

Annex II - 3

United Nations Treaty Collection

Treaty Reference Guide 1999

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(This glossary is intended as a general guide and is not presumed to be exhaustive)

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Part I

Definition of key terms used in the UN Treaty Collection

Introduction

This introductory note seeks to provide a basic - but not an exhaustive - overview of the key terms employed in the United Nations Treaty Collection to refer to international instruments binding at international law: treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and exchange of notes. The purpose is to facilitate a general understanding of their scope and function.

Over the past centuries, State practice has developed a variety of terms to refer to international instruments by which States establish rights and obligations among themselves. The terms most commonly used are the subject of this overview. However, a fair number of additional terms have been employed, such as "statutes", "covenants", "accords" and others. In spite of this diversity of terminology, no precise nomenclature exists. In fact, the meaning of the terms used is variable, changing from State to State, from region to region and instrument to instrument. Some of the terms can easily be interchanged: an instrument that is designated "agreement" might also be called "treaty".

The title assigned to such international instruments thus has normally no overriding legal effects. The title may follow habitual uses or may relate to the particular character or importance sought to be attributed to the instrument by its parties. The degree of formality chosen will depend upon the gravity of the problems dealt with and upon the political implications and intent of the parties.

Although these instruments differ from each other by title, they all have common features and international law has applied basically the same rules to all of these instruments. These rules are the result of long practice among the States, which have accepted them as binding norms in their mutual relations. Therefore, they are regarded as international customary law. Since there was a general desire to codify these customary rules, two international conventions were negotiated. The 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention"), which entered into force on 27 January 1980, contains rules for treaties concluded between States. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention"), which has still not entered into force, added rules for treaties with international organizations as parties. Both the 1969 Vienna Convention and the 1986 Vienna Convention do not distinguish between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet certain common requirements.

Article 102 of the Charter of the United Nations provides that "every treaty and every international agreement entered into by any Member State 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". All treaties and international agreements registered or filed and recorded with the Secretariat since 1946 are published in the UNTS. By the terms "treaty" and "international agreement", referred to in Article 102 of the Charter, the broadest range of instruments is covered. Although the General Assembly of the UN has never laid down a precise definition for both terms and never clarified their mutual relationship, Art.1 of the General Assembly Regulations to Give Effect to Article 102 of the Charter of the United

Nations provides that the obligation to register applies to every treaty or international agreement "whatever its form and descriptive name". In the practice of the Secretariat under Article 102 of the UN Charter, the expressions "treaty" and "international agreement" embrace a wide variety of instruments, including unilateral commitments, such as declarations by new Member States of the UN accepting the obligations of the UN-Charter, declarations of acceptance of the compulsory jurisdiction of the International Court of Justice under Art.36 (2) of its Statute and certain unilateral declarations that create binding obligations between the declaring nation and other nations. The particular designation of an international instrument is thus not decisive for the obligation incumbent on the Member States to register it.

It must however not be concluded that the labeling of treaties is haphazard or capricious. The very name may be suggestive of the objective aimed at, or of the accepted limitations of action of the parties to the arrangement. Although the actual intent of the parties can often be derived from the clauses of the treaty itself or from its preamble, the designated term might give a general indication of such intent. A particular treaty term might indicate that the desired objective of the treaty is a higher degree of cooperation than ordinarily aimed for in such instruments. Other terms might indicate that the parties sought to regulate only technical matters. Finally, treaty terminology might be indicative of the relationship of the treaty with a previously or subsequently concluded agreement.

Treaties

The term "treaty" can be used as a common generic term or as a particular term which indicates an instrument with certain characteristics.

(a) Treaty as a generic term: The term "treaty" has regularly been used as a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation. Both the 1969 Vienna Convention and the 1986 Vienna Convention confirm this generic use of the term "treaty". The 1969 Vienna Convention defines a treaty as "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". The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties. In order to speak of a "treaty" in the generic sense, an instrument has to meet various criteria. First of all, it has to be a binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making power. Thirdly, it has to be governed by international law. Finally the engagement has to be in writing. Even before the 1969 Vienna Convention on the Law of Treaties, the word "treaty" in its generic sense had been generally reserved for engagements concluded in written form.

(b) Treaty as a specific term: There are no consistent rules when state practice employs the terms "treaty" as a title for an international instrument. Usually the term "treaty" is reserved for matters of some gravity that require more solemn agreements. Their signatures are usually sealed and they normally require ratification. Typical examples of international instruments designated as "treaties" are Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties and Treaties of Friendship, Commerce and Co-operation. The use of the term

"treaty" for international instruments has considerably declined in the last decades in favor of other terms.

