SETTLING OF CONTRADICTING TREATIES BETWEEN STATES IN THE INTERNATIONAL LEGAL SYSTEM

By

AJIBOLA SHERIFF[*]

Abstract

A treaty is a formally concluded and ratified agreement between States. This essay is aimed at settling of contradicting treaty between States in the International Legal system. Countries over the years engaged in one form of agreement with one another which can thereby lead to a valid contract between the countries, one party may decide not to honor the agreement which the country might have entered into, this may lead to conflict between countries. It may lead to blockage of free interaction between the countries, to this end, this essay tends to provide a possible means of settling contradicting treaties by providing modalities in which country that has pledge her obligation may honor her obligation with all might; which will go a long way in fostering unity among nations. International Court of Justice has over the years resolve so many conflicting treaties to reinstate party to normal status, who as a result of treaty signed has sustained irreparable injury. If there is a contradicting or conflicting treaty, then international legal system will fall apart. When countries are at war with themselves no unity can be achieved and impediment and anarchy will be the order of the day. States must come together with the bid of honoring their agreement and sanction should be meted on erring State who fails to honor the terms of their agreement.

Introduction

Treaty is a binding formal agreement, contract or other written instrument that establishes obligations between two or more subjects of international law. The law guiding treaties between states is contained in the Vienna Convention of treaties. Treaty is normally negotiated by respective government with full power to conclude a treaty within the instruction given by the law makers as well as assent of the government. A treaty often takes the form of a contract, but it may be a joint declaration or an exchange of notes. A serious treaty, however, generally follow a fixed plan. Treaty usually provides the name and style of contracting parties and is a statement of treaty's general objective. Treaty may be brought to an end by the consent of the parties. In the case of violation of a provision essential to the treaty's object or purpose, the innocent party of a treaty may invoke that breach as a ground for terminating treaty or suspending the operation of the treaty. The fulcrum of this essay is

[*] AJibola Sheriff is an Undergraduate student of Law of the Kogi State University, Kogi State, Nigeria

how contradicting treaty can be resolved if there is an anomaly in the course of the treaty and after the treaty. The international states are supported by the development of treaties.

1.0. Contradicting Treaties and the Resolution of the International Courts over the Years

The majority of reported international tribunal cases explicitly addressing the resolution of two contradicting or conflicting treaties were decided during the period between World War I and World War II.

Coasta Rica v Nicaragua[1] in 1916 the Central American Court (CACJ) heard a treaty dispute which had a significant dispute resolution. At issue was the use of the *San Juan River*, which is shared by Costa Rica and Nicaragua. In 1958 these countries entered into *Canas – Jerez* Treaty, which provided, in part:

Article 6. The Republic of Nicaragua shall have exclusive domination and the highest sovereignty over the waters of San Juan River… but the republic of Coast Rica in those waters perpetual right of free navigation[2]

Article 8.. Nicaragua agrees not to conclude [any contracts for canalization or transit subsequent to this treaty without first hearing the opinions of the Costa Rican Government respecting the disadvantages that may result to the countries …. And in the event that the enterprise should cause no injury to the natural right of Costa Rica, that opinion shall be advisory

The Canas – Jerez Treaty soon become a focal point of interpretative dispute between Nicaragua and Cost Rica, culminating in the two state seeking binding arbitration. U.S president Grover Cleveland sat as the sole arbitrator and issued an award in 1888 that found that Costa Rica had a right to navigate the *San Juan River* (within certain geographic limits) for commercial purposes and that Republic of Nicaragua remains bound not to make grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica

The Case of *Oscar Chinn* of 1937[3], this case was concerned with the regulation of river commerce in the Congo Basin which was administered by Belgium as a colonial power.

[1] Costa Rica v Nicaragua, 11 AM .J. INTL'L L. 181
[2] Costa Rica V. Nicaragua, 11am. J. INT'LL at 192 – 93 (Quoting Canas – Jerez Treaty)

Belgium had enacted new commercial regulations that, Oscar Chinn, a British argued, had the effect of driving some business and the United Kingdom argued the case before the PCIJ. At issue was whether the Belgian regulations violated Belgium's obligation under international law. The court concluded that they did not, but did not clarify which international legal obligation were implicated. The United Kingdom and Belgium were parties to two treaties concerning commerce in Congo Basin. The Berlin Act 1885[4] which had thirteen signatories, and Convention of Saint – German of 1911 which was *inter se* agreement among only some of the parties who had been party to the Berlin Act and that the Belgian law violated Belgium's obligations under the convention.

