

Malabo Protocol and Merger Protocol

The Malabo Protocol properly amends the Merger Protocol

One of the key questions concerning the Malabo Protocol is its relationship with the Merger Protocol. Unlike the Merger Protocol, which *replaced* the earlier protocols for the African Court on Human and Peoples' Rights and the African Court of Justice, the Malabo Protocol *amends* the Merger Protocol. This unusual structure raises a number of important questions: Is it possible to amend a protocol that has not yet entered into force? Even if it is possible, can the Malabo Protocol enter into force after 15 ratifications if the underlying Merger Protocol never receives a sufficient number of ratifications to enter into force? There is surprisingly little scholarship or caselaw on this issue, but what little scholarship exists has suggested that “amendments are permissible only to international legal instruments that have already entered into force.”¹

Although amendments to unratified treaties are rare, the precedent that exists confirms that it is both possible to amend a treaty that has not yet entered into force and that the revised protocol can enter into force even if the underlying protocol never does. It is therefore possible to transition from the existing court to the Malabo Protocol court without ever establishing the ACJ or the Merged Court.² The following paragraphs describe in detail four treaties that were amended prior to their entry into force. Following these descriptions is an analysis of what these examples mean for the Malabo Protocol.

- **The International Agreement on Olive Oil.** The International Agreement on Olive Oil was adopted in October 1955 to reduce the impact of fluctuations in the price of olive oil.³ Three years later, with the agreement not yet ratified, a conference on olive oil was held at which participants adopted a protocol amending the earlier agreement.⁴ Once the amending protocol came into effect,⁵ the amended agreement was then

¹ Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, NETHERLANDS INTERNATIONAL LAW REVIEW 27, 45 (2013), http://collections.unu.edu/eserv/UNU:9/NILR_2013-1_Abass.pdf; see also Gino J. Naldi & Konstantinos D. Magliveras, *African Union Establishes an International Criminal Court*, 30 No. 11 INTERNATIONAL ENFORCEMENT LAW REPORTER 430 (Nov. 2014) (concluding that entry into force of the Merger Protocol is “a condition for any amendments”); Kenyans for Peace with Truth & Justice, *Seeking Justice or Shielding Suspects?* 10 (2016) (concluding that “it is . . . questionable if the Malabo Protocol could in fact enter into force before the Merger Protocol”), <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf>.

² Don Deya, *Is the African Court worth the wait*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Mar. 6, 2012), http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf.

³ UN Treaty Collection, Status of the International Agreement on Olive Oil, 1956, https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-1&chapter=19&clang=en.

⁴ *Id.*; UN Treaty Collection, Status of the Protocol amending the International Agreement on Olive Oil, 1956, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-2&chapter=19&clang=en; Protocol of 3 April 1958 amending the International Agreement on Olive Oil, 1956, 302 U.N.T.S. 122, <https://treaties.un.org/doc/Publication/UNTS/Volume%20302/v302.pdf> [hereinafter Protocol Amending the International Agreement on Olive Oil].

⁵ The amending protocol was opened for signature and came into effect in 1958 upon the signature of two countries. Status of the Protocol amending the International Agreement on Olive Oil, *supra* note 4; Protocol Amending the International Agreement on Olive Oil, *supra* note 4, arts. 3, 4(1) (specifying that the protocol takes effect upon the signature of 2 states).

opened for signature and ratification.⁶ The amended protocol came into effect in 1959 upon the ratification of at least six specified countries.⁷ After its ratification, the complete amended text was registered with the United Nations. The original 1955 agreement was never ratified.⁸

- **The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).** In 1973, the International Convention for the Prevention of Pollution from Ships was adopted to reduce marine pollution from the operation or accidents of ships.⁹ In 1978, with the convention still not in force, a new protocol was adopted which amended several provisions of the 1973 convention.¹⁰ The protocol “absorbed” the original 1973 convention,¹¹ specifying that the provisions of the protocol and original convention should be read together.¹² The protocol was then opened for ratification, and entered into force in 1983.¹³ There were no further ratifications of the 1973 convention after 1978, since ratification of the 1978 protocol constituted ratification of the convention as amended.
- **Convention on the limitation period of the international sale of goods.** In 1974, a United Nations conference adopted the Convention on the limitation period of the international sale of goods.¹⁴ As of 1980, the Convention had not yet entered into

⁶ Protocol Amending the International Agreement on Olive Oil, *supra* note 4, art. 2(3) (amending the ratification provision in the original protocol), 4(2) (providing new terms regarding signature).

