Santa Clara University School of Law

Santa Clara Journal of International Law

Volume 21 | Issue 1 Article 2

2022

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By Ilias Bantekas*

Abstract

The function of signing multilateral treaties has always been perceived as a sine qua non element of inter-state agreements. Its evolution has witnessed several useful variations, such as definitive signatures, the 'all states formula', as well as the enhanced role of treaty depositaries with respect to the effect of signatures. The article argues that despite signature requirements in all multilateral treaties there is a clear trend towards alternative forms of agreement, whether between states or between states and non-state actors. The rise in the power of non-state actors has given rise to simplified forms of agreement where formalities, including treaty-type signatures, have largely been eliminated. While it is not at all argued that the function of signatures to treaties is anachronistic and of no use, the convergence of several formalities associated with treaties may explain the push towards simplified agreements.

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TABLE OF CONTENTS

INTRODUCTION

Treaty-making has typically involved a three-state process, namely: negotiation, signing (of the text) and ratification, which signifies an intention to be bound and ultimately leads to the treaty's entry into force. Ratification is further distinguished by the deposit of an instrument of ratification and the adoption of implementing legislation at the domestic level.[1] As the article will show, certain states are willing to waive either the second or third processes in a manner that either conflates the act of signing with ratification or eliminates it altogether. Signatures still possess particular importance, especially in the context of multilateral treaties. However, as will be demonstrated, there is a distinct move towards agreements that do not constitute treaties, whereby neither signature nor ratification are required.[2] This reflects a reality that states are perhaps weary of the cumbersome nature of treaty-making and are happy to curtail some of their sovereign rights in favor of flexible, yet highly efficient instruments, that do not involve this three-tier process.[3] Multilateral treaties that are adopted after years of negotiation, are opened for signature either to all states or only those states that participated in the negotiations and the final conference.[4] Signature clauses are typically distinct from accession[5] and ratification clauses given their bifurcated legal nature and their distinct legal effects.

One should distinguish between 'signing'[6] and 'ratifying'[7] a treaty. In practice, states sign the text of a newly agreed treaty without necessarily indicating by the mere act of signing that they also wish to be bound by the treaty in question.[8] An intention to be bound is typically expressed through a subsequent act of ratification, acceptance or approval.[9] The formal act by which a state consents to be bound by a treaty is expressed through ratification.[10] The various legal terms used to denote such consent (i.e. acceptance, approval or accession) produce the same functional and legal effect in the international sphere.[11] Their differences lie chiefly, if not exclusively, in the states' internal/constitutional sphere. Article 43 of the UN Convention of Rights of Persons with

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[1] *See* RICHARD GARDINER, TREATY INTERPRETATION, 13-19 (2nd ed. 2015).
[2] *See* Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMPAR. L. Q. 901 (1999); Christin M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMPAR. L. Q. 850 (1989).
[3] *See* Ilias Bantekas & Katerina Akestoridi, *Sustainable Development Goals Between Politics and Soft Law: Towards International Political Normativity*, 37 EMORY INT'L L. REV. (forthcoming 2023).
[4] *See* U.N. OFFICE OF LEGAL AFFAIRS TREATY SECTION, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK, at 12, U.N. Sales No. E.04.V.3 (2003) (exceptionally, the treaty may specify other entities as potential signatories, such self-govered territories).
[5] *See* U.N. OFFICE OF LEGAL AFFAIRS TREATY SECTION, TREATY HANDBOOK, at 10, U.N. Sales No. E.12.V1 (2013) [hereinafter TREATY HANDBOOK].
[6] *Id.* at 5-6.
[7] *Id.* at 8-10.
[8] Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty* 32 ME. L. REV. 263, 266-67 (1980).
[9] This notwithstanding, Art 18(a) VLCT makes it clear that upon signing a treaty and until such time as the ratifies or declares its intention not to ratify, it shall not act in a way that defeats the object and purpose of the treaty. Hence, the act of signing does carry certain obligations under international law. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VLCT].
[10] TREATY HANDBOOK, *supra* note 5, at 8.
[11] U.N. OFFICE FOR LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, ¶ 120-43, U.N. Doc. ST/LEG/7/Rev.1 U.N. Sales No. E.94.V.15 (1999).

Disabilities (CRPD) regarding consent to be bound departs from equivalent provisions in other treaties under the UN aegis, as well as other multilateral treaties, at least in phrasing. Other multilateral treaties, such as Article 29 of the 2003 UN Convention on the Jurisdictional Immunities of States and their Property, specifically distinguish between the two classical types of consent: a) that which is open to signatory states, namely ratification, acceptance and approval and; b) that which is open to non-signatories, namely accession.

Even so, a treaty may provide that a country is considered bound by the signature of its representative in two distinct ways, namely: a) *ad referendum* and; b) by way of a 'definitive signature'. An *ad referendum* signature is conditional upon its subsequent official confirmation by the state. As a result, it becomes definitive once confirmed by the responsible organ. A 'definitive' signature, on the other hand, establishes the consent of the state to be bound by the treaty without further action.[12] Definitive signatures are available in respect of many bilateral treaties as well as those (few) multilateral treaties that are not subject to ratification, acceptance or approval procedures. The norm, however, is reflected in Article 10(1)(b) of the Vienna Convention on the Law of Treaties (VCLT), which stipulates that in the absence of a specified procedure, the authentication of a treaty's text (as being definite) is achieved 'by the signature, signature *ad referendum* or initialing by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text'. This non-binding signature is known as a 'simple signature'.[13] By way of illustration, Article 42 of the CPRD clearly requires a 'simple' signature, given that Article 43 of the CRPD envisages a process of ratification by participating states.

