

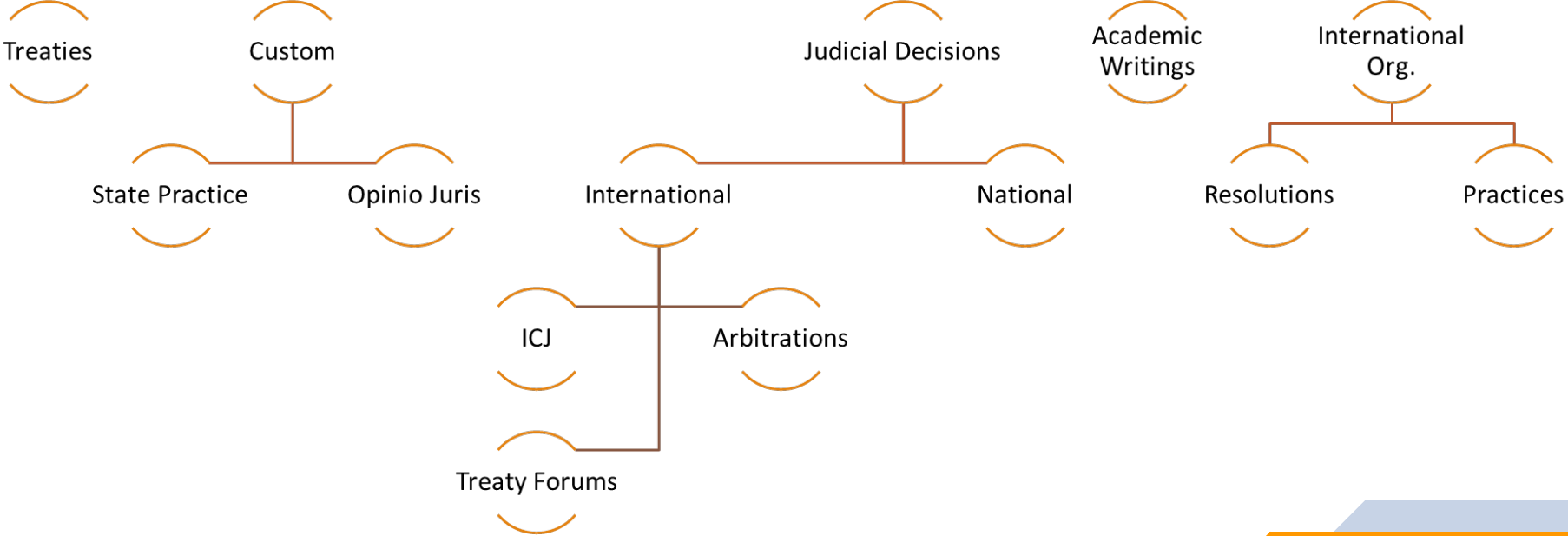
SOURCES OF PUBLIC INTERNATIONAL LAW



Sources

- Article 38(1) of the statute of the International Court of Justice is widely recognised as the most authoritative statement as to the sources of international law

Sources of International Law





CUSTOM

Custom

- The ICJ Statute refers to custom as 'evidence of a general practice accepted as law'

Custom

- Unlike treaties which are only binding on their contracting parties, international custom is **binding on all states**

Custom

State Practice + Opinio Juris

=

Custom

State Practice

Elements:

- Duration
- Uniformity and consistency in practice
- Generality in practice

Opinio Juris

Acting a particular way because you think you're legally obligated to

Opinio Juris

'Not only must the acts concerned be a settled practice, but they must also be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it... The States concerned must feel that they are conforming to what amounts to a legal obligation'

