

# PUBLIC INTERNATIONAL LAW

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# UNIT 3. The International Treaties

# The International Treaties

- I. GENERAL FEATURES

**A) Article 38.1 of the ICJ Statute provides:**

*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

*a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states (...)"*

- Conventions —> Treaties = they are the main source of International Law as for its particular structure



Considerations: Article 38 ICJ Statute. The subjects of the international law find in the treaties, the advances of the security that provides its written form in addition to the flexibility that allows its legal system, based on the autonomy of the will of the parties

## A) Definition of Treaty

It is defined as any international agreement in written form, wether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration... ), concluded between two or more States or other subjects of international law and governed by international law.

*Art. 2.1.a) Vienna Convention on the Law of Treaties, 1969 and 1986:*

*“1. For the purposes of the present Convention: (a) “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 (...)”*

Exclusion to commercial arrangements made between governments under one or more national laws.

Verbal agreements between subjects of international law are not dealt with in a formal sense, although the Vienna Conventions recognize that they can have "legal value" and be binding on the parties.



The Treaties must be concluded between subjects of international law, that is, between States or between States and international organizations or between them.

Therefore, the agreements celebrated by the States with other subjects that do not belong to this order and that consequently are not governed by the international law, are not international treaties.

EX: NGO, State's Contract...

## WARNING!

- **The fact that they are not Treaties does not mean that there is no need to comply with them.**

Art. 3 of VCLT provides that the fact that the Convention is thus limited shall not affect the legal force of agreements between states and other subjects of international law or between such other subjects.

A Treaty is the expression of an agreement of concordant wills celebrated with the intention of producing mandatory legal effects in the international framework.



Spanish Law 25/2014, of 28 November, on Treaties and other international agreements, provides the figure of the "non-regulatory international agreements", affirming that they do not constitute Treaties, nor source of international obligations nor governed by the International Law.

Remember that an international Treaty may adopt the form that the States consider appropriate and be designated by whatever name the Parties choose to consider the most appropriate for their particular nature: **Treaty, Covenant, Agreement, Act, Charter, Statute, Pact, Protocol...**

## **WARNING!**

The most important thing is that the Treaty has a natural conventional (agreement) and a mandatory content regulated by international law.

## B) Historical evolution and typology of the treaties

The treaties have always existed, but their configuration has evolved with the needs throughout history.



Classic international law -> predominates the bilateral treaties or those celebrated between a reduced number of States.

They could be:

- Solemn - further ratification and signature of the monarch.
- Not solemn - for reasons of urgency without a signature.

- Modern times: bilateral agreements -> restricted plurilateral treaties -> multilateral within the framework of international conferences
- Currently, the constitutional treaties of international organizations and those adopted in the field of an international organization are governed by the 1969 Vienna Convention "without prejudice to any relevant rules of the organization".

**To be taken into account:**

**- Framework convention / umbrella convention.**

**- Protocols**

**-> Ex: UNFCCC (1992) - Kyoto (1997) - Paris (2015)**

**\*\* Preamble, clauses, final clauses, annexes...**

## C) Legal Regime of Treaties

- **Vienna Convention of 1969, in force since June 13, 1989.**
- **The 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations is not in force**



- II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

—> Conclusion of Treaties: A group of procedural acts by which the text of the treaty is elaborated, adopted and authenticated and the consent of the States to be bound is expressed.

## A) Capacity of States to conclude treaties

- Art. 6 VCLT;

- State representation: full powers give the bearer authority to negotiate and to sign and seal a treaty but not to commit the State. In the case of less formal agreements full powers are often dispensed with. Thus the definition in VCLT Article 2.1.(c) provides:

*“full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;*

BUT, the representation could be implicit in the case of Heads of State, Heads of Government and Ministers for Foreign Affairs, in virtue of their functions (art. 7 VCLT)

## WARNING!

- Heads of diplomatic missions, may represent a State for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited, but not to conclude that Treaty.
- **NON AUTHORIZED PERSON (art. 8 VCLT):** An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

## B) Negotiation, adoption and authentication

The negotiation is not regulated under the VCLT. So, it is a manifestation of measures and countermeasures.

The successful outcome of negotiation is the adoption and authentication of an agreed text.

### **Adoption:** art. 9.1 VCLT

The adoption of the text of a treaty takes place **by the consent of all the States participating in its drawing up** except WHEN the adoption of a Treaty takes place at an international conference, then is required the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

### **Authentication:** art. 10 VCLT

The text of a treaty is established as authentic and definitive: (a) **by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up**; or (b) **failing such procedure, by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.**



C) Means of expressing consent to be bound by a treaty

—> art. 11 VCLT

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.

## D) Reservations to Treaties

Definition: It is 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.

### —> EXCEPTIONS

1.- When the reservation is PROHIBITED by the treaty (art. 19(a) VCLT)

2.- When the treaty provides that only specified reservations, which do not include the reservation in question (art. 19(b) VCLT)

- Impermissible reservations

VCLT article 20 provides for acceptance of and objection to reservations other than those expressly authorized by a treaty. In this sense, when a reservation is expressly authorized, it does not require any subsequent acceptance by other contracting States UNLESS the treaty provides so.