The PCIJ'S opinion in Oscar Chinn did not turn on an issue of a treaty conflict. In fact, the majority did not perceive that such a conflict was an issue before them. According to three dissenting judges, this was a grave error. Their opinions shed light on the jurisprudence treaty conflict prior to the VCLT, as they grappled with question of the effect on the later *inter se* agreement.

On the 24th April, 2013, the Plurinational State of *Bolivia* instituted proceedings against the Republic of Chile before the Court, concerning a dispute in relation to 'Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean'. In its application, Bolivia asserted that "beyond its general obligations under international law, Chile has committed itself, more specifically through agreements, diplomatic practice and a series of declarations attributable to its highest level representatives to negotiate a sovereign access to the sea of Bolivia.

According to Bolivia, "Chile has not complied with its obligation and denies the existence of its obligation". In its application, as the basis for the jurisdiction of the court. Bolivia invoked Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogota) of 30 April 1948.

On 15 July 2014, Chile filed a preliminary objection to the jurisdiction of the court, and the proceedings on the merits were then suspended. After Bolivia filed its written Statement on the preliminary objection, Public hearing were held in May 2015. In its judgement rendered

[3] Oscar Chinn (UK V Belgium) 1934 P.C. I.J (Ser. A/B) No 63 (Dec 12)
[4] General Act of the Conference of Berlin Respecting the Congo. Feb 26, 1883, 1885, 23 State. 332 Consol. T.S. 485, reprinted in 3 AM J. INTL'L. SUPP. 7 (1909) [Hereinafter Berlin Act]

on 24 September 2015, the court rejected the preliminary objection by Chile and found that it had jurisdiction to entertain the Application filed by Bolivia. Following the submission of Chile's Counter – Memorial, the court authorized the submission of a reply by Bolivia and a rejoinder by Chile and fixed 21 March and 21st September 2017 as the respective time – limits for those pleadings. Public hearing were held in March 2018, and the court delivered its judgement on the merit on 1 October 2018.

In its judgement, the court considered the various legal based invoked by Bolivia in support of Chile's alleged to negotiate Bolivia's sovereign access to the Pacific Ocean. The court concluded that none of those bases established an obligation for Chile to negotiate Bolivia's sovereignty access to the Pacific Ocean, It added that its finding should not be understood "as precluding the parties from continuing their dialogue and exchanges, in a spirit of good neighborliness, to address the issue relating to the landlocked situation of Bolivia, the solution to which willingness on the part of the parties, meaningful negotiation could be undertaken[5].

Marshall Islands v United Kingdom 2014, the Republic of the *Marshall Islands* filed applications against nine states (in alphabetical order: China, Democratic People's Republic of Korea, France, India, Israel, Pakistan, Russian Federation, United Kingdom of Great Britain and Northern Ireland and the United States of America), accusing them of not fulfilling their obligations with respective to the cessation of the nuclear arms race at an early date and to nuclear disarmament.

While these nine applications all related to the same matter, the Marshall Island distinguished between those three states (India, Pakistan, and the United Kingdom) which had recognized the compulsory jurisdiction of the court pursuant to Article 36, paragraph 2, of its statute, and the six others, in respect of which the Marshall Islands proposed to found the jurisdiction of the court on consent yet to be given. In accordance with Article 38, Paragraph 5, of the rules of Court (ICJ), the application filed against these six states were transmitted to them but not entered in the General List, and no action was taken in the proceedings in the absence of their consent. With regard to the cases entered in the General List, the Marshall Islands alleged more specifically, that the United Kingdom had violated Article VI of the Treaty on Non-

[5] Bolivia v. Chile 2013 ICJ (International Court of Justice). Title: Latest development/obligation to negotiate access to the Pacific Ocean. (Bolivia v Chile) / International Court of Justice. https://www.icj-cij.org/en/case/153 accessed on the 21st of of April, 2021

Proliferation of Nuclear Weapons (NPT), to which they were both party. According to that Article, each party "undertakes to negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective national control. Although India and Pakistan were not parties to the NPT, the Marshall Islands contended that certain obligations enshrined in that instrument applied to all states as a matter of customary international law, and such was the case of the obligations provided for in Article VI of the NPT.

