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Christina Binder, Die Grenzen der Vertragstreue im Völkerrecht

## Summary - The Limits of *Pacta Sunt Servanda* in International Law

The debate on stability and change – or the limits of *pacta sunt servanda* – has played a central role in the history of international law. The question under which conditions a state may derogate from treaty obligations in case of changed circumstances seems a constant. It is exacerbated by the inherent characteristic of treaties to “freeze” law at the moment of adoption, thus fixing it at a certain point in time. This distinguishes treaties from international customary law, which – based on state practice and *opinio iuris* – follows reality, in Dupuy’s words, in degrees of mimicry. Contrary to the latter, treaties are in permanent tension to the passing of time and changing circumstances.

Stability and change were discussed at different times with varying focus. The most intensive debate surrounding these structural elements of the law of treaties seems to have taken place in the inter-war period, in the context of peaceful change: Article 19 of the Covenant of the League of Nations adopted an institutionalized solution, conferring the competence to the Assembly of the League of Nations to suggest treaties that have become inapplicable for revision when these endangered the peace of the world. After the failure of the League of Nations, the mechanisms developed after 1945 rather focused on action taken by the treaty parties. Articles 61 and 62 of the Vienna Convention on the Law of Treaties (VCLT) respectively allow for treaty termination or suspension in cases of supervening impossibility of performance and fundamental change of circumstances.

Recent developments added new dimensions to the debate on *stability* and *change*. First, the formation of the law of state responsibility as a system of secondary norms and especially the therein conceptualized circumstances precluding wrongfulness increased the available options to accommodate subsequent changes. In particular the “legalization” (*Verrechtlichung*) of the necessity defence, from “necessity knows no law” to a strictly construed “law of necessity”, diversified states’ means to derogate from treaty obligations without as such endangering treaty stability. Thus, today, the *force majeure* and necessity defences incorporated in the 2001 Articles on State Responsibility (ILC Articles; Articles

23 and 25) provide for (temporary) derogation from treaty obligations in extraordinary situations.

Second, the formation of increasingly specialized treaty regimes in areas such as human rights, the law of the sea, international economic law and investment law raises the question as to the suitability and applicability of the mechanisms of general international law to the respective systems. Mostly known as the phenomenon of fragmentation, the “rise of specialized systems” has also been regarded “as an example of international law’s capacity to adapt to the increasingly complex transnational problems in several functional areas”.<sup>1</sup> Thus, do these systems need their own specialized derogation clauses too?

Third, the courts and institutions which are regularly established in the respective treaty regimes have added a new dimension to the debate on stability and change as well. With their creation, one of the traditional criticisms voiced with respect to the *rebus sic stantibus* doctrine – that there was no institution to adjudicate upon it and that any invocation of the doctrine thus implied a dangerous legal insecurity – disappeared. Such institutions offer new possibilities of the debate’s conceptualization in legal terms.

Against this background, this book examines the limits of *pacta sunt servanda* in cases of subsequent changes of circumstances and compares the functioning of the respective mechanisms established for this purpose: fundamental change of circumstances (Article 62 VCLT), supervening impossibility of performance (Article 61 VCLT), obsolescence, necessity (Article 25 of the ILC Articles) and *force majeure* (Article 23 of the ILC Articles). In today’s international law, are the mechanisms of general law – of the law of treaties and of the law of state responsibility – sufficient and adequate to allow for flexibility without endangering treaty stability?

The investigation thus situates itself at the core of the tension between stability and change. This tension also provides the basis for comparison and evaluation. Doubtless, flexibility and non-performance may be warranted in certain situations by considerations of justice towards the treaty party which has been struck by change, in the interest of a treaty’s legitimacy and the prevention of breach. Still, derogation needs to be balanced against the requirement of treaty stability and the *pacta sunt servanda* rule. Any non-performance is therefore to be kept to the

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<sup>1</sup> T Gazzini/WG Werner/IF Dekker, Necessity across International Law: Introduction, 41 NYBIL 2010, 3, 5.

strict minimum; it has to allow for legal certainty and predictability and, as far as possible, protect the legitimate expectations of the treaty partners (*Vertrauensschutz*). These considerations provide the analytical framework for the exploration of the limits of *pacta sunt servanda* in international law.