⁷ *Id.* art. 2(3) (requiring the ratification of two importing countries and at least four of the five main producing countries to enter into force); UN Treaty Collection, Status of the International Agreement on Olive Oil, 1956, as amended by the Protocol of 3 April 1958,

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIX-3&chapter=19&clang=en.

⁸ Status of the International Agreement on Olive Oil, 1956, *supra* note 3.

⁹ International Convention for the Prevention of Pollution from Ships, 1973,

<http://library.arcticportal.org/1699/1/marpol.pdf>; International Maritime Organization, International Convention for the Prevention of Pollution from Ships [hereinafter IMO International Convention for the Prevention of Pollution from Ships], [http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx).

¹⁰ IMO International Convention for the Prevention of Pollution from Ships, *supra* note 9.

¹¹ *Id.*

¹² Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, art. I(2), 1340 U.N.T.S. 62, <https://treaties.un.org/doc/Publication/UNTS/Volume%201340/volume-1340-A-22484-English.pdf>.

¹³ International Maritime Organization, *Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depository or other functions* 101 (Feb. 8, 2018), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf>; IMO International Convention for the Prevention of Pollution from Ships, *supra* note 9; UN Treaty Collection, Status of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280291139>.

¹⁴ Convention on the limitation period in the international sale of goods, 1511 U.N.T.S. 3 (June 14, 1974), <https://treaties.un.org/doc/Publication/UNTS/Volume%201511/v1511.pdf>; UN Treaty Collection, Status of the Convention on the Limitation Period in the International Sale of Goods, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-7&chapter=10&clang=en.

force.¹⁵ That year, a protocol was adopted amending some of the provisions of the 1974 convention.¹⁶ The protocol specified that accession to the protocol constituted accession to the amended convention.¹⁷ However, unlike the earlier examples, the protocol specified that it could only enter into force if the 1974 convention was also in force.¹⁸ Both the 1974 convention (as amended) and the 1980 protocol came into force on August 1, 1988.¹⁹ However, states that ratified the original 1974 convention but never accessioned to the 1980 protocol – such as Ghana – are not States Parties to the convention as amended.²⁰

- **United Nations Convention on the Law of the Sea.** The UN Convention on the Law of the Sea (UNCLOS) was adopted in 1982 to create a legal order for the world's oceans, thereby promoting their peaceful use, the equitable utilization of their resources and their proper conservation.²¹ On November 16, 1993, UNCLOS finally achieved 60 ratifications, which triggered its entry into force 12 months later.²² Most of the countries that had ratified the treaty, however, were developing countries; developed countries had generally declined to ratify the treaty due to concerns with Part XI, which concerned deep seabed mining.²³ This limited applicability was highly problematic, both because industrialized States were major users, and the heaviest polluters, of the seas and because the entire financial burden of UNCLOS would fall on a limited subset of countries that were least able to afford it.²⁴ After considering several approaches to

¹⁵ Status of the Convention on the Limitation Period in the International Sale of Goods, *supra* note 14; UN Commission on International Trade Law, *Convention on the Limitation Period in the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html.

¹⁶ Protocol amending the Convention on the limitation period in the international sale of goods, 1511 U.N.T.S. 86 (1980), <https://treaties.un.org/doc/Publication/UNTS/Volume%201511/v1511.pdf>.

¹⁷ *Id.*, art. VIII(2).

¹⁸ *Id.*, art. IX.

¹⁹ Status of the Convention on the Limitation Period in the International Sale of Goods, *supra* note 14; UN Treaty Collection, Status of the Protocol amending the Convention on the Limitation Period in the International Sale of Goods, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-7-a&chapter=10&clang=en.

²⁰ *Compare* Status of the Convention on the Limitation Period in the International Sale of Goods, *supra* note 14 (indicating that Ghana signed the original convention in 1974 and ratified it in 1975), *with* Status of the Protocol amending the Convention on the Limitation Period in the International Sale of Goods, *supra* note 19 (no signature or ratification by Ghana), *with* UN Treaty Collection, Status of the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980 (not listing Ghana as a State Party), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-7-b&chapter=10&clang=en.

²¹ UN Convention on the Law of the Sea, preamble, 1833 U.N.T.S. 3 (Dec. 10, 1982) [hereinafter UNCLOS], <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/v1833.pdf>.

