



# ***INTERNATIONAL TREATIES***

***1. THE VIENNA CONVENTION ON THE LAW OF THE TREATIES. 2. THE CONCLUSION OF TREATIES UNDER SPANISH LAW***

## SOME PRELIMINARY REMARKS

- Article 38 of the Statute of ICJ: First formal source of IL “international conventions, whether general or particular, which establish rules expressly recognized by the disputing States”.
- Treaties: main source of IL
  - Peculiar structure of international society (no world legislator).
  - Consensualist character of this order.
  - Advantages of the security afforded by their written form together with the flexibility afforded by their legal regime.
- But: **what** constitutes an **international treaty**? An international treaty is an agreement of wills entered into in writing between subjects of international law, governed by that law and intended to produce binding legal effects.
  - 1969 and 1986 Vienna Conventions on the Law of Treaties Article 2, 1(a): *For the purposes of the present Convention, the term "treaty" means an international agreement concluded in writing between States (and/or international organizations), governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*
  - Elements of the definition:
    - formal instruments that must be in writing. Verbal agreements between subjects of international law are not treaties in the formal sense (they may have "legal value" and binding effects for the parties)

- Must be concluded between subjects of international law, i.e., between States or between States and international organizations or by international organizations among themselves (therefore contracts concluded between States and private individuals or foreign companies (State's Contracts), or those concluded by States with international non-governmental organizations (NGOs), or those concluded by States with foreign infra-State political entities or by the latter among themselves are not truly treaties).
  - Is the expression of an agreement of concurring wills concluded with the intention of producing binding legal effects in the international framework.
  - It may take the form that the States deem appropriate (a single instrument or two or more related instruments) and may be designated by whatever name that the parties may choose as being more appropriate to its particular nature: Treaty, Convention, Agreement, Act, Charter, Constitution, Statute, Pact, Protocol...
- **Evolution of legal regime of treaties** in accordance with the prevailing needs of different historical periods. Doctrinal level: classifications proposed for didactic purposes:
- The most classic: distinction between bilateral and multilateral treaties
    - Classical IL: Bilateral treaties or treaties between a small number of States, which could be solemn or not solemn.

- In modern times: gradual shift from bilateral agreements to multilateral treaties (conclusion of general multilateral treaties negotiated in the framework of international conferences with a very broad participation of States).
  - ❖ Adaptation of the rules to this new reality: more flexible procedures for concluding treaties, replacing the requirement of unanimity with more or less qualified majorities, mechanisms to make the application of treaties more flexible, the "reservations" regime and amendment.
- Other distinction: the so-called "framework conventions" (framework convention or umbrella convention), which lay down the foundations of a treaty action that is intended to be progressively deployed, and their subsequent "protocols", which are in fact more detailed treaties that elaborate on the regulations envisaged in the framework convention.
- In practice, the **typical treaty format**. All these components form part of the treaty for the purposes of its interpretation:
  - the preamble, which details the rationale and objectives of the agreement;
  - the articles, which contain the obligations and rights of the parties;
  - the final clauses, which establish the procedures for the entry into force, registration and publication of the treaties; and
  - the annexes or appendices, which are normally of an administrative or technical nature.

- The **legal regime of the treaties**: customary origin and is based on the principles of free consent, good faith and the *pacta sunt servanda* rule.
  - Today, many of the customary rules relating to the regime of treaties have been codified by both the [Vienna Convention on the Law of the Treaties \(VCLT\) of 23 May 1969](#) on the law of treaties concluded between States, which entered into force on 27/1/1980, as well as by the Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 June 1989, which has not yet entered into force
  - These conventions however have not exhausted all the issues relating to the regime of treaties.
    - Article 3 of both Conventions.
    - the work of codification of the law of treaties has not caused customary law to lose its validity and its ability to fill any gaps that may remain in the codified regime.

# THE VIENNA CONVENTION ON THE LAW OF THE TREATIES-VCLT 1965

- A) Conclusion and entry into force of treaties.
- B) Reservations to a treaty.
- C) Entry into force and provisional application of treaties.
- D) Observation, application and interpretation of treaties.
- E) Amendment and modification of treaties.
- F) Invalidity, termination and suspension of the operation of treaties.