More particularly, the mechanisms of the law of treaties as well as of the law of state responsibility which allow for a non-performance of treaty obligations in case of subsequent changes are assessed as regards 1. the material criteria of application; 2. the procedures of invocation; and 3. the legal consequences of reliance. The layers of analysis thus follow the three levels on which the balance between the interests of the treaty partners – the good faith in the due performance of treaty obligations *versus* the need for derogation under the impression of change – can be struck. It is accordingly asked, to what extent restrictive substantive criteria of application make derogation from treaty obligations more difficult, thereby protecting treaty stability and the good faith of the treaty partners. Or whether it is rather the procedural deferment of the termination's effect which balances the treaty parties' positions by establishing a time frame to prepare for the lapse of the treaty. Finally, is there any balance through the legal consequences of termination/suspension/non-performance, *e.g.* by means of compensation?

Chapter 2 is devoted to the tension between stability and change. More particularly, it deals with the need for treaty stability which is important for the functioning of international relations but may also become counterproductive when circumstances change substantially.

The Chapter starts by outlining the continued importance of the *pacta sunt servanda* principle for the functioning of international relations, and even more so, for the recognition of international law as "law" (Part 2.2). Especially in the traditionally decentralized international system without central judicial institution, treaty stability seems essential. It thus comes as no surprise that even institutions/tribunals in particular treaty regimes such as international human rights or investment law consistently emphasize the importance of treaty stability. Still, Part 2.2 likewise shows that *pacta sunt servanda*, as codified in Article 26 VCLT, is a meta rule. The detailed obligations which derive from treaty performance in good faith depend on the particular treaty and are to be determined by means of treaty interpretation. This is most important in today's international law of cooperation with increasingly dense treaty obligations which reach into formerly exclusively domestic spheres. Compliance with *pacta sunt servanda* therefore has always directer consequences at the national level as well.

Against that background, Part 2.3 deals with the tension between the static principle of *pacta sunt servanda* and subsequent changes. Sometimes, an adjustment between stability and change seems necessary. On this basis it is shown that the accommodation of change may be required for reasons of justice regarding the party affected by the change; in view of the legitimacy of a treaty; and in order to prevent a treaty's breach.

Part 2.4 is dedicated to the (limited range of) mechanisms which allow for an accommodation of subsequent changes within the treaty; *i.e.* within the *pacta sunt servanda* rule. Such accommodation is, for instance, possible through an evolutive/dynamic interpretation of the treaty: especially institutions permanently set up in treaty regimes such as the WTO-Dispute Settlement Body and human rights monitoring institutions (*e.g.* the European Court of Human Rights) engage in such interpretation. Other options include a restrictive interpretation of the treaty obligations of the state party which was struck by the change. It is likewise possible to offer the respective state a wide margin of appreciation in the fulfilment of its treaty obligations. The principle of good faith is a further tool to ease the tension between stability and change within the treaty regime. Still, these options are clearly limited. This is perhaps best illustrated with the ICJ's rejection of the "approximate application" of a treaty in the *Gabčíkovo-Nagymaros* case (1997).

Chapter 2 comes to the conclusion that the tension between *stability* and *change* may only be solved in few instances *within* the treaty regime. For this reason, the subsequent Chapters 3-6 are dedicated to the external limits of *pacta sunt servanda*. Hence, they deal with those mechanisms which allow states to *derogate* from treaty obligations in cases of subsequent changes.