When the reservation is an essential condition, it requires the acceptance of all the parties.

- The ILC Guide (2011)

Some of the difficulties in respect of permissibility of reservations are addressed in the comprehensive Guide to Practice on Reservations to Treaties adopted by the ILC IN 2011.

The ILC Guide is intended as a “tool box” for practitioners in dealing with the permissibility and effects of reservations, pointing them towards solutions with the existing rules.



## E) Entry into force and provisional application of Treaties

- A treaty enters into force in **such manner** and upon **such date** provided for the negotiating States (art. 24.1 VCLT).
- A treaty **enters into force** as soon as **consent** to be bound by the treaty has been **established** for all the **negotiating States** (art. 24.2 VCLT)

### Provisional application:

- A treaty or a part of a treaty is applied provisionally pending its entry into force if:
  - a) the treaty itself so provides; or
  - b) the negotiating States have in some other manner so agreed.

### III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

#### —-> Observance

- *Pacta sunt servanda* (general principle of IL).- Every treaty in force is binding upon the parties and must be performed by them in good faith. (art. 26 VCLT)

- Internal law may not be invoked to justify a failure to perform a treaty.

EXCEPTION: unless there is a violation in the internal law such manifest and concerns a rule of its internal law of fundamental importance. (art. 46 VCLT)

## Application of Treaties

- Non-retroactivity of treaties.- Treaties are not retroactive, that is, unless a contrary intention is established, parties are only bound in respect of acts or facts taking place **AFTER** the treaty has entered into force for the party in question. (art. 28 VCLT)
- Territorial scope of treaties.- Unless otherwise stated, parties shall apply treaty within their whole territory (art. 29 VCLT)  
**EXAMPLE.-** An agreement adopted between Colombia and Spain that regulates the acquisition of citizenship in both countries.

- Application of successive treaties relating to the same subject matter.- The relation of treaties between the same parties and with overlapping provisions is a matter of interpretation. It is presumed that a later treaty prevails over an earlier, there are several rules under art. 30 of VCLT intended to solve this question:

1. Firstly, the obligations of the UN Charter prevail over subsequent incompatible Treaties (art. 103 UN Charter);

2. Secondly, priority clauses that may have been established in the treaties themselves are admitted, but when a treaty is declared subordinate to an earlier or later treaty, the provisions of the latter (the main treaty) shall prevail;

3. When there are no priority clauses, we shall make a distinction in two ways:

a) If all the parties to the earlier treaty are also parties to the later treaty, then the latter prevails and the earlier treaty will be only applied to the extent that its provisions are compatible with those of the later treaty.

b) where the parties to the earlier treaty are not all parties to the later treaty, their mutual relations shall be governed by the (earlier or later) treaty to which they are both parties



## C) Interpretation of Treaties

- General rule of interpretation: good faith

*“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”* (art. 31.1 VCLT).

- Additional rules of interpretation: art. 31.2 VCLT

Textual approach —> emphasizes the intention of the parties **as expressed in the text as the best guide to their common intention.**

Restrictive approach —> this principle may operate in cases concerning regulation of core territorial privileges. In these instances it is not an “aid of interpretation” but an **independent principle**

Teleological approach —> any ambiguity in a treaty text should be resolved by preferring the interpretation which gives effect to the object and purpose of the treaty. This approach is often referred to under the rubric of “evolutive” interpretation.

Effectiveness principle —> in opinions concerning powers, the Court has often adopted a principle of institutional effectiveness and has implied the existence of powers which were necessary to the purposes of the Charter.

## D) Obligations and rights for Third States

- *“A treaty does not create either obligations or rights for a third State without its consent”* art. 34 VCLT

### Exceptions:

1. A rule in a treaty may become binding of non-parties if it becomes a part of international custom
2. A treaty may provide for lawful for violations of the law which are to be imposed on an aggressor state.

## IV. VICISSITUDES AFFECTING THE APPLICATION OF THE TREATIES

### A) Amendment and modification of the Treaties

Amendment: process of reviewing the tracts.

Modification: affects some of the parties.

- "Amendment" is the formal modification of the provisions of a treaty by the parties. To make such an amendment, the same formalities must be followed as were applied in the original elaboration of the treaty. Many multilateral treaties specify the conditions that must be met before amendments can be adopted. In the absence of such provisions, the amendment requires the consent of all parties.



- The term "modification" refers to the variation of certain provisions of a treaty only between some of the parties to that treaty. With respect to the other parties, the original provisions apply. If no mention is made of modifications in a treaty, they are permitted only if they do not affect the rights or obligations of the other parties to the treaty and if they are compatible with the object and purpose of the treaty.

## B) Invalidity, termination and suspension of treaties

The causes of invalidity, termination or suspension of the application must be considered with respect to the entirety of the treaty, except when the treaty itself provides otherwise or its parties agree another elsewhere, or when the following conditions are met:

- That the clauses are separable from the rest of the Treaty.
- That the clauses do not constitute an essential basis for the consent of the other parties to oblige themselves to be treated in the same way.
- That the continued compliance with the rest of the Treaty is not unfair.