## A. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

- By "**conclusion**": set of acts or procedures by which the text of the treaty is elaborated, adopted and authenticated and the consent of the States to be bound is expressed.
  - Capacity and representation of the State: The capacity to conclude treaties (*ius tractandi*) is a fundamental attribute of the subjects of international law and, in the first place, of States.
    - Article 6 VCLT: States that have the status of such under IL.
    - Conclusion of the treaty is carried out by the person or persons representing the State, which is normally evidenced by the presentation of the "full powers":
      - ❖ Article 2 VCLT: *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.*
      - Implicit accreditation of the State's representative:
        - ✓ Article 7 VCLT: if it is clear from the circumstances that the intention of the States concerned has been to consider that person as a representative of the State and to dispense the full powers.
        - ✓ Cases in which a person is deemed to represent the State, by virtue of his or her functions, and without having to submit an instrument of full powers, is considered to represent the State:

- i. Heads of State, Heads of Government and Ministers of Foreign Affairs represent their State for the execution of all acts relating to the conclusion of a treaty.
  - ii. Heads of diplomatic missions represent their State for the adoption of the text of a treaty between the accrediting State and the State to which they are accredited, but not to express the consent of the State to be bound.
  - iii. Representatives accredited to an international conference, an international organization or one of its organs represent their State for the adoption of the text of a treaty at such a conference, organization or organ, but not for the purpose of expressing the consent of the State to be bound.
- When acts relating to the conclusion of a treaty have been performed by a person who cannot be considered as authorized to represent a State for that purpose: such acts shall have no legal effect unless they are subsequently confirmed by that State. If confirmation does not take place, the incompetence of the person to represent the State may be invoked as a defect in the State's consent.
- **“Negotiation”**: process of exchange and discussion of proposals and counter-proposals through which the content of the agreement is gradually being finalized, culminating in the adoption and authentication of the text.



- Not regulated by the VCLT.
- Many forms.
- **“Adoption of the text”**: Act that brings the negotiation to an end, and by which the final content of the treaty as a whole is decided.
  - Article 9, 1 VCLT (unanimity formula): provides that *the adoption of the text of a treaty shall be effected by the consent of all the States participating in the negotiation.*
    - ❖ This formula is appropriate in the case of bilateral treaties.
  - However, when the text of a treaty is adopted at an international conference in which a large number of negotiating States participate, the requirement of unanimity may prove inconvenient: Article 9, 2 VCLT *that the adoption of the text of a treaty at an international conference shall be adopted by a two-thirds majority of the States present and voting, unless those States decide by an equal majority to apply a different rule.*
- **Authentication of the text**: formal act by which it is determined that the text of a treaty is established as "authentic and definitive", attesting to the agreement of the parties on the final text resulting from the negotiation and certifying that this text is the correct and authentic one.
  - formal act of a "notarial" nature.

- Article 10 VCLT: Authentication shall be effected *(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 initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.*
- States that have participated in the negotiation, adoption and authentication of the text of the treaty, thus bringing the collective phase of conclusion to an end, are referred to as “**negotiating States**”. Effects:
  - Although the treaty is not yet binding on them, these States must refrain from acts that would frustrate the object and purpose of the treaty, as long as they have not expressed their intention not to become a party.
- **Consent:** Once the text of the treaty is adopted and authenticated, the negotiating States must decide whether or not to give their definitive consent to be bound.
  - It is an individual legal act.
  - The "manifestation" of a State's consent to be bound by a treaty is a "manifestation" of its consent to be bound by a treaty.
  - Is necessarily preceded by the State's decision to do so, which will be adopted in accordance with the provisions of its domestic law: autonomously regulates the procedures and conditions for the competent organs of the State to give their approval.

- Article 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.*
  - Contemporary practice in the case of multilateral treaties: "**ratification**", but the formula of "acceptance" or "approval" of the treaty is also used in an equivalent sense.
  - The term "accession" should strictly speaking be reserved for cases in which a State expresses its consent to a treaty already in force.
  - Unless the treaty provides otherwise or is otherwise stated, not even uniformity in the form in which each State expresses its consent is required.
- The State which has consented to be bound by the treaty is referred to as the "**Contracting State**" and shall refrain from acts which would defeat the object and purpose of the treaty during the period preceding its entry into force, provided that the entry into force of the treaty is not unduly delayed.

