties unless: (a) the violation was manifest, that is, "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith"; and (b) it concerns a rule of the State's internal law of fundamental importance. At the plenary meeting at which the article was adopted without negative vote, the United States Delegation emphasized that it had supported the article on the basis that it deals solely with the conditions under which a State may invoke internal law on the international plane to invalidate its consent to be bound and that it in no way impinges on internal law regarding competence to conclude treaties insofar as domestic consequences are concerned.

Article 52 states the principle that 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 United Nations Charter. A proposal by 19 States that would have amended the rule by defining force to include any "economic or political pressure" was withdrawn after strong opposition by the United States and other concerned powers. Instead, a declaration condemning the threat or use of pressure in any form by a State to coerce any other State to conclude a treaty was adopted by the Conference and annexed to the Final Act.

Article 53 deals with treaties that conflict with a peremptory norm of international law, the *jus cogens* doctrine. In formulating this article, the International Law Commission started from the principle that there are rules of such fundamental character that no State has the right to set them aside by a treaty. This principle had previously been incorporated in Section 116 of the American Law Institute's *Restatement of the Foreign Relations Law of the United States*. Inclusion

of the *jus cogens* principle in the Vienna Convention was almost universally supported, but there was considerable concern with the theoretical manner in which the norm was formulated. Through efforts by the United States and several others, the article was revised to include two important limitations. The first makes clear that in order for a treaty to be void under the article the peremptory norm violated must have existed at the time of the conclusion of the treaty. The second clarification requires a peremptory norm to be "a norm accepted and recognized by the international community of states as a whole . . .". Inclusion of the latter requirement resulted in broad acceptability of the article. Many delegations had expressed the view that a norm which had not achieved recognition by substantially all States ought not to serve as the basis for claiming a treaty is void. A related article (Article 64) provides that if a new peremptory norm emerges, an existing treaty in conflict with the norm becomes void and terminates.

Section 3 of Part V is entitled Termination and Suspension of the Operation of Treaties. Articles 54, 55, 57, and 58 specify that various aspects of termination and suspension must be dealt with in conformity with the treaty or with the consent of all parties, or, if by agreement between certain of the parties, subject to the same limitations expressed in Article 41 on modification.

Paragraph 1(b) of Article 56 permits denunciation of or withdrawal from a treaty which has no provision on the subject if such right "may be implied by the nature of the treaty". At the instance of the United States Delegation a clear legislative history was established that the procedures for settlement of disputes in Section 4 (Articles 65-68) apply to notices of denunciation grounded upon Article 56.

Article 60 recognizes the long-standing doctrine that a material breach of a treaty by one party may be invoked by the other party to terminate the treaty or to suspend the performance of its own obligations under the treaty.

Article 61 on supervening impossibility of performance contains the reasonable rule that a party may invoke impossibility of performance as a ground for terminating or withdrawing from a treaty if an object indispensable for the execution of the treaty permanently disappears or is destroyed. A State may not, however, invoke impossibility of performance if it is the result of a breach by that State of an international obligation.

Article 62, on fundamental change of circumstances, is a carefully phrased version of the doctrine of *rebus sic stantibus* which has been widely recognized by jurists as a ground under certain conditions may be invoked for terminating or withdrawing from a treaty. An important feature is paragraph 2(a) which precludes invocation of the article as a ground for terminating or withdrawing from a treaty establishing a boundary.

Article 63 makes clear that the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established by the treaty except to the extent that the existence of diplomatic or consular relations is indispensable to applying the treaty.

Section 4 of Part V contains articles on the procedure for invoking grounds for invalidity or termination of treaties and for judicial settlement, arbitration and conciliation. During the debates on the preceding articles on invalidity, suspension and termination one of the

major concerns of the United States and certain other countries was the need to formulate adequate provisions for dealing with an assertion of the invalidity of a treaty or a claim of a right to unilateral termination or suspension.

The International Law Commission had proposed a procedure for dealing with such assertions that would have required a State to notify the other parties of its claim, of the grounds therefor, and of the action to be taken. If no objection to the proposed action were made within three months, it could then be carried out. If objection were made, a solution was to be sought under the means indicated in Article 33 of the United Nations Charter. In the final analysis Article 33 merely provides that disputes should be settled by peaceful means of the parties' own choice. The proposed article thus left undecided the crucial question whether a party could go ahead and terminate a treaty if it did not agree with the other parties on a peaceful means of settlement or if the means selected failed to result in a settlement.

States, such as the United States, that were fighting for the stability of the treaty structure made clear that the Convention would be unacceptable unless some form of impartial disputes-settlement procedure was incorporated into it. The basic opposition to any meaningful form of disputes settlement was organized by the Communist bloc. The issue became the overriding one of the Conference. In the closing hours of the second session, the Conference succeeded in adopting a new article on the settlement of disputes, which should adequately protect United States treaty relations from unilateral claims of invalidity by our treaty partners and should contribute to the stability of treaty obligations generally.