Chapter 3 starts with discussing the mechanisms of the general law of treaties: supervening impossibility of performance and fundamental change of circumstances, as codified in Articles 61 and 62 VCLT. The "traditional counterpart" of the *pacta sunt servanda* rule, fundamental change of circumstances, is dealt with first. Part 3.2 shows that, historically, reliance on the *rebus sic stantibus* doctrine was also (mis-)used to shed inconvenient or burdensome treaty obligations and consequently was a danger to treaty stability. Against that background, the restrictive framing of Article 62 VCLT led to a welcome clarification and limitation of the *rebus sic stantibus* doctrine's scope of application. In view of its restrictions, however, Article 62 VCLT hardly ever lends itself to derogations from treaty obligations and offers only limited means for reactions to change.

This is also reflected in the scarce state practice and jurisprudence. The ECJ in the *Racke* case seems to be the only international tribunal ever to have accepted reliance on a fundamental change of circumstances. Still, the ECJ applied only a restricted standard of review, namely whether the Council had made manifest errors of assessment concerning the conditions of Article 62's VCLT application. Equally rare are examples of state practice. The Netherlands' reliance on a fundamental change of circumstances in the early 1980s to suspend a treaty on development cooperation with Suriname due to human rights violations in the country appears to be one of the few recent examples of the doctrine's invocation.

Part 3.3 is dedicated to supervening impossibility of performance (Article 61 VCLT) as the second mechanism of the law of treaties to accommodate change. It shows that also Article 61's criteria of application are most difficult to meet. This is less due to the provision's restrictive wording, but rather to its very high substantive threshold: amongst others, Article 61 VCLT requires the impossibility of performance to be caused by the permanent disappearance or destruction of an object indispensable for the execution of the treaty for reliance to be permissible. Jurisprudence tended to broaden the provision's scope; for instance by including the disappearance of legal regimes in Article 61's VCLT scope of application. This was, however, "compensated" by a broad understanding of the possible replacement of the "object indispensable for the execution of the treaty" which led to a consistent refusal to recognize supervening impossibility of performance. Already the PCIJ did not consider the disappearance of a currency regime (gold coins) in the *Serbian/Brazilian Loans* cases to constitute an impossibility as its equivalent in gold value was still available. All in all, impossibility of performance is an exception which has hardly been invoked to derogate from treaty obligations. Nor has it ever been accepted by an international tribunal: while Article 61 VCLT was discussed in the *Gabčíkovo-Nagymaros* case and in the *LAFICO v. Burundi* arbitration, the argument was rejected in both cases.

Thus, already due to the provisions' restrictive substantive criteria of application, fundamental change of circumstances and supervening impossibility of performance are clearly focused on treaty stability. While this is positive in view of legal certainty, predictability and the necessary functioning of international relations, the mechanisms of the law of treaties, Articles 61 and 62 VCLT, are of little use for the accommodation of change.

As is shown in Part 3.4, the procedures of the general law of treaties (Articles 65 *et seq.* VCLT) also have deficiencies when it comes to the balancing of the treaty parties' positions in cases of subsequent changes of circumstances. The VCLT's procedures are complex and long which seems particularly problematic in cases of urgent changes. Moreover, their main focus on dispute settlement leaves the treaty partners only limited time to prepare for the lapse of the treaty. The outcome – the procedures end with a non-binding decision of a Conciliation Commission – further weakens the VCLT's procedural requirements. It thus comes as no surprise that, especially in more urgent cases, states only rarely comply with their procedural obligations. Hence, only the very “core” of the VCLT's procedures (such as the duty to notify and the observance of certain minimum timelines until termination takes effect) may be considered as codification of customary international law. Especially the mechanisms of Article 66 VCLT and the procedure before the Conciliation Commission are *de facto* dead law.