²² UNCLOS, *supra* note 21, art. 308(1); UN General Assembly, Consultations of the Secretary-General on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea, Report of the Secretary-General, ¶ 16, U.N. Doc. A/48/950 (June 9, 1994) [hereinafter UN SG Report on UNCLOS], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/244/82/PDF/N9424482.pdf?OpenElement>; D.H. Anderson, *Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 886, 886 n.2, 889 (1994).

²³ D.H. Anderson, *Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea*, 42 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 654, 654 (1993); UN SG Report on UNCLOS, *supra* note 22, at ¶ 1.

²⁴ Anderson, *Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 23, at 661; Anderson, *Further Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 22, at 889-90.

modify UNCLOS,²⁵ it was finally decided that an agreement concerning the “implementation” of Part XI should be adopted (the “Implementing Agreement”).²⁶ Although not titled a treaty or an amendment, the Implementing Agreement was plainly both, as it altered the terms under which Part XI was to be implemented and provided that the provisions in the new agreement would trump any inconsistent provisions in Part XI.²⁷ As such, it amended UNCLOS before its entry into force. To avoid the need for formal amendment or re-ratification by the 60 States that already had ratified UNCLOS, the Implementing Agreement provided for the “tacit consent” of such States, by which such States would be considered to have consented to the Implementing Agreement if they signed it and, within 12 months of its adoption, did not inform the depository that they were opting out of the consent by signature system.²⁸ By contrast, any State ratifying UNCLOS after the adoption of the Implementing Agreement would be deemed to have consented to the Implementing Agreement, while no State could consent to the Implementing Agreement without first or simultaneously ratifying UNCLOS.²⁹ The agreement was adopted on July 28, 1994, and opened for signature the next day.³⁰ It came into effect provisionally on November 16, 1994, the same day that UNCLOS entered into force.

As the foregoing examples demonstrate, there is no single method by which an unratified treaty must be amended. Each of the examples above used a different system: (1) adoption of an amending protocol that had to come into force through a minimal number of signatures, after which only the amended agreement was ratified, not the original agreement (International Agreement on Olive Oil); (2) “absorption” of the original treaty into the amended protocol, whereby ratification of the amendments constituted ratification of the treaty and its amendments together (MARPOL 73/78); (3) accession to the amending protocol constituting accession to the original convention, but requiring that the original convention also meet the conditions for entry into force (Convention on the limitation period of the international sale of goods); and (4) adoption of an “implementing” agreement, pursuant to which former parties to the convention were deemed to have consented to the implementing agreement if they signed it, new parties to the convention were automatically deemed to have consented to the agreement, and new parties to the implementing agreement had to ratify the original convention (UNCLOS). The diversity of these examples confirms that States have a variety of options open to them when choosing how to amend an as-yet-unratified treaty.³¹

²⁵ Four approaches were considered, namely: a protocol amending UNCLOS; an agreement on the interpretation and application of UNCLOS; an interpretive agreement on an initial regime to be followed by a conference to establish a permanent regime; and an agreement providing for a transition between an initial and definitive regime. UN SG Report on UNCLOS, *supra* note 22, at ¶ 11.

²⁶ Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1836 U.N.T.S. 4 (July 28, 1994) [hereinafter Agreement on implementation of UNCLOS], <https://treaties.un.org/doc/Publication/UNTS/Volume%201836/v1836.pdf>.

²⁷ Agreement on implementation of UNCLOS, *supra* note 26, art. 2(1); Anderson, *Further Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 22, at 892.

²⁸ Agreement on implementation of UNCLOS, *supra* note 26, art. 5(1); UN SG Report on UNCLOS, *supra* note 22, at ¶ 12; Anderson, *Further Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 22, at 890, 892; Anderson, *Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 23, at 663.

²⁹ Agreement on implementation of UNCLOS, *supra* note 26, art. 4(1)-(2).

³⁰ Anderson, *Further Efforts to Ensure Universal Participation in the UNCLOS*, *supra* note 22, at 893.

³¹ Although it is hard to draw conclusions based on a limited number of examples, the method of amendment appears to be influenced by the status of the original convention. For example, where a treaty already had a high

In addition, the foregoing examples show that there is no specific language that must be invoked in order to amend an unratified treaty. Each of the amending instruments described above used different provisions with different language.

