

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

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Historical Context

After 1945, the United Nations and its specialized agencies, followed by other international organizations, concluded an increasing number of treaties with States (e.g., agreements on privileges and immunities or headquarter agreements) or between themselves (e.g., cooperation agreements) and thereby built up a fair amount of practice. Scholars created different theories to identify the legal basis of these treaties in international law and the International Court of Justice used the practice for affirming the international legal personality of the United Nations in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (I.C.J. Reports 1949, pp. 174-188, at 179). But no generally shared *opinio juris* evolved. That became evident during the work of the International Law Commission on the codification of the law of treaties: it first included (1950), but later excluded (1962), treaties concluded by international organizations from its draft articles on the law of treaties (see *Yearbook of the International Law Commission*, 1950, vol. II, part VI, chapter I, and *ibid.*, 1962, vol. II, chapter II).

After an unsuccessful attempt at the United Nations Conference on the Law of Treaties to reintroduce such treaties into that Convention, the Conference recommended that the General Assembly entrust the International Law Commission with the preparation of a separate set of draft articles (see Final Act of the Conference, resolution relating to article 1 of the Vienna Convention on the Law of Treaties), which the Commission submitted in 1982.

Significant Developments in the Negotiating History

Thereupon, in 1986, the General Assembly decided to hold a conference in Vienna to adopt the draft articles as a convention. In view of a subject on which particularly the East and the West had strong opposing views, the Assembly took an active part in the preparation of the Conference. It had two main aims: to avoid possible discrepancies between parallel provisions in the 1969 Vienna Convention on the Law of Treaties and the new convention; and to ensure that the specific provisions concerning international organizations would be acceptable to the greatest possible number of participants.

With that in mind, the Assembly transmitted to the Conference a consensus list of articles which had to be considered in full, while all other articles were only to be reviewed for consequential drafting adaptations. The Assembly further adopted draft rules of procedure for the Conference which made the adoption of articles by vote the exception, as voting on codification texts had lately produced unsatisfactory results. In fact, all substantive articles were adopted without a vote by the Conference and only the settlement of disputes procedure, the final clauses and the Convention as a whole were voted on.

Summary of Key Provisions

The first 72 articles of the Convention retain *mutatis mutandis* the text of the relevant articles of the 1969 Vienna Convention on the Law of Treaties. This was achieved by using new terms where none had existed for the transactions of international organizations, such as “act of formal confirmation” (article 2, para. 1(b *bis*)) to correspond to the ratification by States, and by adopting appropriate additional paragraphs referring to international organizations to otherwise unchanged articles.

On a few fundamental questions, however, opinions had been for a long time, and were still, divided. This applied, in particular, to the unsettled question of the source of an organization’s treaty-making capacity. Socialist States asserted that international organizations possessed international legal personality only if it had been conferred upon them by the founding States and treaty-making capacity only if it was explicitly provided for in their constituent instruments. That view was opposed by the great majority of other States and their position inspired the solution adopted by the Conference.

The Convention uses the functional approach from the International Court of Justice’s Advisory Opinion *Certain Expenses of the United Nations (I.C.J. Reports 1962, pp. 151-180, at 167-168)* and states in its preamble that “international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and fulfilment of their purposes”. Key provisions determining the scope of an organization’s capacity to conclude treaties are in article 6 of the Convention, which provides that “[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization”, and the definition in article 2, paragraph 1 (j), which includes the “established practice” among the rules of the organization. The preambular paragraph, which affirms that “the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments”, gives the organization sufficient room to develop its practice by pursuing the purposes which are enshrined in its constituent instrument. Together, these provisions establish that the scope of an organization’s treaty-making capacity is determined by its constituent instrument and rules, but suggest that its international personality derives from general international law. It is, however, important to note that the Convention uses the term “rules of the organization” in two senses. In some articles (e.g., articles 6 or 39, para. 2) the term indicates a qualifying *international law* limitation, whereas in other articles (articles 27, para. 2, and 46, para. 2) the rules are treated as *internal law* in the same manner as the internal law of States.

The draft articles of the International Law Commission did not contain any provision to regulate the relation between the 1969 Convention and the new Convention. Hence, it might have been uncertain which of them would apply to the relations between States under a multilateral treaty to which international organizations were also parties. Since it could not be predicted, moreover, when the new Convention would come into force and for which States, the Conference felt the need of regulation to avoid confusion. Article 73 now provides that in respect of multilateral treaties to which international organizations are also parties, it is the 1969 Convention that continues to apply between the States parties of the multilateral treaty.

The settlement of disputes procedure in article 66 and the annex to the Convention, though it follows as far as possible the model of the 1969 Convention, is highly complex in respect of disputes concerning *jus cogens*. Since international organizations have no standing before the International Court of Justice in contentious proceedings, the device of advisory opinions of the Court, which, under the Convention, are accepted as binding by the parties to the dispute, was employed. However, not all international organizations are authorized to request advisory opinions of the Court; such organizations are advised to do it through a Member State of the United Nations. Should the request not be granted, the dispute may be submitted by any of the parties to the dispute to arbitration in accordance with the provisions of the annex. Recourse to arbitration instead of proceedings before the International Court of Justice is also possible when all the parties to the dispute so agree.

The Conference could not resolve the question of the rights and/or obligations which might arise for States members of an international organization from a treaty to which that organization is a party. The Convention contains only a saving-clause (article 74, para. 3). The discussion on the International Law Commission's proposed article 36 *bis* (see *Yearbook of the International Law Commission*, 1982, vol. II, Part Two, p. 43) at the Conference had made it obvious that the relevant situations were too varied to be covered by a single uniform provision.

Influence of the Instrument on Subsequent Developments

The Convention is not yet in force (as of 18 November 2008). It needs 35 ratifications or accessions by States to do so, (article 85), which are the only ones that count for entry into force purposes, and has as yet only obtained 28. 12 international organizations, including the United Nations, have either confirmed their signature or acceded to the Convention. Nevertheless, as happens with other codified international legal rules, the Convention is, regardless of its formal status, generally accepted as the applicable law and is widely used as a handy written guide in practice.

Related Materials

A. Legal Instruments

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

B. Jurisprudence

International Court of Justice, *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151.

C. Documents

Yearbook of the International Law Commission 1950, vol. II (document A/CN.3/34), part VI, chapter I, p. 380.

Yearbook of the International Law Commission 1962, vol. II (document A/CN.4/148), p. 159.

Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference, (document A/CONF.39/26), Final Act, annex, p. 285 (resolution relating to article 1 of the Vienna Convention on the Law of Treaties).

Yearbook of the International Law Commission 1982, vol. II, Part Two, chapter II, p. 9.

D. Doctrine

G. Gaja, “A ‘New’ Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary”, *British Yearbook of International Law*, vol. 58, 1987, pp. 253-269.

M. Hayashi, “The Dispute Settlement Clause of the 1986 Vienna Convention on the Law of Treaties”, *New York University Journal of International Law and Politics*, vol. 19, 1987, pp. 327-356.

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K. Zemanek, "Agreements Concluded by International Organizations and the Vienna Convention on the Law of Treaties", *University of Toledo Law Review*, vol. 89, 1971, pp. 145-183.

K. Zemanek (ed.), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties*, Vienna, Springer Verlag, 1971 (Österreichische Zeitschrift für öffentliches Recht, Supplementum 1).