DRAFTING A LEGAL TREATY

A treaty is an international agreement, generally concluded in writing, between two or more subjects of international law, in which they express their joint will to assume obligations to assume governed by international law or to renounce rights whether this agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation. It's a formally concluded or ratified agreement between states. It's used for formal agreements between states whose subject matter and provisions are governed by international law[1].

Black's Law dictionary defines a treaty as an agreement, contract between two or more sovereign states formally signed by commissioners properly authorized and solemnly ratified by several sovereign states under the international law[2].

Under international law, the law and practices pertaining to treaties is governed by Vienna Convention on the Law of Treaties. The Vienna Convention on the Law of Treaties refers to a 'Treaty' in its generic sense and defines it 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. Thus the term 'treaty' covers all forms of international instruments namely: treaty, convention, agreement, memorandum of understanding, protocol. Irrespective of the nomenclature, all negotiated and concluded international instruments create legal rights and obligation between parties[3].

There are two types of treaties, bilateral and multilateral treaty. Bilateral treaty is an international agreement between two sovereign states under international law while multilateral treaty is an international agreement between more than two sovereign states under international law. Bilateral and multilateral treaties essentially differ in the way they are concluded, their entry into force and their administration.

A bilateral treaty generally takes the form of a single instrument signed by the two parties or the exchange of two documents, diplomatic notes or letters, confirming the agreement of the parties. A multilateral treaty is made up of a single document. In exceptional circumstances, a multilateral treaty may be concluded by an exchange of documents if the number of signatories does not exceed three or four. International law is governed by the principle of contractual freedom. It does not stipulate any special form for treaties. It even recognizes the validity of oral agreements subject to evidence. Verbal treaties are nevertheless uncommon for reasons of legal certainty.

For a document drafted to be considered a treaty it must entail the following elements: Parties involved; if earlier definitions are anything to go by, parties involved in a treaty are states and

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[1] Federal Department of Foreign Affairs, FDFA, Directorate of International Law DIL on 'Practice Guide to International Treaties' 2015 edition

[2] 'What Is TREATY? Definition of TREATY (Black's Law Dictionary)'

[3] L&T Division, MEA ((SoP 16-01-2018) on 'Guidelines/SoP on the conclusion of International treaties in India,

sovereign nations that come together and draft the treaty as per their terms. Governed by international law; since parties involved in treaty making and ratification process are states but not individuals, there's the need of adopting international laws regulating the process rather than individual laws of each member state. In written form**:** in reference to the VCLT, it relates only to written treaties whether its embodied in a single instrument or more than a single instrument i.e. exchange of notes are invariably found in two or more instrument.

However it's worth noting that the law of treaties covers both formal agreements (conventions, charters, protocols, pact, act, statute) and informal agreements (agreed minutes, exchange of notes or letters, memorandum of understanding)[4]

Inasmuch as drafting of a particular treaty is solely at the discretion of the members contracting, there's certainly some of the aspect that international law has provided to be considered. That aspect is the form and composition of a treaty. They include: Title, Preamble, Main text, Final clauses, Annexes and Testimonium[5].

The title consists of two elements namely: designation (name); and description of it purpose. There's no consistent practice in naming of the treaties. Whereas agreement, convention and treaty are perhaps most common names used, other terms such as acts, charter, covenant and protocol are also used. The importance of a name is to maintain a clear distinction between treaties and Memorandum of Understanding, commonly known as MOUs. The purpose outlines the intention a particular treaty seeks to achieve. It's highly encouraged to keep the purpose of the treaty short, precise and clear but yet again, its construction is at the discretion of the contracting parties .i.e. the "Agreement for the implementation of the provisions of the United Nation Convention on the Law of the Sea of 10th December 1982 relating to the conservation and management of straddling fish stocks and Highly Migratory Fish stocks" of 1995 is almost invariably referred to as the "straddling stocks Agreement". Many treaties with long titles are referred to by the acronyms of the shorthand version of their title i.e. the United Nations Convention on the Law of Seas is commonly known as UNCLOS[6].