- **1. Invalidity of Treaties:** A treaty may be (relative or absolutely) voidable when:
  - There is a **VIOLATION OF INTERNAL LAW.**- this violation would be objectively evident to any State conducting itself a matter in accordance with normal practice and in good faith (art. 46 VCLT)
  - There is an **ERROR.**- a State may be invoke an error as invalidating its consent to a treaty 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 to its consent (art. 48 VCLT)
  - There is a **FRAUD.**- a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty (art. 49 VCLT)
  - There is a **CORRUPTION of State representatives.**- If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty. (art. 50 VCLT)
  - There is a **COERCION** of State representative.-The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. (art. 51 VCLT),
  - There is a **CONFLICT WITH A PEREMPTORY NORM.**- (art. 53 VCLT).

- **2. Termination and suspension of Treaties:**

*“The termination of a treaty or the withdrawal of a party may take place:*

*(a) in conformity with the provisions of the treaty; or*

*(b) at any time by consent of all the parties after consultation with the other contracting States” (art. 54 VCLT).*



A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is **established** that the parties intended to admit the **possibility of denunciation or withdrawal**; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

(art. 56 VCLT)

## V. DEPOSIT, REGISTRATION AND PUBLICATION OF TREATIES.

- The designation of the depositary of a treaty may be made by the negotiating State.
- The depositary may be one or more States, an international organization or the chief administrative officer of the organization

### 1. The functions of a depositary:

- (a) **keeping custody** of the original text of the treaty and of any full powers delivered to the depositary;
- (b) **preparing certified copies** of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty; (
- (c) **receiving any signatures to the treaty** and receiving and keeping custody of any instruments, notifications and communications relating to it;
- (d) **examining whether the signature or any instrument, notification or communication relating to the treaty** is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
- (e) **informing the parties and the States entitled to become parties** to the treaty of acts, notifications and communications relating to the treaty;
- (g) **registering the treaty** with the Secretariat of the United Nations;
- (h) performing the functions specified in other provisions of the present Convention.

## Registration and publication of treaties

1. Treaties shall, after their entry into force, **be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.**
2. **The designation of a depositary shall constitute authorization for it to perform** the acts specified in the preceding paragraph.

## VI. SPANISH DOMESTIC LAW REGARDING CONCLUSION OF TREATIES

A) Capacity for the celebration of treaties and other international agreements.

Art. 149.3 SC "The State has exclusive competence over the following matters: International relations".

25/2014 Law confirms that the State has the exclusive competence to celebrate treaties.



B) Procedure for the celebration of the treaties and other international agreements.

art. 97 SC - It is mainly a competence of the Government, but with the control of the General Courts.

1. Negotiation, adoption and authentication of the text

Competence: The Council of Ministers (mainly); direction of administrative actions: Ministry of Foreign Affairs and Cooperation.

25/2014 Law of Treaties and other international Agreements

- 2. State's consent to be bound

The provision of the State's consent to be bound by means of treaties or agreements will require the prior authorization of the General Courts as follows:

- Treaties of a political nature.
- Treaties or agreements of a military nature
- Treaties or agreements that affect the territorial integrity of the State, the rights and fundamental rights established in Title I.
- Treaties or agreements which imply financial obligations for the Public Treasury.
- Treaties or agreements that imply modification or repeal of any law or require legislative measures for its execution

c) Treaties which do not require an authorization of the General Courts (art. 94.2 SC)

*“The Congress and the Senate will be immediately informed of the conclusion of the remaining treaties or agreements”.*

d) Treaties with contrary stipulations to the EC - art. 95 SC -> NEED constitutional review

*“1. The conclusion of an international treaty containing provisions contrary to the Constitution shall require prior constitutional review.*

*2. The Government or any of the Chambers may request the Constitutional Court to declare whether or not such contradiction exists”.*

C) International administrative agreements and non-standard international agreements -> **NO TREATIES.** Competence for its celebration - art. 2 c) and 44 Law 25/2014.

- An "international administrative agreement" is defined as an agreement of an international nature not constituting a treaty that is concluded by organs, bodies or entities of a subject of international law that are competent by reason of the subject matter, the conclusion of which is provided for in the treaty that it executes or specifies, the usual content of which is of a technical nature regardless of its name and which is governed by international law.



- A "non-regulatory international agreement" is defined as an agreement of an international nature not constituting a treaty or an international administrative agreement concluded by the State, the Government, the organs, bodies and entities of the General State Administration, the Autonomous Communities and Cities of Ceuta and Melilla, the Local Entities, the public Universities and any other subject of public law with competence to do so, which contains declarations of intent or establishes commitments of action of a political, technical or logistical nature, and does not constitute a source of international obligations nor is it governed by International Law.

D) Classification of the nature of the treaty or international agreement.

1. Verification of whether the agreement contained any provision that might be contrary to the SC. If yes, —> TC

2. In other cases, there is a need of prior consultation to the State's Council. This organ may issue an advisory opinion which is, at least, not binding but materially it is a binding document.