Part 3.5 argues that also the VCLT's regime concerning the legal consequences of termination (and suspension) is insufficient to adequately balance the treaty parties' interests in cases of subsequent changes. The VCLT establishes a binary system and only allows for treaty termination or suspension (Articles 70 and 72 VCLT). Although the non-incorporation of renegotiation or judicial/authoritative adaption of a treaty to the changes was well grounded, their omission reduces the possibilities to balance the diverging positions of the treaty partners. This is, in particular, so because the VCLT's termination and suspension regime does not even provide for any adjustment (*e.g.* through compensation) in cases of a partial performance of treaty obligations by one party at the moment of termination/suspension. This *lacuna* is especially problematic in cases of treaty suspension, since in such cases, due to the non-permanent character of the allocations, one cannot rely on other considerations such as unjust enrichment.

Overall, the mechanisms of the general law of treaties offer only limited options to balance the treaty parties' interests in case of termination/suspension. Against that background, Part 3.6 looks into obsolescence as an additional instrument for the accommodation of change. Obsolescence is characterized by the complete disappearance of the (political, legal, social and economic) context which surrounded the conclusion of a treaty. While obsolescence is not mentioned in the VCLT, it has increasingly been recognized after certain provisions of the Austrian State Treaty were declared obsolete in 1990. On this basis, it is argued that obsolescence may usefully complement the VCLT's

termination and suspension regime. Since the lapse of the treaty occurs automatically when the circumstances in which it was concluded have completely disappeared, the notification of obsolescence is merely of declaratory – and not constitutive – character. Given its declaratory effect, the procedural obligations are less onerous than in cases of reliance on formal termination grounds: in Austria, for instance, obsolescence is not subject to an *actus contrarius* and, consequently, to parliamentary approval as is usually necessary in case of political treaties and treaties whose contents modify or complement existing laws. In fact, Austria particularly welcomed the obsolescence's reduced procedural requirements. Its state practice thus evidences somehow "modern" forms of reliance on obsolescence, namely as an instrument of *Rechtsbereinigung*. Bilateral treaties on visa requirements with Eastern European states, for instance, which lost their scope of application in the context of the accession of these states to the Schengen area, are thus declared obsolete on the basis of a simple exchange of notes. Nevertheless, declarations of obsolescence remain the exception. Among the possible reasons are the instrument's limited publicity and its informality, which comply only insufficiently with the need for stability and legal certainty generally required in international relations. Overall, as is shown in Chapter 3, the law of treaties establishes merely inadequate means for the accommodation of change.

Chapter 4 examines necessity and *force majeure* as the most important mechanisms of the law of state responsibility to derogate from treaty obligations in cases of subsequent changes of circumstances. Both mechanisms were incorporated in Articles 25 and 23 of the 2001 ILC Articles on State Responsibility and are generally accepted as codifying customary international law. As circumstances precluding wrongfulness, necessity and *force majeure* are secondary rules of international law and require a *prima facie* breach of international (here: treaty) obligations as a precondition for their invocation. In view of their restrictive criteria of application, the circumstances precluding wrongfulness of the law of state responsibility focus on (treaty) stability as well.

The customary law based necessity defence (Article 25 of the ILC Articles), which is examined in Part 4.2, allows for the non-performance of treaty obligations under certain restrictive conditions, when an essential state interest is threatened by a grave and imminent peril. Article 25 of the ILC Articles is the definite achievement in codifying the defence. It stands in sharp contrast to the older approach to the defence. Historically, necessity was considered as part of the right to self-preservation of a state and thus, given the importance of the interests at stake, *de*

*facto* was not subjected to any rules. While this is perhaps best expressed in the adage “necessity knows no law”, the necessity defence as incorporated in Article 25 of the ILC Articles is a tightly framed “law of necessity”.

The restrictive wording of Article 25 of the ILC Articles is reflected in the rare cases where necessity has been relied upon. Recently, however, the defence attracted attention in connection with Argentina’s economic crisis of 2001-02, in which the country systematically defended the derogation from its obligations towards foreign investors with the state of necessity. And yet, necessity (as incorporated in Article 25 of the ILC Articles) seems to have been only twice accepted by an international tribunal: in the *LG&E* (2006) and the *Continental Casualty* (2009) cases. But even in these cases, the investment tribunals relied primarily on the treaty based emergency exceptions and only turned to Article 25 of the ILC Articles to confirm their conclusions.