After its title, a treaty often begins with a preamble containing the following elements, namely: name of the parties involved and reasons[7]. The contracting parties are indicated using the names of the states or international organization or by the name of the bodies which have authority to conclude on behalf of each party. In treaties between several states (i.e. multilateral treaties) states are named according to their official designation in alphabetical order of the language of the text concerned. As

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[4] International Tribunal for the Law of the Sea, Case No. 16 on disputes concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar),where the International Tribunal on the Law of the Sea declared, within the meaning of article 15 of UNCLOS, that the "agreed minutes" of 1974 was not a legally binding agreement.

[5] Anthony Aust 'Modern Treaty Law and Practice' Cambridge University Press, first published 2000, reprinted 2002.

[6] United Nations Convention on the Law Of the Sea

[7] Ibid,

far as possible, the name of the parties should be uniform throughout the treaty (title, preamble, text and signatures)[8]. It also outlines reasons which have led the parties to conclude a treaty. The agreement's objective is often mentioned in one of the first article of the treaty[9]. Generally, the preamble doesn't contain legal norms and doesn't have immediate legal significance but it can be significant to the interpretation of the treaty.

The main body is the principle part of the treaty. It contains the substantive clauses agreed by the parties which are generally subdivided into articles which are further divided into sections and paragraphs. Articles-which may be grouped in parts, chapters or sections-, are numbered in Arabic numerals and less frequently in Roman ones. The main body contains in order the general provisions, special provisions and the final clauses. The general provisions are set out chronologically according to the steps to be undertaken by the parties for the execution of the treaty.

Special provisions are also set out in logical and systematic order. Reference to subsequent provisions for the sake of clarity, cross-referencing in the same treaty should not be used too frequently.

Final clauses are part of the main body of treaty but require particular attention as they can be a trap for the unwary parties. Often neglected during the negotiation and drafting of treaties, they nevertheless play a significant role in ensuring the correct application of the treaty provision. Final clauses can include articles on: relationship to other treaties; settlement of disputes; amendment and review; statute of annexes; signatures; ratification; accession; entry into force; duration ;withdrawal/termination; provisional application; territorial application; reservations ;depository; registration; and authentic texts.

Bilateral and multilateral treaties are often accompanied by annexes which govern technical issues or details. They may also contain exchanges of supplementary letters, application protocols, lists of all kinds, geographical maps. In principle, the annexes have to be considered as an integral part of treaties. They may also have to be signed by plenipotentiaries depending on their form (i.e. protocol) at least as far as bilateral treaties are concerned, with the exception of lists, maps and of course the exchange of notes for which initialing is preferred.

Testimonium is a Latin name for last, formal part of a treaty beneath which the representatives sign. A testimonium consist of the following formal statement:

> In witness whereof the undersigned, being duly authorized [by their respective Governments], have signed this [agreement] done at [place], this [ ] day of [ ], two thousand and [ ]

The exchange of letters or diplomatic notes is the simplest form of concluding a treaty. The term indicates exactly what is involved in the procedure used to establish this type of agreement. It

[8] Ibid,
[9] Ibid,

generally governs matters of lesser significance in isolation or annexed to another instrument. It's basically a method of concluding an agreement in situations where due to time constraints or emergency, states do not have enough time to negotiate a formal agreement. This method may also be used for amending/terminating an existing instrument through diplomatic channel.

Notes may also be exchanged to extend the validity of a treaty. The exchange of notes and correspondences related to thereto is conducted through the diplomatic channel. Its form is simple as compared to a treaty which is complex and advanced. The preamble and the final clauses are reduced to their simplest form. The first communication constitute the proposal and sets pout the rights and obligations which the contracting parties have agreed beforehand, including the terms of entry of force and denunciation. The second communication, which generally quotes the text of the first in full to avoid any misunderstanding, responds to it by restricting itself to expressing consent and customary salutations.

Unlike a treaty, exchange of letters is an informal agreement that can be legally binding depending on the circumstances leading to its drafting as propounded in the case of ***Bangladesh vs. Myanmar*** (**supra**)[10] where the International Tribunal on the Law of the Sea declared, within the meaning of article 15 of UNCLOS, that the "agreed minutes" of 1974 was not a legally binding agreement.