Agreements

The term "agreement" can have a generic and a specific meaning. It also has acquired a special meaning in the law of regional economic integration.

(a) Agreement as a generic term: The 1969 Vienna Convention on the Law of Treaties employs the term "international agreement" in its broadest sense. On the one hand, it defines treaties as "international agreements" with certain characteristics. On the other hand, it employs the term "international agreements" for instruments, which do not meet its definition of "treaty". Its Art.3 refers also to "international agreements not in written form". Although such oral agreements may be rare, they can have the same binding force as treaties, depending on the intention of the parties. An example of an oral agreement might be a promise made by the Minister of Foreign Affairs of one State to his counterpart of another State. The term "international agreement" in its generic sense consequently embraces the widest range of international instruments.

(b) Agreement as a particular term: "Agreements" are usually less formal and deal with a narrower range of subject-matter than "treaties". There is a general tendency to apply the term "agreement" to bilateral or restricted multilateral treaties. It is employed especially for instruments of a technical or administrative character, which are signed by the representatives of government departments, but are not subject to ratification. Typical agreements deal with matters of economic, cultural, scientific and technical co-operation. Agreements also frequently deal with financial matters, such as avoidance of double taxation, investment guarantees or financial assistance. The UN and other international organizations regularly conclude agreements with the host country to an international conference or to a session of a representative organ of the organization. Especially in international economic law, the term "agreement" is also used as a title for broad multilateral agreements (e.g. the commodity agreements). The use of the term "agreement" slowly developed in the first decades of this century. Nowadays by far the majority of international instruments are designated as agreements.

(c) Agreements in regional integration schemes: Regional integration schemes are based on general framework treaties with constitutional character. International instruments which amend this framework at a later stage (e.g. accessions, revisions) are also designated as "treaties". Instruments that are concluded within the framework of the constitutional treaty or by the organs of the regional organization are usually referred to as "agreements", in order to distinguish them from the constitutional treaty. For example, whereas the Treaty of Rome of 1957 serves as a quasi-constitution of the European Community, treaties concluded by the EC with other nations are usually designated as agreements. Also, the Latin American Integration Association (LAIA) was established by the Treaty of Montevideo of 1980, but the subregional instruments entered into under its framework are called agreements.

Conventions

The term "convention" again can have both a generic and a specific meaning.

(a) Convention as a generic term: Art.38 (1) (a) of the Statute of the International Court of Justice refers to "international conventions, whether general or particular" as a source of law, apart from international customary rules and general principles of international law and - as a secondary source - judicial decisions and the teachings of the most highly qualified publicists. This generic use of the term "convention" embraces all international agreements, in the same way as does the generic term "treaty". Black letter law is also regularly referred to as "conventional law", in order to distinguish it from the other sources of international law, such as customary law or the general principles of international law. The generic term "convention" thus is synonymous with the generic term "treaty".

(b) Convention as a specific term: Whereas in the last century the term "convention" was regularly employed for bilateral agreements, it now is generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of states. Usually the instruments negotiated under the auspices of an international organization are entitled conventions (e.g. Convention on Biological Diversity of 1992, United Nations Convention on the Law of the Sea of 1982, Vienna Convention on the Law of Treaties of 1969). The same holds true for instruments adopted by an organ of an international organization (e.g. the 1951 ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted by the International Labour Conference or the 1989 Convention on the Rights of the Child, adopted by the General Assembly of the UN).

Charters

The term "charter" is used for particularly formal and solemn instruments, such as the constituent treaty of an international organization. The term itself has an emotive content that goes back to the Magna Carta of 1215. Well-known recent examples are the Charter of the United Nations of 1945 and the Charter of the Organization of American States of 1952.

Protocols

The term "protocol" is used for agreements less formal than those entitled "treaty" or "convention". The term could be used to cover the following kinds of instruments: (a) A Protocol of Signature is an instrument subsidiary to a treaty, and drawn up by the same parties. Such a Protocol deals with ancillary matters such as the interpretation of particular clauses of the treaty, those formal clauses not inserted in the treaty, or the regulation of technical matters. Ratification of the treaty will normally ipso facto involve ratification of such a Protocol.

(b) An Optional Protocol to a Treaty is an instrument that establishes additional rights and obligations to a treaty. It is usually adopted on the same day, but is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a "two-tier system". The Optional Protocol to the International Covenant on Civil and Political Rights of 1966 is a well-known example.

(c) A Protocol based on a Framework Treaty is an instrument with specific substantive obligations that implements the general objectives of a previous framework or umbrella convention. Such protocols ensure a more simplified and accelerated treaty-making process and have been used particularly in the field of international environmental law. An example is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer adopted on the basis of Arts.2 and 8 of the 1985 Vienna Convention for the Protection of the Ozone Layer.

