ESIL Reflections
Editorial Board: Patrycja Grzebyk (editor-in-chief), Lucas Lixinski, Alina Miron, Anne Saab and Peter-Tobias Stoll

1 February 2024 Volume 13, Issue 2

‘Change in International Law: Rules of Change or Changing Rules?’ Series

Change and the Law of Treaties: The accommodation of change under general international law and in specific treaty regimes

Christina Binder
Bundeswehr University Munich; University of Vienna

Image by Leo Rivas (cc)

1. Introduction

The question of how to accommodate change has always played a central role in the law of treaties. It is exacerbated by the inherent tendency of treaties to ‘freeze’ law at the moment of their adoption, thus fixing it at a certain point in time. This characteristic distinguishes treaties from customary law, which – based on state practice and *opinio iuris* – follows reality, to use Dupuy’s words, in degrees of mimicry.[1] Contrary to the latter, treaties are in permanent tension with the passing of time and changing circumstances. *A fortiori,* this is evident in treaty regimes established with the aim of dealing with (quickly changing) fields, such as the regulation of new information technologies, environmental

[1] Pierre-Marie Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’, in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011), 123 at 124.

law or the fight against climate change, which call for the incorporation/regulation of changes on a rapid and continuous basis.

In legal terms, the tension is connected to the question of the relationship between the static principle of *pacta sunt servanda* – generally aiming to stabilise the treaty parties' expectations in view of compliance with their treaty obligations – and subsequent changes owed to evolving social realities. The balance between these poles is even more apparent today, in view of the changing structure of international law and the development of special treaty regimes, which provide for ever more stringent regulations at the domestic level and highlight a need to accommodate change within the context of a complex and rapidly developing existence.

Sometimes, an adjustment between stability and change seems necessary in addition to an adaptation of the treaty in light of the changes. It may be required to accommodate change for reasons of justice regarding the party affected by the change; to keep a treaty up to date in light of subsequent developments; in view of the legitimacy of a treaty;[2] and in order to prevent a treaty's breach. The techniques, the 'treaty law toolset', to accommodate change varies accordingly.

Against this background, this ESIL Reflection explores the possibilities of accommodating and responding to subsequent developments in the general law of treaties, as well as in specific treaty regimes. More particularly, it will start with the instruments of general international law for accommodating change: i.e., the rules of treaty interpretation, a margin of appreciation afforded to a state in the performance of a treaty, and the principle of good faith (Section 2). It argues that while there are certain possibilities to account for subsequent changes, there are also obvious limitations (Section 3). Especially treaties subject to rapid social or global developments, such as in the field of the environment or climate change, require new perspectives on the accommodation of change. On this basis, Section 4 deals – more briefly – with the rules of change in specific treaty regimes, taking the example of the law on climate change. Overall, the Reflection shows that 'Change and the Law of Treaties' remains of ongoing relevance and calls for innovative and progressive approaches.

[2] See for further reference e.g. Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations, in R Wolfrum/V Röben (eds), *Legitimacy in International Law* (Springer 2008), 1 at 9.

2. Rules of change in the general law of treaties

A (limited) range of mechanisms allow for the accommodation of subsequent changes under the general law of treaties.[3] First, the accommodation of change may be possible through the evolutionary/dynamic interpretation of a treaty (Art 31.1 of the Vienna Convention on the Law of Treaties (VCLT)).[4] While such an interpretation must be covered by the original state consent,[5] it may keep a treaty alive in light of subsequent changes. Change may therewith be read into a treaty. As noted by Dupuy:

> Permissible modifications to a treaty that take into account the passing of time thus often require a new interpretation of its terms. To this end, a judge is often requested to redefine the meaning of a treaty without altering its nature. Such a manner of interpreting treaties, sometimes called an *evolutionary* interpretation, is no mean feat. In many cases the very survival of the agreement and its applicability to present-day concerns are at stake.[6]