Under the new article—Article 66 of the Convention—any party to a dispute arising under the *jus cogens* articles may invoke the jurisdiction of the International Court of Justice unless the parties agree to submit the dispute to arbitration. In any other dispute arising under Part V—such as claims of invalidity or termination based on error, fraud, breach, or changed circumstances—any party to the dispute may set in motion a conciliation procedure. That procedure, which is set forth in the Annex to the Convention, includes establishment in each case of a conciliation commission and submission by that commission of a report to the parties and to the Secretary-General of the United Nations. The report may contain findings of fact and conclusions of law, as well as recommendations to the parties for settlement of the dispute, although it is not binding upon them. Paragraph 7 of the Annex provides that the expenses of the commission will be borne by the United Nations. The General Assembly of the United Nations on December 8, 1969 adopted Resolution 2534 (XXIV) approving the provision and requested the Secretary-General to take action accordingly.

The provisions for the settlement of disputes meet the requirements of the United States. By contributing to the prompt resolution of disputes relating to validity of treaties they should go far in helping to maintain the stability of treaty relationships throughout the world. The provision for expenses is a desirable innovation and worthwhile investment, since the concern of many newly independent and small States with the cost of third-party settlement procedures had been a very real obstacle to their general acceptability.

The Syrian Arab Republic, in depositing its accession to the Convention on October 2, 1970, made several reservations, the most serious of which was to reject the Annex on conciliation procedures. The United States Representative to the United Nations has notified the Secretary-General that the United States objects to that reservation and intends, at such time as it may become a party to the Convention, to reject treaty relations with the Syrian Arab Republic under all provisions in Part V with regard to which that State has rejected the obligatory conciliation procedures set forth in the Annex.

The final section of Part V, Consequences of the Invalidity, Termination, or Suspension of the Operation of a Treaty, includes rules for the unwinding of treaties the invalidity or termination of which has been established under the Convention.

PART VI—MISCELLANEOUS PROVISIONS

Article 73 excludes from the applicability of the Convention questions arising from State succession, State responsibility, or the outbreak of hostilities.

Article 74 provides that sovereignty or absence of diplomatic or consular relations between States does not prevent the conclusion of treaties between them. The rule accords with modern treaty practice.

PART VII—DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

As the depositary of more international treaties than any other country, the United States had a substantial interest in the depositary articles and was able to achieve several worthwhile improvements in these technical articles. Article 76 makes clear the international character of the depositary function and the obligation to perform it impartially. Article 77 is a comprehensive catalog of depositary functions. Sensible rules for correction of errors are provided in Article 79.

PART VIII—FINAL PROVISIONS

Included in Articles 81-85 are standard provisions on signature, ratification, accession, entry into force, and authentic texts. Entry into force requires deposit of thirty-five instruments of ratifications or accession. This is a larger number than required by many earlier treaties, but was considered appropriate because of the fundamental importance of the Convention on the Law of Treaties.

The Vienna Convention on the Law of Treaties is a major achievement in the development and codification of international law. At the opening session of the conference in March 1968, the Legal Counsel of the United Nations, Constantinos Stavropoulos, described it as the "most important . . . and perhaps also the most difficult" of the series of codification conferences called by the United Nations. By agreeing on uniform rules to govern State practice on a host of technical matters related to the negotiation, adoption, and execution of treaties, the Conference achieved one of its basic objectives. But the Convention on the Law of Treaties has a much larger significance. By codifying the doctrines of *ius cogens* and *rebus sic stantibus*, it provides a framework for necessary change. By reasserting the principle of *pacta sunt servanda*, long recognized as the keystone of the

treaty structure, it strengthens the fabric of treaty relationships. By requiring impartial procedures for settlement of disputes, it provides an essential element in minimizing unfounded claims that treaties should be terminated or suspended.

The United States Delegation to the Vienna Conference was led by Richard D. Kearney, United States Member of the International Law Commission. Included on the Delegation at one or both sessions were John R. Stevenson, now Legal Adviser of the Department of State, and Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs; Herbert W. Biggs, Professor of International Law, Cornell University; Myres McDougal, Professor of Law, Yale University; Joseph M. Sweeney, Dean, Law School, Tulane University; and Frank Wozencraft, former Assistant Attorney General, Department of Justice. Others on the United States Delegation were Jared Carter, Robert E. Dalton, Warren Hewitt, Bruce M. Lancaster, and Herbert K. Reis from the Department of State and Ernest C. Gigg III and Robert B. Rosenstock from the United States Mission to the United Nations.

In preparing for the Conference the United States Government worked closely with the Study Group on the Law of Treaties established by the American Society of International Law in 1965. With Professor Oliver Lissitzyn of Columbia University as chairman, this group of eminent international lawyers met regularly with representatives of the Departments of State and Justice.

The Study Group also joined forces with the Special Committee on Treaty Law of the Section of International and Comparative Law of the American Bar Association, of which Eberhard Deutsch is chairman. The comprehensive knowledge, experience, and wisdom of the members of the academic and legal communities serving in these two groups were of incalculable assistance to the Delegation in the formulation of United States policy and planning for the Conference. The House of Delegates of the American Bar Association in July 1971 approved a resolution recommending that the Convention be submitted to the Senate and that the Senate advise and consent to its ratification without reservations.

I believe that the Convention on the Law of Treaties will be an important element in promoting the stability of treaty relationships. I hope that the United States will become a party in the near future. Respectfully submitted,

WILLIAM P. ROGERS.

(Enclosure: Copy of the Vienna Convention on the Law of Treaties.)