## **B. RESERVATIONS TO A TREATY**

- **Concept:** is a unilateral statement made by a State when expressing its consent to be bound by a treaty, in order to exclude or modify the legal effects of certain provisions of the treaty in their application to the reserving State. They affect the integrity of the treaty (differentiated regimes within itself).
- **Typology (objective of the reservation):**
  - to exclude the application of one or more provisions of the treaty which the reserving State does not wish to accept (exclusionary reservation)
  - or wishes to have interpreted in a particular way as far as it is concerned (interpretative reservation).
- **VCLT regime of reservations:** liberal approach and excellent legal technique, rigorously resolving very complex problems relating to the formulation of reservations, the integration of the reserving State as a party to the treaty and the effects of reservations and objections to reservations.
  - Possibility of formulating reservations is excluded only in the cases provided for in article 19 VCLT:
    - the reservation is prohibited by the treaty;
    - the treaty provides that only specified reservations, which do not include the reservation in question, may be made;

- in cases not failing under above possibilities, the reservation is incompatible with the object and purpose of the treaty.
- The formulation of a reservation that is admissible under these criteria does not automatically make the reserving State a party to the treaty, but depends on the reaction of the other contracting States. Art. 20 VCLT (different situations):
  - In case of a reservation expressly authorized by a treaty: it is not require any subsequent acceptance by the other contracting States unless the treaty so provides.
  - When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
  - When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
  - In other cases and unless the treaty otherwise provides:
    - ❖ acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

- ❖ an objection by another contracting State to a reservation does not preclude the entry into force of the treaty between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
- ❖ an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
- When it is considered that a State has accepted a reservation: if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.
- Effects of reservations VCLT: Depend on the acceptance or objection of the reservations by the other Contracting States:
  - In the relations between the reserving State and the State accepting the reservation: the provisions of the treaty to which the reservation refers are modified to the extent determined by the reservation.
  - In the relations between the reserving State and the objecting State, but without refusing to allow the treaty to enter into force between them, the provisions to which the reservation refers do not apply between them to the extent determined by the reservation.

- In the relations between the State formulating a reservation and the State objecting to it, expressing furthermore its unequivocal intention that the treaty should not enter into force between them, no treaty relationship is established between them.

## C. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

- Article 24 VCLT: a treaty shall enter into force, as a legal instrument with binding effect between the Parties, in the manner and on the date specified therein or agreed upon by the negotiating States.
  - In the absence of an express provision: as soon as the consent of all the negotiating States to be bound by the treaty has been recorded.
  - In practice, multilateral treaties therefore often fix the minimum number of manifestations of consent of States required for the treaty to enter into force, and sometimes additional conditions are added.
- Possibility of provisional application, prior to their formal entry into force: Provisional application is exceptional and will only occur if the States parties so agree (Article 25 VCLT).
  - Termination: if that State notifies the negotiating States of its intention not to become a party to the treaty, unless the treaty or the negotiating States have agreed otherwise.
- The State which has consented to be bound by the treaty and with respect to which the treaty is in force is referred to as "**State party**" and the obligations and rights set forth therein are fully applicable.



➤ Effects on third States:

- General rule: article 34 VCLT a treaty does not create obligations or rights for a third State which is not a party to the treaty without its consent (*pacta tertiis neque prodest neque nocet*).
- Exceptions:
  - Article 35 VCLT: a treaty may give rise to an obligation to a third State if the parties to the treaty intend to create such an obligation and only if the third State expressly accepts this obligation in writing (genuine written collateral agreement)
  - Article 38 VCLT: the rule set forth in a treaty may become binding on a third State as a customary rule of general international law recognized as such.
  - Article 36 VCLT: a treaty may confer a right on a third State if that is the intention of the States parties to the treaty and if the third State assents thereto, such assent shall be presumed to have been given in the absence of any indication to the contrary.
- The third State which accepts to benefit from the right granted to it must comply with any conditions that have been established. The right created is of lesser stability since it may be revoked or modified by the parties to the treaty, unless it is established otherwise (necessity of third State consent).