Legal drafting is an art, not a science; like any other art, it requires a disciplined ordering of material. Inasmuch as drafting skills are innate, it can, nevertheless, be improved by following simple precepts. The basic rules for drafting treaties are essentially the same as of any other legal instrument, whether a contract, legislation or a UN resolution[11]. These precepts are:

1. **Simplicity**: the first draft should be as uncomplicated as it can be, it will become complex as negotiations advance;
2. **See the text as a whole**: this is essential during redrafting;
3. **Consistency**: do not use different form of words to say the same thing ;adopt one(clear) system of numbering and stick to it; and
4. **Language**: adapt and use a language for drafting which you're comfortable with. Even if you're fluent in a foreign language, have your draft reviewed by a native speaker of that language for clarity purposes.

Initial draft should be done by one person. It's plausible for the initial draft to be done by the policy maker and have the same reviewed by a legal practitioner[12]. The form in which the initial draft might be presented in is merely on a personal preference. Have your draft read by a disinterested person, if

[10] **International Tribunal for the Law of the Sea, Case No. 16** on disputes concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)

[11] Anthony Aust '**Modern Treaty Law and Practice**' Cambridge University Press, first published 2000, reprinted 2002 pg 358.

[12] Ibd,

he cannot understand it, start over again[13]. In terms of style, use short and precise sentences by avoiding unnecessary words. Try limiting cross-reference; instead repeat the provision unless it's long. If there's need to refer to the same provisions several times, consider making it into a definition[14].

In numbering, include a correct numbering scheme in the first draft, otherwise it will be difficult to remember properly later. Once the initial draft has been presented, do not change the numbering of the articles unless the text becomes hopelessly complicated. Otherwise leave renumbering till the end. The negotiations will go more smoothly if the representatives do not have to refer to 'Article 7' which used to be 'Article 5'.

If the draft is translated and there is no exact equivalent word for a word, insert it after the approximate translation (e.g. 'public order' (***ordre publique***)').

If the draft is of an amending treaty and the amendments will be extensive, consider a replacement treaty or attaching a consolidated text to the amending treaty or to the final act 'for information'. i.e. the text of Euro-control Convention 1960 was extensively amended by a Protocol in 1981, and a non-authoritative consolidated text of the amended convention was attached to the Final Act of the amendment conference.

When presenting the draft, leave wide margins and always use double-spacing, though it double copying cost, it will be much appreciated by the reader. Include-as temporary measure- either explanatory notes or footnotes, or both, to the articles including references to precedents. Avoid endnotes which only irritate the reader. Use square brackets liberally to indicate alternative formulations, doubts or disagreements. At the top of the front page of the draft and redrafts, put the date when it was produced. Indicate the name of the originator (state or international organization).

In Kenya, it's the cabinet secretary for foreign affairs that deals with the process of drafting a treaty in which Kenya would like to be part of. Relevant cabinet secretaries consult with the cabinet secretary of foreign affairs who shall then initiate the treaty making process in conformity with the Treaty Making and Ratification Act.

The cabinet secretary of foreign affairs in consultation with the relevant cabinet secretaries initiates the tabling of all treaties, accompanied by a cabinet memorandum to the cabinet. The cabinet then starts the process of adoption and signature prior to Kenya expressing consent to be bound by ratification, acceptance, approval or accession. The cabinet secretary of foreign affairs will then submit two copies of the treaty accompanied by an explanatory Memorandum to be tabled during routine proceedings in the national assembly, pursuant to the standing orders[15].

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[13] Ibd,

[14] Ibd,

[15] 'Kenya Treaties' <http://treaties.mfa.go.ke/>

Once the treaty and the Explanatory Memorandum are tabled, copies will be distributed to the members of the national assembly[16]. The purpose of the Explanatory Memorandum is to provide the national assembly with information regarding the treaty particularly: why becoming a party to that treaty would be in Kenya's national interest and benefit; the advantages and disadvantages of Kenya becoming a party; any obligation which would accrue from becoming a party[17]; the likely economic, social, cultural, political, environmental and legal effects and impacts. The National Assembly shall then issue a certificate of approval to the ministry of foreign affairs. The adoption and signing of treaty is done at this stage.

Ratification is an approval of an act of its agent that lacked the authority to bind the principal legally. Ratification defines the international act in which 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, and in the case of multilateral treaties, the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. It's an international act by which the state signifies its consent to be bound by a treaty and includes acceptance, approval and accession where the treaty so provides.

Pursuant to article 2(6) of the constitution, treaties and conventions ratified shall form part of the laws of Kenya. Once the National Assembly gives its approval for ratification of a treaty, the Ministry for foreign Affairs prepares instruments of ratification, accession or acceptance for signatures.