India and Pakistan having formed the court that they considered that it lacked jurisdiction to entertain the dispute alleged by the Marshall Island and that the latter's Application was inadmissible, the court decided that these questions needed to be resolved first and that they would be determined separately, before any proceedings on the merits, pursuant to Article 79, Paragraph 2, of the Rules of Court (ICJ). The parties subsequently on these questions within the time – limits fixed.

In the proceedings instituted against the United Kingdom, the Court fixed the time limits for the filling of a Memorial by the Marshall Islands and a counter Memorial by the United Kingdom. However, with the time – limit of three months following the filling of the Applicants memorial, the United States raised certain preliminary objections in the case. Consequently, Pursuant to Article 79, Paragraph 5, of the Rules of Court, the proceedings on the merit were suspended, and the Marshall Island presented a written statement of its observation and submissions on the preliminary objections raised by the United Kingdom.

Public hearing was held in all three cases in March 2016, and the Court delivered its judgement in each on 5 October 2016.

In each of the three judgement, the court considered that the respondent State's preliminary objection based on the absence of a dispute between the parties at the time the Applications were filed should be upheld. The court noted that, in order for a dispute to exist, the two sides must hold clearly opposite views concerning the question of the performance or nonperformance of certain international obligations. It further noted that dispute exists when the evidence demonstrate that the respondent was aware, or could not have been unaware, that its views were positively opposed by the applicant. Lastly, it observed that, in principle, the existence of a *dispute is to be determined as of the date of the application* is submitted to

the court. Having examined the Statement and conduct of the parties in each of the cases, the court considered that they do not provide a basis for finding a dispute between the two States in each case before the court.

Since the court did not have jurisdiction under Article 36, Paragraph 2, of its statute, it could not proceed to the merits of the cases[6]

2.0. Obligation To Resolve

The most important and most difficult[7] decision in the process of international negotiation very well may be the threshold decision of States to enter into negotiation at the first place once the will to resolve a dispute negotiation at the first place. Once the will to resolve a dispute negotiation is present on the part of national leaders, agreement on procedures and substance. Modern international law also extends legal protection to the third phase of the negotiating process - the period between the conclusion of negotiations and the entry into force of the negotiated arguments. During this period, states which have signed to refrain from acts which would defeat the object and purpose of agreement[8] This requirement aims to prevent prospective parties to the agreement from undermining the benefit accorded by the agreement from undermining the benefits accorded by the agreement to other prospective parties. Negotiating States may also agree to apply the agreement, or part of it, provisionally, prior to its actual entry into force, in order to effectuate immediately certain provisions of the agreement or to provide immediate legal protection to the successful outcome of their negotiations. International law recognizes the regime of provisional application, although the obligation imposed on states during this period are somewhat enigmatic.

From the point of view of international law, the two prior phases of the negotiation process, the Prenegotiation and the actual negotiation are more problematic. In its final draft codification of the law of treaties, the international law commission (ILC) recommended extending the obligation to refrain from acts which would defeat the object and purpose of an

[6] https:www.icj-cij.org/en/case/153 visited on 12/03/2021

[7] In many cases, persuading parties in a conflict to a negotiated settlement is even more complicated, time – consuming, and difficult than reaching agreement once the negotiations have begun. Harod H. Saunders, *We need a larger Theory of Negotiations:* The importance of Pre-negotiating phases. 1 NEG. J. 249, 249 (1985) Hereinafter Saunder, *We need Larger Theory of Negotiation*

[8] Vienna Convention on the Law of Treaties, 22 CORNEL INT'L

eventual negotiated agreement to the negotiating phase[9]. Thus States participating in negotiations would incur substantive Legal obligations as soon as they entered into the negotiating process. The *Vienna* Conference on the Law of treaties does not impose any substantive obligation on negotiating states during the negotiating phase, it is quite probable that such obligations may be imposed by Customary International law or by general principles of law applicable to the relations between states.

3.0. **Settling of Conflicting Treaty**

Resolving conflicting treaty can be said to come by the way of negotiation. It is very useful to distinguish the obligation from the obligation to conclude agreement. Although some scholars question the utility of this distinction, believing that obligation to conclude an agreement is no more than a commitment to negotiate in good faith, the distinction is helpful, because it allows for separate consideration of the decision to undertake negotiations. An obligation to resolve conflicting treaty entails a commitment to negotiate and the obligation to consult. This obligation entails some degree of commitment towards the parties by making sure that the parties comes into a reasonable conclusion geared towards maintaining peace and progress.