## D. OBSERVATION, APPLICATION AND INTERPRETATION OF TREATIES

- In order to give effect to the provisions of a treaty, the parties are required to observe, apply and interpret it in accordance with the regime provided for in the VCLT.
  - Fundamental principle: *pacta sunt servanda* rule (article 26 VCLT), by virtue of which "every treaty in force is binding on the parties and must be performed by them in good faith" and, as a general rule, domestic law cannot be invoked as a justification for non-performance. States parties must:
    - comply with its provisions by ensuring their application both in their international relations and in their domestic law: obligation to incorporate the treaty into their domestic law, in accordance with their own constitutional and legislative provisions.
  - Temporal scope of application: the principle of non-retroactivity of treaties, unless there is evidence of the contrary intention of the parties.
  - Territorial scope of application of treaties: a treaty shall be binding on each of the parties for the duration of its operation and in respect of the whole of its territory, unless a different intention is recorded.
- Problems regarding application: States parties to a treaty conclude a subsequent treaty on the same subject matter.
  - Starting point: presumption of compatibility between the provisions of the two treaties.

- safeguarding as far as possible the joint validity of both treaties (prior and subsequent), except insofar as their provisions are incompatible.
- In cases where the incompatibilities between the provisions are irreducible, it is necessary to apply priority criteria to overcome the contradictions.
  - Article 30 VCLT: series of simple rules that seek to resolve the various situations that may arise when successive treaties exist on the same subject matter, seeking to safeguard the continuity of the application of the treaties to the extent compatible with the will of the parties:
    - ❖ 1<sup>st</sup>: The provisions of the Charter of the United Nations prevail over any other treaty, as provided for in Article 103 of the Charter itself.
    - ❖ 2<sup>nd</sup>: Priority clauses that may have been established in the treaties themselves are admitted:
      - when a treaty declares itself to be subordinate to another treaty, the provisions of the latter (principal treaty) shall prevail.
    - ❖ 3<sup>rd</sup>: Cases of no priority clauses:
      - Cases where all the parties to the earlier treaty are also parties to the later treaty, the provisions of the latter (main treaty) will take precedence.
      - Cases where the parties to the earlier treaty are not all parties to the later treaty, their mutual relations are governed by the earlier or later treaty (prior or subsequent) to which they are both parties.

- **Interpretation:** the operation intended to determine the meaning and scope of the provisions of a treaty.
  - The rules on the interpretation: Articles 31 to 33 VCLT (expressive of customary law on the subject).
    - Article 31,1 VCLT: "general rule of interpretation": *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.*
      - ❖ The essential element of the general rule for treaty interpretation is the "ordinary meaning" of the terms of the treaty: The text must be presumed to be the authentic manifestation of the intention of the parties and that, consequently, the starting point of interpretation is the literal meaning of the text.
      - ❖ The interpretation of the ordinary meaning of the terms used must be made in good faith, in their context and in the light of the object and purpose of the treaty, so that it may produce its "useful effect" in accordance with the letter and spirit of the text.
        - "context": elements, both intrinsic (interpretative agreements concluded between the parties on the occasion of the conclusion of the treaty) and extrinsic (interpretative agreements concluded subsequently or resulting from subsequent practice and relevant rules of international law applicable between the parties).

- ❖ Only a term shall be given a "special meaning", different from the ordinary meaning of the terms used, if it is established that this was the intention of the parties.
- Article 32 VCLT: "supplementary means of interpretation", only in order to confirm the interpretation made in accordance with the general rule or when such an interpretation leaves the meaning of the text "ambiguous or obscure" or leads to a "manifestly absurd" result. In particular:
  - ❖ The so-called "travaux préparatoires" of the treaty
  - ❖ The "circumstances of its conclusion".
- Texts authenticated in several languages: equal value, unless it has been agreed that one of the texts shall prevail in case of discrepancy, and they shall be presumed to have the same meaning. When, in spite of everything, an insurmountable difference of meaning, the meaning which best reconciles the texts shall be adopted, having regard to the object and purpose of the treaty.
- Situations affecting the normal regime of observance and application of treaties:
  - Amendment or modification
  - Determination of their invalidity (nullity),
  - Termination
  - Suspension.

