

The Law of Treaties

Introduction

- Main source - Vienna Convention on the Law of Treaties
- Why Vienna C.? – codifies custom
- What is a treaty? Art. 2 Sec 1a):
 - *“treaty” means 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;*

A written instrument between two or more parties

- Art. 3 of the VC:
- *The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:*
 - *the legal force of such agreements;*
 - *the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;*
 - *the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.*

A Treaty must be between parties endowed with intl. personality

- Art. 3 of the VC again...
 - *The fact that the present Convention does not apply to intl. agreements concluded between States and other subjects of international law or between such other subjects of international law, ...shall not affect:*
 - *the legal force of such agreements; ...*

The agreement must be governed by intl. law

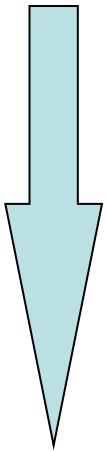
- Under customary international law – an agreement concluded between states is not necessarily a treaty
- Such agreement may be subject to a municipal law
- VC – represents an innovation

The Agreement should create a legal obligation

- The intention to create legal relations is not mentioned in the VC as the element of intention is embraced in the phrase “governed by intl. law”
- Reasons for excluding the intention are also practical: states may want express only their political intent

Conclusion of Treaties

- Regulation in Vienna Convention:
 - Art. 6 – 18 : Conclusion of Treaties
 - Art. 19 – 23 : Reservations
 - Art. 24 and 25 : Entry into Force
- Provisions of the VC have logical order
 1. Capacity of states
 2. Full powers
 3. Adoption of the text
 4. Authentication of the text
 5. Means of expressing consent to be bound by a treaty
 6. Obligation not to defeat the object and purpose of a treaty prior to its entry into force



Negotiation and Full Powers

- Art. 7: 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
 - *a) he produces appropriate full powers; or*
 - *(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.*
- Art. 7: 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
 - *(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;*
 - *(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;*
 - *(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.*

Adoption of the Text of a Treaty

= the 1st stage of the conclusion of a T.

- Art. 9 of the VC:
 - 1. *The adoption of the text of a treaty takes place **by the consent of all the States** participating in its drawing up except (!) as provided in paragraph 2.*
 - 2. *The adoption of the text of a treaty at an international conference (!) takes place **by the vote of two thirds of the States** present and voting, unless by the same majority they shall decide to apply a different rule.*
- The adoption of the text does not create any obligation!

Authentication of the Treaty

- Authenticated treaty cannot be unilaterally changed
- There are several forms of authentication:
 1. Signing
 2. Initialling
 3. Etc.
- An error may appear – solution: error can be corrected by:
 - initialling the corrected treaty text,
 - by executing or exchanging an instrument containing the correction or
 - by executing the corrected text of the whole treaty by the same procedure as in the case of the original text

Consent to be bound

- Art. 11 of the VC provides:
 - *The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.*

Signature

- Signing – legal effects:
 1. may represent simply an authentication of its text.
 2. Where such a signature is subject to ratification, acceptance or approval, signature does not establish consent to be bound.
 3. where a treaty is not subject to ratification, acceptance or approval, signature will signify consent to be bound.
- Art. 12 VC: *1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:*
 - a) *the treaty provides that signature shall have that effect;*
 - b) *it is otherwise established that the negotiating States were agreed that signature should have that effect; or*
 - c) *the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.*

Ratification

= the formal act by which one state declares its acceptance of the terms of the treaty and undertakes to observe them.

- R.
 - Municipal vs International
- Reasons for R.
 - Historical, Practical, Legislative
- Ratification in the VC – see Art. 14 (1): *1. The consent of a State to be bound by a treaty is expressed by ratification when:*
 - a) the treaty provides for such consent to be expressed by means of ratification;*
 - b) it is otherwise established that the negotiating States were agreed that ratification should be required;*
 - c) the representative of the State has signed the treaty subject to ratification; or*
 - d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.*
- Ratification by performance

Accession

= the act by which a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states

- Accession is only possible if:
 1. it is provided for in the treaty, or
 2. if all the parties to the treaty agree that the acceding state should be allowed to accede

Reservations and objections

- Not all provisions of a T. may be acceptable for every state
- See Art. 2 Sec 1d): *“reservation” means 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;*
- Reservation may be **objected**
- **Legal effect:** A reservation established with regard to another party
 - modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - modifies those provisions to the same extent for that other party in its relations with the reserving State.
- **Legal effect:** The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

Entry into Force

- This issue is usually expressly determined by the treaty.
- If not, the treaty comes into force as soon as all the negotiating states have consented to be bound by the treaty

Registration

- According to the Art. 102 of the Charter of the United Nations "*every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it*".

Validity of Treaties

- validity of a treaty may be impeached only through the application of the present convention
- Possible reasons for invalidity:
 - Non-compliance with provisions of municipal law
 - Treaty entered into by a representative who lacks authority
 - Corruption of a state representative
 - Error
 - Fraud
 - Coercion of a state representatives
 - Coercion of a state
 - Unequal treaties
 - Conflict with peremptory norm of general international law – *ius cogens*

Non-compliance with provisions of municipal law

- Controversial, there is no absolute solution
- Several different solutions possible:
 - The T. is void if there is a failure to comply with the requirements to state's constitutional law
 - The T. is void if there is a failure to comply with well known constitutional limitations
 - the T. is valid
 - the T. valid except where one party to the T. knew that the other party was acting in breach of a constitutional requirement.
 - The T. is void only if the violation was manifest and concerned a rule of municipal law of fundamental importance.
- A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

T. entered into by a representative who lacks authority

- Who is a representative?
 - The one who have full powers
 - The one who appears to be a representative based on the states practice
- Heads of State, Heads of Government and Ministers for Foreign Affairs do not need the FP
- SOLUTION: the T. is void unless the state afterwards confirms it

Corruption of a state representative

- Art. 50 of the VC: corruption may cause that the T. is void

Error

- *1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.*

Coercion of a state's representatives

- Art. 51 of the VC: *The expression of a State's consent to be bound by a T. which has been procured by the coercion of its R. through acts or threats directed against him shall be without any legal effect.*

Coercion of a state

Art. 52 of the VC: A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Unequal treaties

- Unequal T. are not legally binding
- *This idea is not generally accepted*

Ius cogens

Art. 53 of the VC: A T is void if, at the time of its conclusion, it conflicts with a peremptory norm of general intl. law. For the purposes of the present Convention, a peremptory norm of general intl. law is a norm accepted and recognized by the intl. community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general intl. law having the same character.

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Bye bye!