An indication for the permissibility of evolutionary interpretation – i.e. of the parties' intent that a treaty be interpreted not in light of the circumstances at the time of its conclusion but rather at the time of its interpretation/application – is usually the use of certain 'generic terms' in the treaty, partly coupled with the long/indefinite duration of the treaty over time.[7] Examples of such terminology include 'commerce',[8] 'territorial status'[9] or 'sacred trust'.[10] Indeed, with regard to certain subject matters, international dispute settlement bodies seem to assume that they intrinsically possess evolutionary

[3] See generally Christina Binder, *Die Grenzen der Vertragstreue im Völkerrecht: am Beispiel der nachträglichen Änderung der Umstände* (Springer 2013), 75 *et seq.*

[4] Note that the terms 'evolutionary', 'evolutive' and 'dynamic' are used as synonyms here. For a differentiation see Jan Erik Helgesen, 'What are the limits to the evolutive interpretation of the European Convention on Human Rights', 31 *HRLJ* 2011, 275 (276).

[5] See e.g. the Separate Opinion of Judge Bedjaoui in the *Gabčikovo-Nagymaros* case (*Gabčikovo-Nagymaros Project,* Judgment, ICJ Reports 1997 (Separate Opinion of Judge Bedjaoui), 120, paras 12-14).

[6] Dupuy (n 1), 125.

[7] See *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment, ICJ Reports 2009, 213, at 242 (paras 63-66.) See for further reference generally Eirik Bjorge and Robert Kolb, 'The Interpretation of Treaties over Time', in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP, 2nd ed, 2020) 489.

[8] See *id;* see also *Pulp Mills on the River Uruguay (Argentina v Uruguay),* Judgment, ICJ Reports 2010; *Arbitration regarding the Iron Rhine ('IJzeren Rijn') Railway (Belgium v The Netherlands),* Award, 24 May 2005.

[9] See ICJ, *Aegean Sea Continental Shelf* (*Greece v Turkey*), Judgment, 19 December 1978, ICJ Reports 1978, 3, at 32 (para 77).

[10] See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21 June 1971 ICJ Reports 1971, 16, at 31-32 (para 53).

elements.[11] Rosalyn Higgins, for instance, referred to human rights treaties as 'generic term' treaties.[12] Robert Kolb maintains that: '[…] institutional treaties (such as the UN Charter, or the ECHR) tend to be interpreted in the light of the law as it stands at the moment of interpretation. These treaties are intended to inform social life as it evolves. […]'.[13] Accordingly, in many instances, evolutionary interpretation may enable the incorporation of change in line with evolving social realities.

Another means to keep a treaty up to date and to incorporate subsequent changes in law is the technique of systemic integration (Art 31.3.c VCLT).[14] In accordance with Art 31.3.c VCLT, any rule of international law applicable between the treaty parties may be read into the treaty through interpretation, as long as this takes place within the textual limits of the treaty.[15]

Interpretation that is reliant on subsequent practice (Art 31.3.b VCLT) provides an additional option,[16] as highlighted inter alia in the ILC's project on treaties over time, which prominently refers to the relevance of (*inter alia*) subsequent practice for treaty interpretation.[17] Such practice is primarily dependent on the action of the treaty parties, with potentially enhanced possibilities for the incorporation of change, even including the customary law-based modification of the initial treaty rule. As observed by Mark Villiger in relation to subsequent practice: '[…] parties may in their practice gradually wander from interpretation to the customary modification of the treaty.'[18] According to the

[11] See also *Gabčikovo-Nagymaros Project,* Separate Opinion of Vice-President Weeramantry, ICJ Reports 1997, 88, paras 113-114; Christian Djeffal, *Static and Evolutive Treaty Interpretation – A Functional Reconstruction* (CUP 2016), 266.

[12] Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem', 46 *ICLQ* 1997, 501.

[13] Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016), 158. Moreover, also environmental treaties have been considered as evolutionary in nature and thus prone to evolutive interpretation. See Gianfranco Gabriele Nucera, 'The Interpretation of Treaties as Living Instruments', in G Pascale and S Tonolo (eds), *The Vienna Convention on the Law of Treaties. The Role of the Treaty on Treaties in Contemporary International Law* (Edizioni Scientifiche Italiani 2022), 211, at 228 *et seq*.