Part 4.3 analyses the *force majeure* defence (Article 23 of the ILC Articles) as means to derogate from treaty obligations. It demonstrates that the conditions for reliance on *force majeure* are stringent. As is shown, *force majeure* is characterized by the elements of unforeseeability, irresistibility and externality which have to be proven by the state wishing to invoke the defence. Generally speaking, *force majeure* may be distinguished from necessity by the characteristic lack of free will, as evidenced in the English expression “act of god”. The defence’s narrow restrictive criteria of application are corroborated by the rare state practice and jurisprudence. Reliance on *force majeure* (*i.e.* on Article 23 of the ILC Articles) has remained the exception and has never been accepted by an international tribunal/institution. The only case where it was discussed more extensively (before being rejected) seems to be the ICSID decision *Aucon v. Venezuela* (2003). On the other hand, the defence gained relative prominence in the jurisprudence of the Iran-US Claims Tribunal, which partly qualified the revolutionary conditions in Iran after the overthrow of the Shah as *force majeure*.

Part 4.4 is dedicated to the *de facto* non existent procedural requirements for reliance on necessity and *force majeure*. As held by Special Rapporteur Crawford: the circumstances precluding wrongfulness function as a “shield rather than as a sword”. One can therefore rely on these defences even when a case on an alleged breach of international obligations is already pending before an international institution. This facilitates an expeditious means for the state which is burdened by the changed circumstances. Conversely, the *de facto* missing procedural requirements pose a challenge to treaty stability and the good faith of the



other treaty parties which are given no time to prepare for the treaty's lapse.

The legal consequences of reliance on the circumstances precluding wrongfulness, which are examined in Part 4.5, remain largely unaddressed by the ILC Articles on State Responsibility. True, reliance on the circumstances precluding wrongfulness does not have a permanent impact on the existence of a treaty. The duty to perform revives once the necessity or *force majeure* situation has disappeared. Otherwise, however, Article 27 of the ILC Articles is formulated as non-prejudice clause and does not take a position whether compensation is to be paid. Still, a general duty to compensate the other treaty parties for their "material" losses was increasingly accepted in literature, state practice and jurisprudence. This opens certain room to adjust the treaty parties' positions in terms of compensation. In case of *force majeure*, *ex gratia* compensations are possible.

In sum, Chapter 4 shows that the circumstances precluding wrongfulness of the law of state responsibility, necessity and *force majeure*, carefully frame a state's possibilities to derogate from treaty obligations in cases of subsequent changes of circumstances without endangering treaty stability. Especially the "legalisation" of the necessity defence has brought a welcome certainty into the debate on stability and change.

Against that background, Chapter 5 undertakes to compare the mechanisms of the law of treaties and those of the law of state responsibility. This with the particular objective in mind of assessing whether the formation of necessity and *force majeure* has broadened a state's possibilities to derogate from treaty obligations in cases of subsequent changes of circumstances.

Part 5.2 starts with examining the similarities between the different mechanisms. It argues that the substantive criteria of application of fundamental change of circumstances (Article 62 VCLT) and necessity (Article 25 of the ILC Articles) on the one hand and supervening impossibility of performance (Article 61 VCLT) and *force majeure* (Article 23 of the ILC Articles) on the other hand are quite comparable. That is why the different mechanisms can, in principle, be applied to the same kind of situations. This is evidenced in the few cases where changed circumstances were at stake: in *LAFICO v. Burundi* and the *Gabčíkovo-Nagymaros* case, for instance, states have relied on both, the mechanisms of the law of treaties as well as on those of the law of state responsibility, interchangeably to argue a non-performance of treaty obligations.