## E. AMENDMENT AND MODIFICATION OF TREATIES

- Means of amendment or modification procedures: Articles 39 to 41 VCLT. Distinction based not on the extent of the changes introduced, but the number of parties affected (all or only some):
  - **“Amendment”**: Cases in which the revision process is carried out among all the parties to the treaty.
    - Article 39 VCLT: General rule “*A treaty may be amended by agreement between the parties*”.
      - ❖ Process of amendment of multilateral treaties: Article 40 VCLT-41 VCLT.
      - ❖ In order to ensure the integrity of consent: Guarantees of notification and participation of all parties.
    - The agreement amending a treaty does not bind any State party that does not become a party to that agreement: The amending agreement thus constitutes a kind of separate treaty. The relations between the States parties to the original treaty that do not become parties to it are governed by the provisions relating to the application of successive treaties relating to the same subject-matter.
  - **“Modification”**: cases in which the process affects only some of the parties to the treaty.

- Article 41 VCLT: provided that it is not prohibited by the treaty and that such modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations under the treaty.
- They shall give notice to the other parties of their intention to conclude the modification agreement and the contents of such agreement.

## F. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (Part V VCLT)

- Part V Grounds for nullity or termination of a treaty, the withdrawal of a party, or the suspension of its operation: relatively innovative provisions.
  - General provisions: limits and precautions to safeguard the validity and integrity of treaties.
    - Article 42 VCLT: the validity and continuance in force of treaties may be altered only for the reasons and under the conditions provided for in the Convention (taxative conditions) or in the treaty itself.
    - Article 43 VCLT: In all cases *shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.*
    - Article 44 VCLT: In principle, the grounds for invalidity, termination or suspension of operation must arise in respect of the treaty as a whole, unless the treaty itself provides or otherwise agreed by the parties or when the following exceptional conditions are met:
      - ❖ the clauses are severable from the remainder of the treaty,
      - ❖ the clauses did not constitute an essential basis of the consent of the other parties to be bound by the treaty as a whole,



- ❖ continued performance of the remainder of the treaty would not be unjust.
- Lost of the right to invoke such circumstances: if it has so expressly agreed or has behaved in such a manner that it may be considered as having acquiesced in the validity of the treaty or to its continuation in force.
- **Invalidity of treaties:**
  - Grounds for the invalidity: serious anomalies which occurred at the time of the conclusion of the treaty, and which have been discovered subsequently.
    - ❖ Some derive from the existence of a defect in the consent of the State:
      - Irregularity of the manifestation of consent under domestic law (articles 46 and 47).
      - Error (article 48),
      - Fraud (article 49),
      - Corruption of the representative of a State (article 50),
      - Coercion of a State by a State (article 51)
      - Coercion of a State by threat or use of force (article 52).
    - ❖ Content of the treaty in conflict with a peremptory norm of general international law (jus cogens) (Article 53).
  - Detailed rules determining the conditions under which grounds for invalidity may be validly invoked and the procedures to be followed for this purpose.

- The consequences of the invalidity:
  - ❖ General terms Article 69 VCLT,
    - *The provisions of a void treaty have no legal force.*
    - The acts based on that treaty:
      - ✓ each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
      - ✓ That have been performed in good faith during the time preceding shall not be considered unlawful.
  - ❖ Cases of multilateral treaties where the consent of a given State to be bound by is vitiated: the consequences of the nullity affect only the relations of that State with the other parties to the treaty, but not the relations of those other parties with each other.
  - ❖ Cases of invalidity for contradiction to a norm of jus cogens: the nullity affects all the parties to the treaty, which must also eliminate as far as possible the consequences of any act which has been performed and adjust their relations with each other, and to bring their mutual relations into conformity with the peremptory norm of general international law.