[14] See e.g. Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill 2015) 125.

[15] For details on systemic integration see also Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* 2005, 279.

[16] Art 31 VCLT: '[…] 3. There shall be taken into account, together with the context: […] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; […]'. See also the reference to subsequent agreements in Art 31.3.a VCLT which seems however of reduced relevance in this context.

[17] See ILC, 'Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties', A/CN.4/715, 2018: 'Draft Conclusion 7.1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.'

[18] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff, 2009) 432. Note, however, that the ILC establishes in Draft Conclusion 7.3 on subsequent agreements and subsequent practice in relation to the interpretation of treaties a presumption against subsequent modification: '[…] It is presumed that the parties to a treaty, by […] a practice in the application of the treaty, intend to interpret the treaty, not

ILC, criteria for the weight attributed to subsequent practice are, among others, its clarity and specificity, as well as whether and how it is repeated.[19]

While the above options generally take subsequent changes as a point of departure, another possibility is to focus on the treaty synallagma and the party burdened by the change. Indeed, additional options to accommodate change include a restrictive (sovereignty friendly) interpretation of the treaty obligations of the state party impacted by the change, therewith shifting the synallagma in treaty compliance in the latter's favour. While this restrictive interpretation rule is not mentioned in the VCLT, it may be deduced from the object and purpose of a treaty in accordance with Article 31.1 VCLT[20] to ensure a proper balance of the distribution of rights within the treaty system.[21] Especially in reciprocal treaties, this restrictive interpretation may reduce the burden of a state saddled with the change by giving it certain leeway as regards compliance with its treaty obligations.

A similar effect may be achieved by according states a wide margin of appreciation when it comes to compliance with treaty obligations (even though the doctrine is not frequently used to accommodate change properly speaking). As it pertains to the application of a treaty rather than to its interpretation, the margin of appreciation doctrine establishes a methodology for scrutiny by international courts of national authorities' decisions and may thus be turned into a means to accommodate change.[22] In so doing, the margin of appreciation relies on open treaty provisions and judicial self-restraint (judicial deference). The yardstick to assess the leeway left to a state in compliance is the normative flexibility of treaty provisions, i.e., their 'open-endedness'. The application of a margin of appreciation is generally possible (probably even warranted) in the case of 'standard type', 'discretionary', and 'result oriented' norms.[23] States burdened by subsequent changes may therewith be accorded discretion.

---

to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. […]' (ILC Subsequent agreements and subsequent practice (n 17)).

[19] ILC, Draft Conclusion 9 (Ibid.).

[20] See in this sense Villiger: 'One of the objects and purposes will certainly be to maintain a proper balance of the distribution of rights within the treaty system.' (Villiger (n 18) 427).

[21] As stated in by the PCA in the *Iron-Rhine arbitration*: 'The doctrine of restrictive interpretation never had a hierarchical supremacy but was a technique to ensure a proper balance of the distribution of rights within a treaty system.' (*Iron-Rhine,* n 8, para 26). See also investment tribunals' move towards balanced interpretation; on this generally, Alex Mills, 'The Balancing (and Unbalancing?) of Interests in Investment Arbitration', in Z Douglas, J Pauwelyn and J Vinuales (eds), *The Foundations of International Investment Law* (OUP 2014), 436, at 457ff. See however the limitations of restrictive interpretation as regards treaties which protect the interests of the international community as discussed below.

[22] See generally Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *EJIL* 2005, 907, at 909. Examples for e.g. 'standard type' norms are 'necessity', 'good faith' or 'proportionality'; for 'discretionary norms', e.g. '[the contracting parties] consider necessary'.

[23] See ibid, at 912ff.