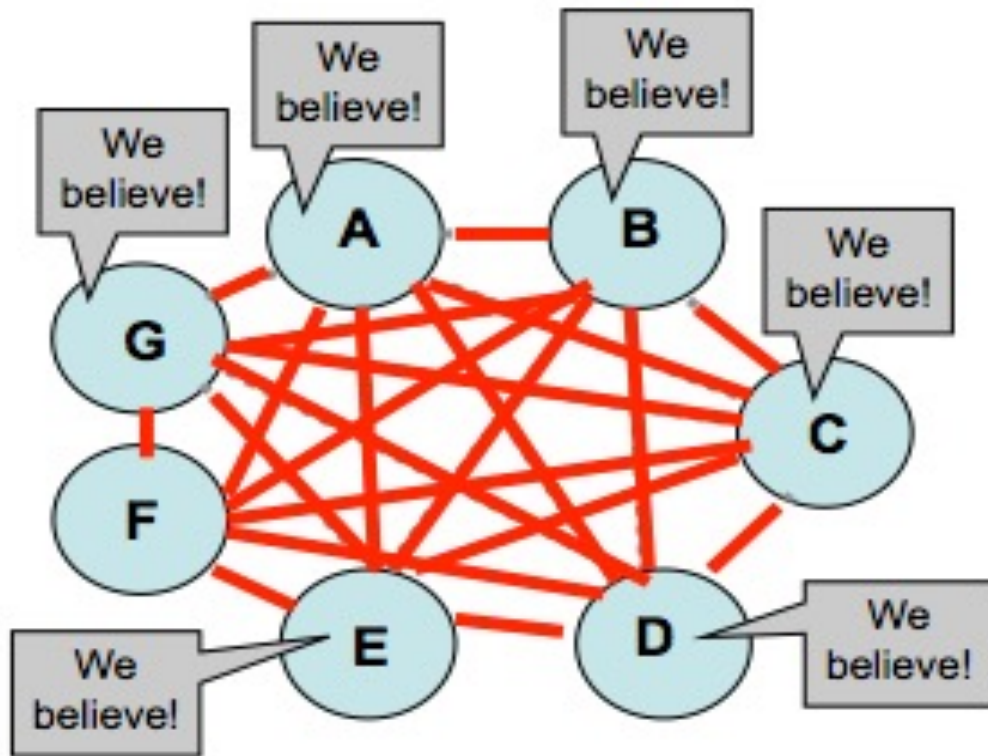
-- *North Sea Continental Shelf Case*

Opinio Juris

Problem = how do we figure out the beliefs of states?

We can look at official statements, diplomatic correspondence, government press releases, speeches, submissions to tribunals, votes in the General Assembly

Tipping Point



Persistent Objector

- Once there is state practice + opinio juris – a new custom will emerge which will bind all states unless a state has **persistent objector** status
- This allows a state which has persistently rejected a new rule even before it emerged as such to **avoid its application**

The background features a dark blue horizontal band on the left, a light blue gradient at the top, and a white area on the right. A bright orange horizontal bar is positioned at the bottom, partially overlapping the white area. The word "TREATIES" is written in white, bold, uppercase letters on the dark blue band.

TREATIES

TREATY

- 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 (Art.2(1)(a) VCLT)
- Treaties can be referred to by a number of different names: international conventions, international agreements, covenants, final acts, charters, memorandums of understandings (MOUs), protocols, pacts, accords, and constitutions for international organizations. Usually these different names have no legal significance in international law.

TYPES OF INTERNATIONAL TREATIES (SUBSTANTIVELY)

■ **CODIFYING TREATIES:** Codification is the process through which rules of law are committed to written form. Such as codifying customary international law into a treaty e.g. the customary law on diplomatic relations was codified in the Vienna Convention on Diplomatic Relations 1961

TYPES OF INTERNATIONAL TREATIES (SUBSTANTIVELY)

- **LAW-MAKING TREATIES:** Treaties which create rules to be followed by those who ratify the treaty.
- Examples would include the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Test Ban Treaty) (PTBT 1963) and United Nations Convention on the Law of the Sea (UNCLOS)

TYPES OF INTERNATIONAL TREATIES (SUBSTANTIVELY)

- **CONSTITUENT INSTRUMENTS:** International organizations (IOs) are normally created by treaties, often referred to as the 'constitution' or the 'constituent instrument' of the organization. Apart from States, IOs may also become parties to constituent instruments of (other) IOs. It focuses on the creation of a new legal person.
- Examples would include the Treaty on European Union (TEU) which established the European Union. The North Atlantic Treaty established NATO.

ART. 11: CONSENT

The consent of a State to be bound by a treaty may be expressed by:

- ▷ Signature (only good faith obligation to be bound)
- ▷ Exchange of instruments constituting a treaty (legally bound)
- ▷ Ratification or acceptance/approval (legally bound)
- ▷ Accession (legally bound)
- ▷ By any other means agreed between the parties

RESERVATIONS & DECLARATION

- **Reservation:** As per Art. 2(d) of the VCLT defines it as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.
- **Declarations:** contain the State's understanding of some matter in the treaty or its interpretation of a particular provision. Unlike reservations, they do not exclude or modify the legal effect of the treaty.