- **Termination or suspension:** In general, it may occur either because it is established that this is the will of the parties or because certain circumstances so require.
  - Termination of a treaty or suspension of its operation based on the will of the parties:
    - ❖ such measures may take place either by virtue of the provisions of the treaty or by consent of the parties, after consultation with the other contracting States.
    - ❖ Article 56 VCLT: when the treaty so provides or when it is established that such was the intention of the parties or when the right of renunciation or withdrawal may be inferred from the nature of the treaty.
    - ❖ Article 58 VCLT suspension of the operation of a multilateral treaty by agreement between some of the parties: only when such suspension is provided for by the treaty or, when it is not prohibited by the treaty, provided that such suspension does not affect the enjoyment of the rights and performance of the obligations arising out of the treaty and is not incompatible with the object and purpose of the treaty.
  - Termination or suspension of the operation as a consequence of certain supervening events: VCLT lists:
    - ❖ The conclusion of a subsequent treaty between all the parties, if it is established that such is the intention of the parties, or the subsequent treaty is incompatible with the earlier treaty (Article 59);

- ❖ as a consequence of its serious breach by one of the parties (Article 60).
- ❖ impossibility of subsequent performance due to the permanent disappearance or destruction of an object indispensable for the performance of the treaty (Article 61);
- ❖ fundamental change of circumstances in relation to those existing at the time of the conclusion of the treaty (article 62);
- ❖ emergence of a new peremptory norm of general international law (article 64).
- Legal consequences of:
  - ❖ The termination of a treaty:
    - those provided for in the treaty itself or which the parties may agree, or
    - the extinction of the obligations which the parties had assumed under the treaty, without this having any retroactive effect on the rights, obligations or legal situations created prior to the termination of the treaty.
    - Exception: Treaty becomes null and void because it conflicts with a new peremptory norm of general international law (jus cogens), the termination of the treaty shall exempt the parties from the obligation to continue to perform it and the rights, obligations or legal situations created prior to its termination may only be maintained thereafter to the extent that their maintenance is not in itself in conflict with the new peremptory norm of law.

- ❖ The suspension of the operation of treaties:
  - Those foreseen by the parties,
  - failing that, "the parties between which the operation of the treaty is suspended shall be exempted from the obligation to perform the treaty in their mutual relations during the period of suspension".
- Procedure to be followed: Articles 65 to 68 VCLT.
  - ❖ A party which alleges a ground for contesting the validity of a treaty, terminating it, withdrawing from it, or suspending its operation shall notify the other parties of its claim.
  - ❖ If after a period of time which, except in cases of special urgency, shall not be less than three months:
    - no party has raised objections, the notifying party may adopt the measure it has proposed.
    - If any of the other parties raises an objection, a legal dispute will arise and a solution must be sought by the peaceful means indicated in Article 33 of the Charter, without prejudice to other provisions in force between the parties with respect to the settlement of disputes.
      - ✓ If within 12 months no settlement has been reached, article 66 VCLT:
        - i. compulsory arbitration procedure

- ii. or recourse to the ICJ (disputes relating to the challenge to the validity of a treaty deriving from the application of the rules of jus cogens),
- iii. and a special conciliation procedure indicated in the Annex to the Convention in all other cases.

# **THE CONCLUSION OF TREATIES UNDER SPANISH LAW**

➤ ***Applicable laws:***

- Constitution of December 6, 1978.
- Relevant norms of the block of constitutionality: Organic Law 2/1979, of October 3, 1979, on the Constitutional Court and Organic Law 3/1980, of April 22, 1980, on the State Council.
- Law 25/2014 of 27 November on Treaties and other International Agreements.
- Some Statutes of Autonomy also contain provisions on this matter.

➤ **Capacity to conclude treaties:**

- International relations are the exclusive competence of the State (Article 149 of the Constitution) meaning the central State Administration and not the Autonomous Communities (CCAA).
  - The Constitutional Court interpretation of the concept of "international relations: matters such as "treaties, peace and war, recognition of States, foreign representation, international responsibility, etc." belong to the sphere of foreign relations over which the State has exclusive competence and that "in Spanish law the treaty making power belongs to the sphere of international relations.
- Law 25/2014 on Treaties and other international: it is excluded that the Autonomous Regions can per se enter into international treaties, not even in matters within their competence, since this is an attribution that belongs exclusively to the State.