Examples may be the margin of appreciation left to states by the European Court of Human Rights as regards compliance with their human rights obligations[24] or the margin of appreciation left to states and their regulatory measures by international investment tribunals in light of emerging public interest concerns.[25]

Likewise, generally focused on the treaty synallagma is the principle of good faith: going beyond the mere interpretation of a treaty, it is an additional 'rule of change' and to some extent allows for a further reaching accommodation of subsequent changes. The principle of good faith calls for a 'reasonable exercise' of treaty rights and prevents abusive reliance on these rights by a treaty party.[26] Therewith, the principle of good faith requires not asking anything unreasonable from the treaty partner, including in cases where the treaty partner is impacted by a change. The principle of good faith makes it possible, accordingly, to reconcile the tension between treaty stability/*pacta sunt servanda* and change, turning it into a means of accommodating change. In principle, good faith reaches further than the treaty text, as it relates to the substance of a treaty. Treaty obligations may therefore be re-interpreted, within certain limits, in light of a treaty's object and purpose. In certain constellations, the principle of good faith and object and purpose interpretation therewith enter into a mutually reinforcing relationship that allows for the consideration of elements that each notion individually does not include. This is shown, for instance, when terms are reinterpreted in light of their purpose, even going beyond their literal meaning, as was the case when Russia took the seat of the USSR in the Security Council, following the dissolution of the USSR without modification of the wording of Article 23.1 UN Charter.[27] Change may therefore be accommodated even beyond a treaty's text.

3. Appreciation: Potential and limits of the accommodation of change in the general law of treaties

There are some options for the accommodation of change in the general law of treaties. They span from evolutionary interpretation, i.e., reference to subsequent practice, to a restrictive interpretation of

[24] Cf Christina Binder, 'The Concept of Margin of Appreciation', *Journal für Rechtspolitik* (2015), 56.

[25] See *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 399.

[26] See Cheng: 'The unreasonable exercise of a right […] constitutes an abuse of right which being an act that is inconsistent with the duty to carry out the treaty in good faith, is considered unlawful' (Ben Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) 117; *cf.* PCA, *North Atlantic Coast Fisheries Case* (*Great Britain v. United States*), Award, 6 September 1910, XI RIAA 167).

[27] See for further reference Anthony Aust, 'Pacta Sunt Servanda', in *Max Planck Encyclopledia of Public International Law*, 2007, para 3.

treaty obligations and the margin of appreciation accorded to a state in the performance of a treaty, to reliance on the principle of good faith. The reasons for the accommodation of change may differ and range from keeping a treaty up to date in light of evolving social realities (e.g., evolutionary interpretation of 'institutional treaties') to upholding an according synallagma in the treaty obligations when changes impact one party more strongly by means of the restrictive interpretation of a treaty.

Still, evident limitations govern the possibilities for accommodating change. Firstly, even in treaty regimes that are open to the incorporation of subsequent developments, such as human rights or environmental protection treaties, the wording of the treaty puts limits on its evolutionary interpretation. Also, evolutionary (like sovereignty friendly) ways of treaty interpretation remain *interpretation* and do not allow for the revision of the treaty. As held by the ICJ in the *Interpretation of Peace Treaties* Advisory Opinion (1950): 'It is the duty of the Court to interpret the Treaties, not to revise them.'[28] The arbitral tribunal in the *Laguna del Desierto* case emphasized interpretation as 'a judicial function whose purpose is to determine the precise meaning of a provision but which cannot change it.'[29] Therefore, neither evolutionary interpretation nor the discretion granted to a state in the performance of a treaty are comprehensive means of accommodating subsequent developments.

Similar limits apply to the margin of appreciation doctrine as a means of accommodating change: they relate, again, to the treaty text, and may also stem from the attitude of the respective tribunal and whether it is willing to exercise judicial self-restraint. For example, in the *Oil Platforms* case as well as in the Advisory Opinion on the *Construction of a Wall*, the ICJ tended to reject discretion in the implementation of treaties.[30] At the same time, a sovereignty friendly interpretation of treaty obligations has limited room in certain treaty regimes; especially when the protection of the interests of the international community is at stake, such as with human rights or environmental/climate change protection treaties, it cannot be considered as implicit in the treaty synallagma. A restrictive interpretation may therewith be considered incompatible with the object and purpose of these treaties and accordingly cannot serve as a means for accommodating change.