There are however, two decisions of the *ICJ* which holds that states are obligated in certain situation. The reasoning holds that states are obligated in certain situation. The reasoning of the ICJ in those cases supports the general proposition that states are under an obligation to negotiate in disputes involving situations where each possesses legal rights which can only be defined in relation to legal right of the other.

4.0. **Methods Of Settling a Contradicting Treaty**

Conflict is as old as the history of mankind and therefore normal, natural and unavoidable, yet it can generate negative and very destructive impacts, as well as awareness economic growth and development. What matters is our response to conflict and post conflict situations. The conflict between Nigeria and Cameroon was a boundary and territorial dispute – the Bakassi Peninsula being that most contested. Attempts were made in the past to resolve the dispute through bilateral negotiations, but in 1981, and again in 1993, 1994 and 1996, the

[9] Report Of The International Law Commission On The Work Of Its Eighteen Session Commentary to the Draft Article on the Law of Treaties, art 15, U.N. DOC A/6 309/Rev.1

dispute nearly escalated to war. Between 1994 and 2002, the matter was before the International Court. Yet following negotiations between the two countries, facilitated by UN and crowned by the June 2006 Green – tree agreement in New York and subsequent instruments, Nigeria completed the withdrawal of its military, administration and police from Bakassi Penindula in August 2008[10]

4.1. Putting of Treaty into Writing

The best way of settling of contradicting treaty dispute is by putting of the treaty into writing, this is evident in the Article 30(2) of the VCLT. Commentators have highlighted the relevance of clauses abrogation or precedent, though their effectiveness depends on how well they are drafted. In 1945 Jenks wrote that "the existence of a manual of Common forms for standard articles could give a great stimulus to the adoption of suggestions designed to remedy the characteristics shortcomings of the technique of international legislation by means of the multipartite instrument[11] Nearly a decade later he lamented that the technical legal equipment necessary to give a picture of the international statute book as a whole is still defective in the extreme[12].

4.2. Unequivocal Assurance

Interpretation alone cannot resolve the problem of contradicting or conflicting, the parties themselves are themselves are able to do so. Where a party has interpreted the texts and believes there is a potential conflict, the first step should be to seek assurance.

In such, for example *Costa Rica* would have been able to immediately withdraw from *Canas – Jerez* Treaty once Nicaragua refused to give any assurance. Such a rule would give parties a better sense of their relative positions and facilitate any renegotiation by providing them with a common understanding of the texts.

4.3. Institutionalized Safeguard

[10] In Many cases, Persuading parties in a conflict to negotiate settlement is even more complicated, time – consuming, time – consuming, and difficult than reaching agreement once negotiations have begun. Harold H. Saunder, *We need a larger theory of Negotiation:* The importance of Pre-negotiating

[11] C. Wilfred Jenks, the Need for an International Legislative Drafting Bureau, 39 AM. J. INT'L L. 163 175 (1945).
[12] Jenks, Law – Making Treaties, 30 Brit Y.B Int'l L. 401

Safeguard procedures should be established within international institutions. Rosenne suggested that a possible solution concerning the UNCLOS scenario would be to assign a monitoring role to the UN Secretary General, due to his double role as despository of United Convention of the Law of Sea (UNCLOS) specifically, and in the registration and publication of treaties more generally, under Article 102 of the U.N Charter[13]

4.4. Identifying Relevant from Irrelevant Conflicts

The VCLT[14] attempts to solve conflicts between treaties with the same subject matter. While this is useful in certain instances, it does not apply to the problems of greatest concern today. In 1953 Jenks argued for understanding of treaty conflict broader than simply a subject matter test, contending that if treaties deal with related questions or have repercussions upon one another in any way there is a possibility of conflict[15].

Conclusion

To sum up, contradicting treaties can be resolved by applying the terms of Treaty and Law governing treaty by the international courts, this essay found that treaty cannot be resolved if the treaty is not being put into writing for clear visitation if any substantial part of the treaty otherwise known as agreement is being breached. Unequivocal assurance should also be given by parties at the process of entering into treaty. For example, *Costa Rica* would have been able to withdraw from Cana-Jerez Treaty once Nicaragua refused to give any assurance. International Court of Justice (Vienna Convention of treaties) should also do well by scrutinizing the content of the treaty and also invoked the law guiding treaty in order to resolve the contradicting treaty between States.

[13] Rosenne, International Law of Treaties 98, 90
[14] Vienna Convention on the Law of Treaties
[15] Jenks, Law – Making Treaties, 30 Brit Y.B Int'l L. 401

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