Moreover, the examples above indicate that where a treaty has not yet entered into force, there is no requirement that an amendment to the treaty follow the amendment procedures specified in the treaty itself. Potential amendments are not bound by those procedures precisely because those procedures have not entered into force and therefore do not have the force of law. Instead, additional agreements and/or protocols are typically used, and States other than those that have ratified the original treaty may participate in negotiating those additional agreements.³²

The converse of this proposition, however, is that where the amendment procedures specified in a treaty are not used, those amendments cannot be binding on any State which previously ratified the original convention but which does not ratify the amending protocol. For example, Ghana ratified the Convention on the limitation period of the international sale of goods but did not ratify its later amending protocol; thus, it did not become a State Party to the convention as amended.³³ This practice is consistent with the Vienna Convention on the Law of Treaties, under which an amendment does not bind any party to a treaty that does not become a party to the amendment as well.³⁴

Although none of the foregoing examples is identical to the situation of the Malabo and Merger Protocols, the MARPOL 73/78 convention and the Olive Oil conventions are the most similar. In both cases, once the amending protocol was adopted, States ratified only the amending protocol or the treaty as amended, and not the underlying treaty.³⁵ Once there were a sufficient number of ratifications of the amending protocol or amended treaty, the combined instrument (i.e., the underlying treaty with the amendments made by the amending protocol) entered into force.³⁶ The original protocol, without the amendments, never entered into force.³⁷

Such a procedure is consistent with the terms of the Malabo Protocol. In fact, the Malabo Protocol *replaces* in its entirety the Merger Protocol and *amends* the Statute annexed to the Merger Protocol. As such, the provisions of the Malabo Protocol and the Merger Protocol, like the original treaties and amending protocols of the Olive Oil convention and MARPOL 73/78, must be read together.

number of ratifications (60) and was on the verge of entry into force (i.e., UNCLOS), a system of tacit consent for prior ratifiers avoided the problem of requiring a second round of ratifications for those States.

³² See also UN, Treaty Section of the Office of Legal Affairs, Treaty Handbook, 4.4.2 (2006), <https://treaties.un.org/doc/source/publications/THB/ENGLISH.pdf>.

³³ See *supra* note 20 & accompanying text.

³⁴ Vienna Convention on the Law of Treaties, art. 40(2), 1155 U.N.T.S. 332 (May 23, 1969), <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

³⁵ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, *supra* note 12, art. IV(1); Protocol Amending the International Agreement on Olive Oil, *supra* note 4, art. 5.

³⁶ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, *supra* note 12, arts. I(2), V(1); Status of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, *supra* note 13; Protocol Amending the International Agreement on Olive Oil, *supra* note 4, art. 5; Status of the International Agreement on Olive Oil, 1956, as amended by the Protocol of 3 April 1958, *supra* note 7.

³⁷ Status of the International Agreement on Olive Oil, 1956, *supra* note 3.

Admittedly, the amending protocols for the Olive Oil Convention and MARPOL were somewhat more explicit about the relationship between the amending protocol and the underlying treaty, and it might have been helpful for the Malabo Protocol to more explicitly address its relationship with the Merger Protocol as well. But, so long as the effect is adequately clear,³⁸ there is no international law requirement under either the Vienna Convention on the Law of Treaties or customary international law that would require any particular or explicit language in the Malabo Protocol. Indeed, there can be little doubt that the Malabo Protocol, like the MARPOL 78 amending protocol, was intended to “absorb” the Merger Protocol since the provisions of the Malabo Protocol do not make sense without reference to the provisions of the Merger Protocol. It is irrelevant that the Malabo Protocol does not explicitly use the term “absorb” – that term was not used in the MARPOL amending protocol either, but it is widely recognized to have absorbed the earlier treaty.³⁹ Accordingly, States that ratify the Malabo Protocol consistent with the ratification provisions contained therein⁴⁰ are necessarily ratifying the Merger Treaty as absorbed into the Malabo Protocol.