[28] ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (2nd phase),* Advisory Opinion, 18 July 1950, ICJ Reports 1950, 221.
[29] ICJ, *A Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy. 'Laguna del Desierto'* (Argentina *v* Chile), 21 October 1994, 113 ILR 1.
[30] ICJ, *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America),* Judgment, 6 November 2003, ICJ Reports 2003, 161, 196 (para 73); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136, 198 (paras 151-153).

While interpretation that is reliant on subsequent practice by the treaty parties (Art 31.3.b VCLT) potentially reaches further and touches upon the customary law-based modification of treaties, it ultimately only concerns changes which involve all the treaty parties.[31] This reduces the usefulness of Art 31.3.b VCLT as a rule of change.

Thus, there are clear limits to the accommodation of subsequent changes through the rules of general treaty law. These limits are most obvious in the ICJ's rejection of the 'approximate application' of a treaty in the *Gabčíkovo-Nagymaros* case (1997).[32] Indeed, in accordance with the 'approximate application' doctrine, when a treaty cannot be applied literally due to subsequent changes, it is to be applied in a way that respects as closely as possible its purpose. In the *Gabčikovo-Nagymaros* case, Slovakia had relied on the doctrine when arguing that pending the overall realisation of the hydro-electric dam project as foreseen in the 1977 (bilateral) Treaty with Hungary, the damming of the water on its own territory as a provisional solution could be accommodated as an 'approximate application' of the Treaty. The ICJ rightly declined to accept this and found both parties to be in violation of their treaty obligations. The dangers of reliance on an 'approximate application' put forward unilaterally by one party, as was the case in *Gabčíkovo-Nagymaros*, relate to the lack of clear criteria as to how a treaty may be approximately applied; what is understood by 'approximate' and where would the limits of such approximate application lie in light of subsequent changes? As held by Judge Bedjaoui in his Separate Opinion in *Gabčíkovo-Nagymaros*, the legal certainty and stability of treaty obligations might therefore be put into question.[33] Consequently, the theory of (unilateral) approximate application is not a valuable means of accommodating change.

Something similar can be said about the mandatory adaptation of a treaty by dispute settlement bodies. This does not constitute a permissible instrument in the toolbox of general treaty law to account for subsequent changes, especially when this changes (increases) the treaty obligations of a party. Not even reliance on the principle of good faith would allow for such an option.[34] This prevents treaty adaptation by a dispute settlement body (e.g. the ICJ) in light of subsequent changes.

[31] See Art. 31.3.b VCLT's reference to 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. See generally above, Section 2 for details.
[32] ICJ, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* Judgment, 25 September 1997, ICJ Reports 1997, 7, para 76.
[33] Separate Opinion, Judge Bedjaoui, n 5, para 31.
[34] See Dissenting Opinion by Judge Fitzmaurice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 10), 16.

States remain the 'masters' of the treaty. Consequently, and as most explicitly affirmed in the *Gabčíkovo-Nagymaros* case, the accommodation of change, i.e. treaty revision, ultimately needs to take place through negotiations between treaty parties. Reliance on such 'procedural' elements introduces a dynamic dimension into the treaty relations. It enables the incorporation of subsequent changes and a revision of a treaty in light of its object and purpose, therewith turning into a rule of change in the hands of the treaty parties. Most famously, in the *Gabčíkovo-Nagymaros* case, the ICJ held that the element of good faith, as reflected in the *pacta sunt servanda* rule (Art. 26 VCLT) would require understanding the 1977 Treaty in light of its object and purpose and asked the parties to find 'an agreed solution within the cooperative context of the Treaty'[35].