- However, Law 25/2014 recognizes to the Autonomous Communities:
  - ❖ the right to propose the conclusion of treaties on matters of interest to them (right of initiative),
  - ❖ The right to be informed of the negotiation of international treaties that affect their competences (right to information) and
  - ❖ The right to request the Government to be part of the Spanish delegation negotiating such treaties (right to participation).
  - ❖ to enter into so-called "administrative international agreements" (entered into in execution of a treaty and governed by international law) which are not constitutive of a treaty and "non-normative international agreements" (declarations of intent or merely "political" commitments) which are neither constitutive of a treaty nor a source of international obligations.
- **Procedure for the conclusion of treaties:** system of shared competences in which various State bodies intervene in their own right: mainly the Government, the Cortes Generales and the King.
  - Article 97 of the Constitution, the Government "directs domestic and foreign policy", one of the main manifestations of which is precisely the conclusion of international treaties.
    - The competence of the Government is very broad but it is not absolute, since its action is controlled by the Cortes Generales.

- must be subject to the specific rules on international treaties contained in articles 93 to 96 of the Constitution.
- The King is responsible for "manifesting" the consent of the State to be bound by treaties, by means of an act which does not imply the exercise of powers (formal or protocolary character).
- **Proceedings relating to the material elaboration of the text of the treaty:**
  - The decision-making powers in this phase correspond essentially to the Council of Ministers and the direction of administrative actions to the Ministry of Foreign Affairs and Cooperation, although the different Ministerial Departments have been recognized as having certain competences in the negotiation, adoption and authentication of the text of the treaties.
  - The MFA, on the proposal of the relevant ministry, shall appoint the representatives of the "Kingdom of Spain and issue their full powers.
    - Law 25/2014 list of persons who, by virtue of their functions, may represent Spain for the negotiation, adoption and authentication of the text of a treaty, without the need to present full powers.
    - International treaties may be negotiated by the ministerial departments within the scope of their respective competences, in coordination with the Ministry of Foreign Affairs and Cooperation, and the negotiators of the competent ministerial departments may themselves proceed to the adoption of the text.

- The **authentication of the text**: must be authorized by the Council of Ministers, at the request of the Ministry of Foreign Affairs and Cooperation and, where appropriate, jointly with the head of the competent Ministry.
- The **consent**:
  - Regulated in various provisions of the current Constitution and completed by the Law 25/2014 (different scenarios):
    - Constitutional regime: it is up to the Government to take the decision on the provision of the consent of the State to be bound, for which the prior authorization of the General Courts is required in the cases provided for in Articles 93 and 94, 1 of the Constitution.
      - ❖ Treaties requiring authorization by means of an organic law: treaties by which an international organization or institution is attributed the exercise of competences derived from the Constitution. Article 81, 2 of the Constitution requires an absolute majority of Congress in a final vote on the whole of the bill.
      - ❖ Treaties requiring prior authorization by the General Courts but not a law (ad hoc decision, art. 74,1 CE): treaties that concern matters of particular relevance, such as:
        - Treaties of a political nature.
        - Treaties or agreements of a military nature.

- Treaties or agreements affecting the territorial integrity of the State, or the fundamental rights and duties established in Title I.
  - Treaties or agreements that involve financial obligations for the Treasury.
  - Treaties or agreements involving the amendment or repeal of any law or requiring legislative measures for their implementation.
  - ❖ Treaties which do not require the authorization of the General Courts: The consent may be given directly by the Government, by virtue of the general powers for the direction of foreign action (art. 74.2).
    - Obligation to inform The Congress and the Senate immediately.
  - Law 25/2014: In the case of "administrative international agreements" and "non-normative international agreements autonomous procedures that do not require parliamentary authorization for their conclusion.
- Can the State conclude **Treaties containing stipulations contrary to the Constitution?**: yes, but it needs to previously amend the Constitution to eliminate the antinomy (art. 95 constitutional review). Previous request to the Constitutional Court (binding declaration)
- The proceedings depend, then, on the qualification of the nature of the treaty:
- Contrary to CE: Constitutional Court.

- In other cases: prior consultation with the Council of State (art. 22 Organic Law 31/1980 of April 22, 1980, on the Council of State). The opinion of the Permanent Commission of the Council of State is mandatory, but the qualification is not binding (in practice, the Government has always followed them).



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