Notwithstanding these similarities as regards the mechanisms' material criteria of application, there are structural differences between the law of treaties and the law of state responsibility. These are dealt with in Part 5.3. The ILC, when drafting the Articles on State Responsibility, distinguished between primary and secondary rules. The ILC Articles do not define the content and extent of state obligations, whose breach gives rise to state responsibility; they are merely concerned with the consequences which flow from their breach. Consequently, an (apparent) breach of a primary obligation is a precondition for the application of the law of state responsibility.

It is shown that these differences largely correspond to the distinction between the law of treaties and the law of state responsibility. These two branches are clearly separated and categorically different. While the law of treaties establishes, in principle, primary rules and obligations, the law of state responsibility provides for secondary obligations that regulate the consequences of a breach of the primary obligation.

The differences entail, as is shown in Part 5.4, the different functioning of the mechanisms of the law of treaties and of the law of state responsibility. Most importantly as regards 1. their mode of application, 2. procedures and 3. consequences of reliance. First, the law of state responsibility requires a *prima facie* breach of treaty obligations. The regime of state responsibility is thus only reached when a treaty has not been correctly suspended or terminated in accordance with the law of treaties. This implies a two step approach, with the non-performance grounds of the law of state responsibility coming after those of the law of treaties. Second, the procedures of reliance on the mechanisms of the law of state responsibility are much less complex than those established in the law of treaties (Articles 65 *et seq.* VCLT). As stated, necessity and *force majeure* function "as a shield rather than as a sword" and can still be relied upon in ongoing proceedings. This may be explained, *inter alia*, by the event based approach of the law of state responsibility and the *ex post* concept of reliance which is only possible once a *prima facie* violation has occurred. Third, also the legal consequences of reliance are different. While, in principle, reliance on Articles 61 and 62 VCLT has permanent consequences for the treaty relationship – successfully invoked it ends the treaty relation –, the operation of necessity or *force majeure* depends on the duration of the impediment and the treaty relation revives once the impediment disappears. The VCLT does not deal with compensation or any other form of adjustment between the treaty parties in case of termination. Conversely, in cases of a successful reliance on necessity, compensation is generally due.

On this basis, Part 5.5 shows that the mechanisms of the law of state responsibility, especially the legalization of the necessity defence, broaden the possibilities of states to derogate from treaty obligations. They diversify the possibilities to react to subsequent changes while, at the same time, maintaining an optimal balance between the treaty parties. To exemplify, the mechanisms of the law of state responsibility are – due to their reduced procedural requirements – an exit option for extreme cases. They are important for a state which is affected by changed circumstances and needs to derogate quickly from its treaty obligations. Conversely, the duty of compensation even in cases of a successful reliance on necessity leaves room to adjust the different treaty parties' positions. This is not only a welcome reflection of the idea of "justice". From a longer term perspective, the duty to compensate could contribute to a – cautious – flexibilisation of the necessity defence.

Furthermore, reliance on the circumstances precluding wrongfulness will be the only means to derogate from treaty obligations when treaties codify customary international law. Likewise, considerations of domestic law induce at times a preference for the less cumbersome mechanisms of the law of state responsibility. While the invocation of necessity or *force majeure* is generally possible as decision of the executive branch alone, treaty termination (and suspension) frequently requires parliamentary approval.

Finally, the mechanisms of the law of state responsibility allow more readily to derogate from treaty obligations when interests of the international community are at stake than those of the law of treaties. The 2001 ILC Articles mirror the changing structure of international law and the growing "verticalization" of international relations in fields such as human rights. More generally, they reflect an increasingly value oriented international community. This stands in contrast to particularly Articles 61 and 62 VCLT which are – as the totality of the VCLT – expression of a rather horizontally conceived law of interstate relations.

In sum, the circumstances precluding wrongfulness increase the range of mechanisms to derogate from treaty obligations in cases of subsequent changes of circumstances; at least at the abstract and theoretical level.