Still, the *Gabčíkovo-Nagymaros* case also illustrates the limits of such party-based mandates to incorporate change. Since it is mainly upon the treaty parties to find a solution, guided only by the object and purpose of the treaty and the principle of good faith, it may lead to a stalemate when the parties are not able to agree. As a matter of fact, the *Gabčíkovo-Nagymaros* case remains pending before the ICJ today, more than 25 years after the judgment, because the state parties (Slovakia and Hungary) have not been able to find a solution. The difficulties of such 'negotiated' settlements are brought into relief by the fact that the case concerned a bilateral treaty where the accommodation of change is arguably easier than in the case of multilateral settings.

Indeed, especially in multilateral settings, the rudimentary means to incorporate change in general treaty law often seem insufficient. In light of this, specific treaty regimes, especially on environmental protection and climate change, have opted for refined solutions for the accommodation of subsequent changes and other challenges. This will be discussed in the ensuing paragraphs, by taking the example of the climate change regime.

4. The accommodation of change in specific treaty regimes – the example of climate change

Treaties with the objective of combatting climate change are highly sophisticated examples of the accommodation of change. They thus stand in the tradition of environmental treaties that have for a long time employed different techniques/means of adapting treaty regimes to changing

[35] *Gabčíkovo-Nagymaros* (n 32) para 142.

circumstances.[36] At the same time, treaties with the objective of combatting climate change encounter particular challenges. On the one hand, the rapid worsening of climate emergencies and the unprecedented pace of global warming – hand in hand with increasing scientific evidence thereof – require global action all while duly taking account of technological progress in dealing with the climate crisis. On the other hand, the accommodation of change takes place in a complex setting with multiple stakeholders (private actors, states) and hugely diverging interests between the different (groups of) states involved.[37]

Against that background, the treaty regime governing climate change envisaged a framework convention (the 1992 United Nations Framework Convention on Climate Change (UNFCCC)) that was to be concretised by subsequent protocols (the 1997 Kyoto Protocol and the 2015 Paris Agreement).[38] This 'Convention Annex approach' enables an easier, more flexible and tailored way for the accommodation of subsequent developments. More specifically, the 1992 UNFCCC provides the legal and institutional framework, which has been detailed in subsequent treaties that have been adopted with fixed commitment periods to be periodically renewed. Nonetheless, this approach also shows the difficulties of accommodating rapid change in complex settings. While the Kyoto Protocol aimed for more stringent obligations but saw fading state support especially in the second commitment period, the 2015 Paris Agreement, which replaced the Kyoto Protocol in 2020, has broader, more vaguely formulated and mainly procedural obligations (e.g. relating to the communication of Nationally Determined Contributions). Therefore, not only the UNFCCC but also the obligations in the Paris Agreement need further specification.

The UNFCCC provides for this by foreseeing an ongoing concretisation of the treaty obligations (*inter alia*) in light of subsequent changes. Rather than through dispute settlement bodies, this is primarily ensured through the Conference of Treaty Parties (COP), which meets on an annual basis, and the UNFCCC Secretariat (aided by the Subsidiary Body for Scientific and Technological Advice as well

[36] Examples for the Convention-Annex approach, where technical details are dealt with in several annexes/appendices which are subject to easier modification, include the 1973/1978 International Convention for the Prevention of Pollution from Ships or the 1973 Convention on International Trade in Endangered Species of Wild, Fauna and Flora (CITES). See also the explicit incorporation of review procedures in treaty regimes as provided for in the 1995 Agreement on the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks which foresees regular review conferences.

[37] The positions of the Global South and Global North, the USA and EU, the G 77 and Small Island Developing states are partly diametrically opposed. (See Sumudu Atapattu/Andrea Schapper, *Human Rights and the Environment. Key Issues* (Edward Elgar Publishing 2019), 207).