(d) A Protocol to amend is an instrument that contains provisions that amend one or various former treaties, such as the Protocol of 1946 amending the Agreements, Conventions and Protocols on Narcotic Drugs.

(e) A Protocol as a supplementary treaty is an instrument which contains supplementary provisions to a previous treaty, e.g. the 1967 Protocol relating to the Status of Refugees to the 1951 Convention relating to the Status of Refugees.

(f) A Proces-Verbal is an instrument that contains a record of certain understandings arrived at by the contracting parties.

Declarations

The term "declaration" is used for various international instruments. However, declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration. Declarations can however also be treaties in the generic sense intended to be binding at international law. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations. Ascertaining the intention of the parties can often be a difficult task. Some instruments entitled "declarations" were not originally intended to have binding force, but their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage. Such was the case with the 1948 Universal Declaration of Human Rights. Declarations that are intended to have binding effects could be classified as follows:

(a) A declaration can be a treaty in the proper sense. A significant example is the Joint Declaration between the United Kingdom and China on the Question of Hong Kong of 1984.

(b) An interpretative declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter.

(c) A declaration can also be an informal agreement with respect to a matter of minor importance.

(d) A series of unilateral declarations can constitute binding agreements. A typical example are declarations under the Optional Clause of the Statute of the International Court of Justice that create legal bonds between the declarants, although not directly addressed to each other. Another example is the unilateral Declaration on the Suez Canal and the arrangements for its operation issued by Egypt in 1957 which was considered to be an engagement of an international character.

Memoranda of Understanding

A memorandum of understanding is an international instrument of a less formal kind. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. It is typically in the form of a single instrument and does not require ratification. They are entered into either by States or International Organizations. The United Nations usually concludes memoranda of understanding with Member States in order to organize its peacekeeping operations or to arrange UN Conferences. The United Nations also concludes memoranda of understanding on co-operation with other international organizations.

Modus Vivendi

A modus vivendi is an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an informal way, and never requires ratification.

Exchange of Notes

An "exchange of notes" is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.

Part II

Glossary of terms relating to Treaty actions

Adoption

"Adoption" is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the states participating in the treaty-making process. Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question. A treaty can also be adopted by an international conference which has specifically been convened for setting up the treaty, by a vote of two thirds of the states present and voting, unless, by the same majority, they have decided to apply a different rule.

[Art.9, Vienna Convention of the Law of Treaties 1969]

Acceptance and Approval

The instruments of "acceptance" or "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. In the practice of certain states acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state.

[Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969]

Accession

"Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depository, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question.

[Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]

Act of Formal Confirmation

"Act of formal confirmation" is used as an equivalent for the term "ratification" when an international organization expresses its consent to be bound to a treaty.

[Arts.2 (1) (b bis) and 14, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986]

Amendment

The term "amendment" refers to the formal alteration of treaty provisions affecting all the parties to the particular agreement. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Many multilateral treaties lay down specific requirements to be satisfied for amendments to be adopted. In the absence of such provisions, amendments require the consent of all the parties.

[Art.40, Vienna Convention of the Law of Treaties 1969]

Authentication

The term "authentication" refers to the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, states cannot unilaterally change its provisions. If states which negotiated a given treaty do not agree on specific procedures for authentication, a treaty will usually be authenticated by signature, signature ad referendum or the initialing by the representatives of those states.

[Art.10, Vienna Convention on the Law of Treaties 1969]

Correction of Errors

If, after the authentication of a text, the signatory and contracting states are agreed that it contains an error, it can be corrected by initialing 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. If there is a depository, the depository must communicate the proposed corrections to all signatory and contracting states. In the UN practice, the Secretary-General, in his function as depository, informs all parties to a treaty of the errors and the proposal to correct it. If, on the expiry of an appropriate time-limit, no objections are raised by the signatory and contracting states, the depository circulates a proces-verbal of rectification and causes the corrections to be effected in the authentic text(s).

[Art.79, Vienna Convention on the Law of Treaties 1969]

Declarations

Sometimes states make "declarations" as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty. Usually, declarations are made at the time of the deposit of the corresponding instrument or at the time of signature.

Definitive Signature

When the treaty is not subject to ratification, acceptance or approval, "definitive signature" establishes the consent of the state to be bound by the treaty. Most bilateral treaties dealing with more routine and less politicized matters are brought into force by definitive signature, without recourse to the procedure of ratification.