At the same time, the (welcome) focus on treaty stability of all mechanisms (of the law of treaties as well as the law of state responsibility) makes their weakening of *pacta sunt servanda* marginal. The narrow formulation of fundamental change of circumstances (Article 62 VCLT) and necessity (Article 25 of the ILC Articles) and the high material threshold of impossibility of performance (Article 61 VCLT) and *force*

*majeure* (Article 23 of the ILC Articles) is likewise reflected in the limited state practice and jurisprudence. It implies that all mechanisms are merely reduced means for the accommodation of change. While this is welcome in view of the necessary predictability of performance and the stability of international relations, derogation from treaty obligations is only rarely possible.

Moreover, as shown in Part 5.6, the criteria of application of all mechanisms (fundamental change of circumstances, impossibility of performance, obsolescence, necessity and *force majeure*) reflect the problem of general (international) law which has to remain applicable to multiple situations. Their abstract wording and elements take only insufficient account of case specific characteristics and the particularities of different treaty regimes. This becomes especially evident when applying the non-performance provisions of general international law to the specific regimes. Even more, since the dense net of state obligations in these regimes increases the need to accommodate change and enable corresponding derogations from treaty obligations. In short, the growing need for flexibility can only insufficiently be resolved by the mechanisms of general international law.

For this reason, Chapter 6 examines non-performance options – termination clauses as well as treaty based emergency exceptions – in different treaty regimes, namely in human rights law, the law of the sea, the GATT/WTO-regime and international investment law. All the regimes examined provide for a “system adequate” derogation from treaty obligations on the basis of specific provisions which may also be relied upon when circumstances change. They thus contribute to ease the tension between stability and change in line with the requirements of the respective treaty regime. Put differently, the debate on stability and change seems to increasingly move from general international law into the different subsystems. Historically, the main “opponent” of treaty stability was the *rebus sic stantibus* doctrine (Article 62 VCLT). Today, it is primarily the treaty based termination clauses and emergency exceptions which function as the external limits of the *pacta sunt servanda* rule in cases of subsequent changes of circumstances.

As shown in Part 6.2, the majority of treaty regimes (in human rights law, international economic law, the law of the sea and international investment law) contain regime specific termination clauses. These clauses offer a primarily procedural solution to the tension between stability and change. The establishment of minimum timelines (generally between six months and one year) after which the denunciation takes effect leaves the other treaty parties a certain time to prepare for the lapse

of the treaty. This contributes to legal certainty since an exit from the treaty is not linked to compliance with (necessarily vague and general) substantive criteria. Only treaties of disarmament and arms control include material termination conditions such as the occurrence of extraordinary events which threaten supreme state interests.

Still, an empirical analysis of state practice in the respective regimes shows that notwithstanding the incorporation of procedural termination provisions in most of the treaties examined, states have only exceptionally left treaty regimes. In today's international law of cooperation, permanent exit does not seem to be an option.

Part 6.3 investigates the increased need for temporary non-performance. An empirical analysis of states' derogation practice shows that temporary non-performance is rather frequent. That is why the "system adequate" formulation of treaty based emergency exceptions, which takes due account of the requirements of the respective regimes, is particularly needed. The treaty specific emergency exceptions differ sometimes significantly from the necessity defence under general international law. For instance, emergency exceptions in human rights treaties (e.g. Article 4 of the International Covenant on Civil and Political Rights) mirror the vertical structure of these treaties, which aim at the protection of individuals. They subject a state's derogation from its human rights obligations to strict rules and also establish a monitoring system with a regular international control of derogations through human rights treaty bodies. The emergency exceptions thus not only reflect the importance of interests involved: human rights. The monitoring system also provides for international control in an area where states do not necessarily have a reciprocal interest in compliance with treaty obligations.