ARTICLE 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

a) The reservation is prohibited by the treaty;

(Art. 120 of the Rome Statute of the ICC prohibits reservations altogether)

b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(See for example Art. 12(1) of the 1958 Geneva Convention on the Continental Shelf)

ARTICLE 19. FORMULATION OF RESERVATIONS

c) In cases not falling under sub-paragraph (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

(Object and purpose, broadly, includes its title, preamble, major concern of parties at the time of the conclusion of the treaties, travaux etc.)

OBSERVANCE OF TREATIES

■ Article 26. “Pacta sunt servanda”

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

■ As the ICJ noted in the **Gabcikovo Nagymaros Project case (1997)**:

- ▶ “Art. 26 combines two important elements... the latter [good faith]... implies that the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purposes can be realized”

OBSERVANCE OF TREATIES

But what if a State violates the terms of a treaty:

- ▶ As per the VCLT if the violation amounts to a 'material breach' (breach of a term that is essential to the accomplishment of the treaty's object and purpose), then the injured party may terminate/suspend the treaty in whole or in part (Art. 60).
- ▶ The breach would also amount to an internationally wrongful act. These are governed by the ILC's Draft Articles on State Responsibility. They state that where one state has committed an internationally wrongful act then the injured state may take counter-measures (actions which are ordinarily unlawful but permitted due to the original breach). I.e. one wrongful act may permit another wrongful act.

INTERNAL LAW AND OBSERVANCE OF TREATIES

- Article 27. “Internal Law and Observance of Treaties”
 - ▶ A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.
- In case of a conflict between treaty law and domestic law, treaty law would prevail (Greco-Bulgarian Communities Case PCIJ (1930))

INTERPRETATION OF TREATIES: ART. 31 (GENERAL RULES)

1. A treaty shall 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.

This dictates that there are a multiplicity of factors involved in the interpretation of a particular provision. In addition to good faith, the court also gives effect to ordinary meanings of the terms of a treaty. In the event of a conflict between the object and purpose and ordinary meaning of a term, the textual interpretation prevails (**Bank Markazi Iran-US Claims Tribunals**)

INVALIDITY, TERMINATION & SUSPENSION OF THE OPERATION OF TREATIES

- i. Relative Grounds:
 - ▶ Error (Art. 48)
 - ▶ Fraud (Art. 49)
- ii. Absolute Grounds (treaty rendered *void ab initio*)
 - ▶ Coercion of a Representative of a State (Art. 51)
 - ▶ Coercion of a State by the Threat or Use of Force (Art. 52)
 - ▶ Treaties Conflicting with a Peremptory norm of General International Law (Jus Cogens) (Art. 53)

TERMINATION OF A TREATY

- **Material Breach**
- **Supervening (Interrupting) impossibility of performance.**
- **Fundamental change of circumstances**

GENERAL PRINCIPLES

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General Principles

- These are general principles of law which in one form or another is recognized in a wide range of national legal systems
- E.g. laches, good faith, res judicata, impartiality of judges, estoppel, etc.

General Principles

- Why have them?
- A situation may arise when there is an absence of law relating to an issue
- No method to legislate to provide rules to regulate new situations
- So general principles fill the gap so that we don't have a *non liquet*.

SUBSIDIARY SOURCES



Judicial Decisions

- Judicial decisions are a subsidiary means for determination of rules of law
- No doctrine of binding precedent in international law
- BUT the ICJ refers frequently to its past cases

Writings of Publicists

- The ICJ Statute recognises 'the teachings of the most highly qualified publicists of the various nations' as a subsidiary means for the determination of rules of international law
- ICJ can consult and quote the writings of academic authorities when need arises

THANK YOU

The image consists of a light blue background. A dark blue diagonal band runs from the top right towards the bottom left. The text "THANK YOU" is written in white, bold, uppercase letters on the left side of this band. At the bottom right, there is a white geometric shape with a pointed right edge, and a thick orange horizontal bar is positioned just above it, extending from the white shape towards the right edge of the frame.