[Art.12, Vienna Convention on the Law of Treaties 1969]

Deposit

After a treaty has been concluded, the written instruments, which provide formal evidence of consent to be bound, and also reservations and declarations, are placed in the custody of a depository. Unless the treaty provides otherwise, the deposit of the instruments of ratification, acceptance, approval or accession establishes the consent of a state to be bound by the treaty. For treaties with a small number of parties, the depository will usually be the government of the state on whose territory the treaty was signed. Sometimes various states are chosen as depositories. Multilateral treaties usually designate an international organization or the Secretary-General of the United Nations as depositories. The depository must accept all notifications and documents related to the treaty, examine whether all formal requirements are met, deposit them, register the treaty and notify all relevant acts to the parties concerned. [Arts.16, 76 and 77, Vienna Convention on the Law of Treaties 1969]

Entry into Force

Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of states to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of states must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries have expressed their consent or the conditions have been satisfied. A treaty enters into force for those states which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally.

[Art.24, Vienna Convention on the Law of Treaties 1969]

Exchange of Letters/Notes

States may express their consent to be bound by an "exchange of letters/notes". The basic characteristic of this procedure is that the signatures do appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of both letters or notes, each of the parties having in their possession one letter or note signed by the representative of the other party. In practice, the second letter or note, usually the letter or note in response, will typically reproduce the text of the first. In a bilateral treaty, letters or notes may also be exchanged to indicate that all necessary domestic procedures have been completed.

[Art.13, Vienna Convention on the Law of Treaties 1969]

Full Powers

"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, authenticating the text of a treaty, expressing the consent of a state to be bound by a treaty, or for accomplishing any other act with respect to that treaty. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their state for the purpose of

all acts relating to the conclusion of a treaty and do not need to present full powers. Heads of diplomatic missions do not need to present full powers for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited. Likewise, representatives accredited by states to an international conference or to an international organization or one of its organs do not need to present full powers for the purpose of adopting the text of a treaty in that conference, organization or organ.

[Art.2 (1) (c) and Art.7 Vienna Convention on the Law of Treaties 1969]

Modification

The term "modification" refers to the variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable. If the treaty is silent on modifications, they are allowed only if the modifications do not affect the rights or obligations of the other parties to the treaty and do not contravene the object and the purpose of the Treaty.

[Art.41, Vienna Convention on the Law of Treaties 1969]

Notification

The term "notification" refers to a formality through which a state or an international organization communicates certain facts or events of legal importance. Notification is increasingly resorted to as a means of expressing final consent. Instead of opting for the exchange of documents or deposit, states may be content to notify their consent to the other party or to the depository. However, all other acts and instruments relating to the life of a treaty may also call for notifications.

[Arts.16 (c), 78 etc., Vienna Convention on the Law of Treaties 1969]

Objection

Any signatory or contracting state has the option of objecting to a reservation, inter alia, if, in its opinion, the reservation is incompatible with the object and purpose of the treaty. The objecting state may further declare that its objection has the effect of precluding the entry into force of the treaty as between objecting and reserving states.

[Art.20-23, Vienna Convention on the Law of Treaties 1969]

Provisional Application

A treaty or a part of a treaty can be applied provisionally, if the treaty itself so provides or if the contracting parties have in some other manner so agreed. The provisional application ends once the treaty enters into force.

[Art.25, Vienna Convention on the Law of Treaties 1969]

Ratification

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depository to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty

on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

[Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]

Registration and Publication

Article 102 of the Charter of the United Nations provides that "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". Treaties or agreements that are not registered cannot be invoked before any organ of the United Nations. Registration promotes transparency and the availability of texts of treaties to the public. Article 102 of the Charter and its predecessor, Article 18 of the Pact of the League of Nations, have their origin in one of Woodrow Wilson's Fourteen Points in which he outlined his idea of the League of Nations: "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always openly and in the public view".

[Art.80, Vienna Convention on the Law of Treaties 1969]

Reservation

A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.

[Arts.2 (1) (d) and 19-23, Vienna Convention on the Law of Treaties 1969]

Revision

Revision has basically the same meaning as amendment. However, some treaties provide for a revision additional to an amendment (i.e., Article 109 of the Charter of the United Nations). In that case, the term "revision" refers to an overriding adoption of the treaty to changed circumstances, whereas the term "amendment" refers only to a change of singular provisions.

Signature ad referendum

A representative may sign a treaty "ad referendum", i.e., under the condition that the signature is confirmed by his state. In this case, the signature becomes definitive once it is confirmed by the responsible organ.

[Art.12 (2) (b), Vienna Convention on the Law of Treaties 1969]

Signature Subject to Ratification, Acceptance or Approval

Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates

an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.
[Arts.10 and 18, Vienna Convention on the Law of Treaties 1969]