[38] See also the 1985 Vienna Convention on the Protection of the Ozone Layer as concretised by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer which follow a similar model.

as the Subsidiary Body for Implementation). These bodies have indeed become the 'institutional motors' to accommodate change in the highly complex setting of climate change with hugely diverging interests. States parties to the UNFCCC are not left 'alone' but meet in a pre-conceived setting.[39] The annual meetings of the COP ensure a certain regularity and provide a platform for a 'tailored' accommodation of change/subsequent developments, being fed into the regime through the UNFCCC institutions and other stakeholders. Especially the last COPs in Glasgow (2021), Sharm El Sheikh (2022) and Dubai (2023) showed the broad platform these Conferences provided,[40] with more than 3000 NGOs, including representatives from business and industry, environmental groups, research and academic institutes officially admitted as observers,[41] thus giving them the opportunity to participate in a somehow formalized way. Accordingly, the platform for the accommodation of change has multiplied and the voices pushing for it have diversified. States parties are guided and pressured through public/media attention to find solutions.

From the perspective of the UNFCCC, this set-up for the incorporation of change seems the only viable way to live up to ongoing developments concerning the climate crisis and account for the complexities mentioned above. The adaptation and further development of the treaty regime on climate change is left to the very state parties, in the proceduralized/institutionalized form of the COPs. From a domestic perspective, the responsibility for the accommodation of change thus shifts from the legislative to the executive branch. Rather than national parliaments whose approval is generally necessary when new treaties are adopted and obligations therein agreed upon, in the COPs, the representatives of governments agree on relevant obligations and the next steps to take, generally without parliamentary approval. Hence, responsibilities for the accommodation of change have also shifted accordingly, with likewise (organised) civil society playing an ever more important role.

5. Concluding appreciation

The accommodation of change is one of the 'eternal' questions of international treaty law. Obviously, there are certain means to accommodate change under the general law of treaties, most importantly the different techniques of treaty interpretation. These are, by nature, general. A lot depends on the wording and on the object and purpose of the respective treaty regimes, as well as, more generally,

[39] Contrary to the setting after *the Gabčikovo-Nagymaros* case (see Section 3, *supra*).

[40] It was in total far more than 10.000 participants; see https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/statistics-on-non-party-stakeholders/statistics-on-participation-and-in-session-engagement; see generally https://unfccc.int/process-and-meetings/conferences/past-conferences/past-conferences-overview.

[41] See e.g. the UNFCCC Website of COP 27 (2022), https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/overview/observer-organizations.

whether there is a body set up as guardian of the regime with an (implicit) competence to incorporate subsequent changes.[42] Overall, the rules of change under general treaty law are rather abstract.

Especially in complex fields subject to rapid developments such as international environmental or climate law, this has proven insufficient. That is why recent treaty regimes, e.g., on climate change, allow for a 'tailored' and highly sophisticated accommodation of change. Later developments are accounted for through the adoption of subsequent protocols/treaties and through the decisions made at the annual meetings of the treaty parties (the COPs). As shown in the treaty regime on climate change, this also means that the actors of relevance for the accommodation of change have therewith changed: at the international level, they have shifted from dispute settlement bodies to the UNFCCC Secretariat and the COPs as institutionalized meetings of the treaty parties; at the domestic level from the legislative to the executive branch. As seen at the COPs in particular, non-state actors (e.g. environmental NGOs) also have an increasingly formalized role[43] to play when it comes to accommodating change. Their voices add to and enrich the rules of change. So, the rules of change, as well as the methods and actors for incorporating them are continually evolving and diversifying, especially in highly sophisticated treaty regimes, such as those on climate change.

Cite as: Christina Binder,' Change and the Law of Treaties: The accommodation of change under general international law and in specific treaty regimes', ESIL Reflections 13:2 (2024).

[42] Especially institutions permanently set up in treaty regimes such as the WTO-Dispute Settlement Body and particularly human rights monitoring institutions (e.g. the ECtHR) engage in dynamic interpretation in view of an incorporation of subsequent changes. They are guardians of a 'common institution' and established on a permanent basis with obligatory competence which makes them less dependent on state consent *pro futuro*. The ECtHR is perhaps best known in this respect: it interprets the ECHR in standing jurisprudence as living instrument which is to be kept up-to date by means of interpretation.

[43] See the observer status at COPs, mentioned above.