As earlier noted, treaties are agreements between sovereign states governed by international law. That treaty clearly outlines the rights and obligations of each member state that are party to that treaty.

Since a treaty is a legally binding document, it contains a legal framework for seeking redress in resolving conflicts and disputes that may arise from either breach or misinterpretation of the same. Article 103 of the UN Charter imposes the supremacy of obligations stemming from the UN Charter for UN member states in case of conflict with obligations deriving from any other international agreement.

International Court of Justice is an international court established with exclusive jurisdiction to determine matters, pursuant to article 36(2) of the ICJ statute giving them the power to hear and determine matters dealing with:

1. Interpretation of a treaty;
2. Any question of international law;
3. The existence of any fact which, if established would constitute a breach of an international obligation; and

[16] Ibd,
[17] Ibd,

4. The nature or extent of the reparation to be made for the breach of an international obligation.

Judicial decisions are significant in interpreting treaties as to ascertain certainty where the terms of a treaty is a bit ambiguous or lacking clarity. In **Australia v Japan case**[18] on whaling in the Antarctic whose judgment was given on 31st march 2014 was on whether Japan violated her obligations under International Convention for the Regulation of Whaling and of other international obligations for the preservation of marine mammals and the marine environment. Proceedings were instituted on 31 May 2010 by Australia, which accused Japan of pursuing "a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II')", in breach of obligations assumed by Japan under the 1946 International Convention for the Regulation of Whaling and of other international obligations for the preservation of marine mammals and the marine environment.

The former Yugoslav Republic of Macedonia vs. Greece[19] on the application of interim accord of 13th September 1995 where the former Yugoslav Republic of Macedonia filed in the Registry of the Court an Application instituting proceedings against the Hellenic Republic in respect of a dispute concerning the interpretation and implementation of the Interim Accord of 13 September 1995.

According to Andrius Momontovas, conflict of treaties arises when a state party to an earlier treaty concludes or applies a new treaty (or such treaty enter into force for that state) leading to the violation of obligation arising for that state from the earlier treaty. He contends that treaty conflict may be resolved by simultaneously applying the Vienna Convention on the Law of Treaties and the law of state responsibility. He concluded that article 30 of VCLT shall apply to all treaties having incompatible provisions irrespective of its limited literal meaning referring to treaties governing "the same subject-matter"

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[18] Whaling in the Antarctic (**Australia vs. Japan: New Zealand intervening**), International Court of Justice, where the Court considered that the evidence before it did not establish that such was the case. It concluded that the special permits issued by Japan for the killing, taking and treating of whales in connection with JARPA II were not granted "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the 1946 Convention.

[19] Application of the Interim Accord of 13th September 1995 (the **former Yugoslav Republic of Macedonia vs. Greece**), International Court of Justice In particular, the Applicant sought to establish that, by objecting to the Applicant's admission to NATO, the Respondent had breached Article 11, paragraph 1, of the said Accord, which provides that: "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member ; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

When a treaty conflicts with another, there's always a question as to which treaty should prioritize over the other, for example in **Soering vs. United Kingdom [Soering]**[20] the European court of Human Rights (ECtHR) declared that United Kingdom's obligation under the European Convention on Human Rights (ECHR) would prevail over the violation of extradition treaty between United Kingdom and United States of America.

In **Matthews vs. United Kingdom [Matthews]**[21] the same court found the United Kingdom responsible for violating European Convention on Human Rights (ECHR) irrespective of its obligations arising from another conflicting of treaty.

The European Court of Justice (ECJ), in the **Schmidberger Case [Schmidberger]**, faced a similar issue of conflict of norms where the court preferred freedom of expression over free movement of goods, as guaranteed by the Treaty on the Functioning of the European Union (TFEU).

Christopher Borgen, an American scholar, is of the idea that the Vienna Convention on the Law of Treaties (VCLT) is a sure mean of settling issue of conflict of treaties. Like Andrius Momontovas, he cites article 30 of the VCLT as a provision to remedy the situation.

[20] **Application no. 14038/88, case of Soering vs. United Kingdom** at the European Court of Human Rights, 1989

[21] **Application no. 24833/94, case of Matthews vs. The United Kingdom** at the European Court of Human Rights, 1999