The treaty exceptions contribute to legal certainty, since, given the establishment of regime specific criteria, derogation from treaty obligations becomes more predictable. At the same time, they illustrate the fragmentation of international law. The debate on stability and change is conducted with increasingly differentiated instruments in the various treaty regimes.

As shown in Part 6.4, the incorporation of treaty based termination provisions and emergency exceptions calls for norm conflict resolution techniques in order to clarify their relationship to general international law. The relationship is to be solved differently in the law of treaties and the law of state responsibility.

The *lex specialis* principle applies to the relationship between treaty based termination clauses and the mechanisms of the general law of treaties (Articles 61 und 62 VCLT). It points to the more special norm – generally the treaty provision. A treaty's termination provisions will thus be regularly applicable as *lex specialis*. The two step approach applies to the relationship between treaty based emergency exceptions and the necessity defence of the law of state responsibility (Article 25 of the ILC Articles). One has thus to establish first whether the treaty based emergency exception is applicable. If it is, the derogation is lawful and there is no need to refer to the customary law based necessity defence. Since there is not even an apparent breach of treaty obligations, any reference to the circumstances precluding wrongfulness of the law of state responsibility would be incorrect. Also the two step approach consequently points to the treaty provision which is generally examined first. This is welcome in particular in the case of necessity. It takes optimal account of the specific characteristics of treaty based emergency exceptions which draw the “limits of *pacta sunt servanda*” in a regime adequate way. What is more, cases of temporary non-performance are comparatively frequent. For this reason, an orderly derogation with the least possible impact on the treaty relations and a maximum protection of the treaty partners' good faith seems particularly important.

Part 6.5 analyses the jurisprudence of international investment tribunals in the Argentine crisis and shows that the positive effect of a treaty regime specific fine tuning, the advantages of a “system adequate” incorporation of emergency exceptions, is reduced when international tribunals incoherently apply the provisions or wrongly understand their rapport with the law of state responsibility. The opportunity in jurisprudence to determine the abstract elements of the necessity defence more precisely and the chance to establish a correct relationship between the treaty based emergency exceptions and Article 25 of the ILC Articles has thus not been realized – or not yet (?) To the contrary, the limits of *pacta sunt servanda* were drawn very differently by the investment tribunals. This reduces predictability and prevents legal certainty which should guide any derogation from treaty obligations.

From the perspective of fragmentation, the diverging decisions of the investment tribunals in the Argentine crisis demonstrate compellingly the important unifying function of general international law when it comes to deal with stability and change. On the basis of a (correct!) treaty interpretation, the elements of the customary law based necessity defence could, for instance, have been drawn upon to concretize the treaty based emergency exceptions and could thus have contributed to

their consistent application. Precondition for this is, however, an accurate understanding of international law by the respective institutions. This would require knowledge of the limits of treaty interpretation, the classification of the law of state responsibility as system of secondary norms and the correct use of methods for the solution of norm conflicts.

The contradictory decisions of the investment tribunals in the Argentine crisis were not so much caused by treaty norms which were incompatible with general international law. Rather, it was the investment tribunals' problematic application of the respective norms. More generally formulated, the threats to coherence and unity of international law were less the specific *provisions* of a treaty regime but rather their *application*. In fact, the unity and remaining relevance of international law – central questions of the fragmentation debate in view of the proliferation of specialized treaty regimes – are primarily in the hands of the regimes' institutions. These, however, frequently act in accordance with the particularities of their treaty regime and care (too) little about general international law.

What is thus needed, is a more universalist vision on international law with respect to central questions such as the relationship between treaty based emergency exceptions and the mechanisms of general international law (here: the customary law based necessity defence). Only a correct handling of international law's toolbox to deal with change will make it possible to solve the tension between stability and change adequately, *i.e.* in the interest of an optimal adjustment of the treaty parties' positions, in line with legal certainty and predictability.

That is why this book is a plea for an exacter dogmatic as well as a deepened examination of the relationship between general international law and particular treaty regimes from a universalist perspective.