Besides the somewhat more explicit language in the amending protocols to the Olive Oil Convention and MARPOL, the other key difference between these protocols and the Malabo Protocol is that the former two explicitly indicated that any State becoming a party to the agreement after the date the amending protocol was adopted would become a party to the protocol *as amended*⁴¹ and that the amended protocol would have sole effect. Under these explicit terms, it was not possible for the original treaty to be ratified as-is (i.e., without the amendments) and therefore the original treaty could never obtain enough ratifications to enter into force. By contrast, the Malabo Protocol contains no such provision. It is therefore possible for a State to ratify the Merger Protocol without ratifying the Malabo Protocol, and if the Merger Protocol were to obtain a sufficient number of ratifications, it could enter into effect before, or instead, of the Malabo Protocol. Thus, although ratification and entry into force of the original Merger Protocol is not a prerequisite to ratification and entry into force of the Malabo Protocol, neither is ratification and entry into force of the un-amended Merger Protocol precluded by the Malabo Protocol. However, if the Malabo Protocol enters into effect before the Merger Protocol, any subsequent ratifications of the Merger Protocol would be presumed to include ratification of the amendments in the Malabo Protocol absent the expression of a contrary intent.⁴²

³⁸ By contrast, lack of clarity might be a reason for contesting the validity of a treaty under the Vienna Convention. See Vienna Convention on the Law of Treaties, *supra* note 34, Part VI (particularly art. 48 on error).

³⁹ See, e.g., IMO International Convention for the Prevention of Pollution from Ships, *supra* note 9 (describing MARPOL 78 as having “absorbed” MARPOL 73); American Society of International Law, *International Convention for the Prevention of Pollution from Ships* (2017), <https://www.asil.org/eisil/international-convention-prevention-pollution-ships>.

⁴⁰ AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014) art. 9 [hereinafter Malabo Protocol], <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

⁴¹ Protocol Amending the International Agreement on Olive Oil, *supra* note 4, art. 5; Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, *supra* note 12, art. V(3).

⁴² Vienna Convention on the Law of Treaties, *supra* note 34, art. 40(5).

Finally, contrary to some expressed concerns,⁴³ entry into force of the Malabo Protocol without entry into force of the Merger Protocol does not increase the risk that States which previously ratified the Merger Protocol will “renege” on those ratifications. A State which ratifies a treaty prior to its amendment has the choice of whether to be bound by the original treaty (in this case the Merger Protocol) or whether to ratify and be bound by the amended treaty (the Malabo Protocol).⁴⁴ If a State which already has ratified the Merger Protocol chooses not to ratify the Malabo Protocol and the Malabo Protocol enters into effect, only the provisions of the un-amended Merger Protocol will apply to that State. The largest consequence of this situation will be that the African Court’s international criminal jurisdiction will not extend to that State. In addition, any difference or conflict between the provisions, however small, will have to be resolved in favor of the provisions of the Merger Protocol with respect to that State.⁴⁵ The State would not, however, have a basis for withdrawing from the Merger Protocol because the Merger Protocol does not have a provision permitting withdrawal and no right of withdrawal can be implied in it,⁴⁶ because the provisions of the Malabo Protocol are not so incompatible with the Merger Protocol as to prevent their provisions from being simultaneously applied to different States Parties,⁴⁷ and because the State’s obligations would not be transformed.⁴⁸

In summary:

- It is permissible to amend an as-yet-unratified treaty, as the Malabo Protocol amends the Merger Protocol;
- There is no specific procedure that must be used to amend an as-yet-unratified treaty, and the Malabo Protocol appears to most closely follow the “absorption” method, by which an amended instrument enters into effect once a sufficient number of ratifications is obtained on the amending protocol;
- There is no specific language that must be used to amend an as-yet-unratified treaty, and thus although the Malabo Protocol could have been more explicit, the language appears to be adequately clear to serve its purpose;
- If the Merger Protocol obtains a sufficient number of ratifications before the Malabo Protocol does, the Merger Protocol could enter into effect prior to, or instead of, the Malabo Protocol; and
- Any State that already has ratified the Merger Protocol or ratifies the Merger Protocol before the Malabo Protocol enters into force is not bound by the Malabo Protocol unless it also ratifies the Malabo Protocol, but likely cannot withdraw from the Merger Protocol either.

⁴³ See Abass, *The Proposed International Criminal Jurisdiction for the African Court*, *supra* note 1, at 46 (suggesting that proposing amendments to a treaty that has not yet entered into force creates a danger that those States which have already ratified the treaty will renege).

⁴⁴ Vienna Convention on the Law of Treaties, *supra* note 34, art. 40(4).

⁴⁵ *Id.*

⁴⁶ See *id.* art. 56.

⁴⁷ See *id.* art. 59.

⁴⁸ See *id.* art. 62.