International practice suggests that signatory states to a treaty can express their consent to be bound by anyone of three methods, namely: ratification, acceptance or approval.[14] To be clear, none of these is meant as an expression to sign the text; rather, they are deemed as functionally the same and produce the same legal effects under international law.[15] The treaty section of the UN Office of Legal Affairs stipulates that, "acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise."[16]

The choice of method, in practice, is dictated by internal/constitutional requirements. Ratification, for example, involves a two-phase process for states. Firstly, national constitutions (in respect of dualist constitutions) require that a signed treaty be approved by parliament, subject to specified majorities, and that an implementing law be adopted on which physical and legal persons can rely on at the domestic level (*locus standi*).[17] The first stage concerns the domestic (legal, regulatory and political) adaptation of the treaty. Once the first stage has been completed –

[12] TREATY HANDBOOK, supra note 5, at 6.
[13] TREATY HANDBOOK, supra note 5, at 5.
[14] The VCLT envisages other methods, which are however excluded from the CRPD. These are: consent by signature (Art 12 VCLT) and consent by an exchange of instruments constituting a treaty (Art 13 VCLT). VCLT art. 12-13, May 23, 1969, 1155 U.N.T.S. 331.
[15] *See* VCLT art. 14(2), May 23, 1969, 1155 U.N.T.S. 331, at 7; TREATY HANDBOOK, *supra* note 5, at 6.
[16] U.N. OFFICE OF LEGAL AFFAIRS TREATY SECTION, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK, at 36, U.N. Sales No. E.04.V.3 (2003) [hereinafter FINAL CLAUSES OF HANDBOOK].
[17] Monist constitutions do not require (domestic) implementing legislation once parliament has ratified a treaty. The treaty becomes part of domestic law automatically. *See* TREATY HANDBOOK note 5, at 9.

although states may just as well deposit an instrument of ratification without adopting implementing legislation[18] - an instrument of ratification is sent and deposited with the treaty's depositary.[19] This expresses the state's consent to be bound in its international relations. Acceptance and approval involve the same two-stage process. In the practice of certain states acceptance and approval have been used instead of ratification when, at the national level, constitutional law does not require the treaty to be ratified by the head of state.[20]

While acknowledging that treaties are not always efficient in all fields of international affairs, this article denies the argument that they are outdated and largely unused forms of agreement. Instead, the intention of this author is to demonstrate the practice of effect of signatures in the contemporary multilateral landscape and at the same time demonstrate alternative models of agreement devoid of signature and ratification. Section 2 explores the legal effects of signing a treaty, including the rights and obligations of signatory states thereto. Section 3 examines the so-called "all states" formula, which has allowed non-UN member states and de facto state entities to become parties to certain treaties. Section 4 sets out briefly the idea that a signature may be appended indefinitely and without a timeline within which to ratify the underlying treaty. Section 5 elaborates the notion of definitive signatures, which is long-standing in the UN, whereas section 5 puts into context the practice of signatures by a select number of regional organizations on the basis of powers bestowed upon them by their member states. Section 9 introduces the reader to the idea that the relative demise of treaties and their associated formalities is associated with the growth of the transnational law sphere. Section 8 lays out the argument that the rigidity of treaties, including the process of signatures, has given rise to informal agreements lacking strict formalities.

I. EFFECT OF SIGNATURE

The 'simple' signing of a treaty produces three particular legal effects, namely: a) that the text is final and authentic; b) that the signatory may enter into an interpretative declaration, if not specifically precluded by the treaty and; c) that a state is obliged to refrain from acts which would defeat the object and purpose of the treaty it has signed 'until it shall have made its intention clear not to become a party to the treaty'.[21] As a result, although a simple signature does not bind the signatory, within the framework of the UN it does reflect the expression of the signatory to take

[18] For example, the UK ratified the European Convention on Human Rights in 1951 but went on to adopt implementing legislation (the Human Rights Act) in 1998.

[19] The CRPD's depositary is the UN Secretary-General, in accordance with Art 41 CRPD. Convention on the Rights of Persons with Disabilities, art. 41, Mar. 30, 2007, 2515 U.N.T.S. 3.

[20] One should distinguish between the methods (i.e. ratification, accession or approval) a state employs to express its consent from the instruments by which such expression is physically undertaken (i.e. instrument of ratification, exchange of letters/notes, etc). Any written form expressing an intention to be bound by the CRPD and which is deposited with the depositary is tantamount to an instrument of ratification. See TREATY HANDBOOK, *supra* note 5, at 10, which enumerates the formalities associated with a valid instrument of ratification, namely: a) title, date and place of conclusion of treaty; b) full name and title of person signing, including proof of full powers; c) unambiguous expression to be bound; d) date and place where instrument was issued; e) signature of head of state, head of government or foreign affairs minister.

[21] Vienna Convention on the Law of Treaties art. 18(1)(a), May 23, 1969, 1155 U.N.T.S. 331. Art 18 is now viewed as having crystallised into customary law. *See* Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation'? in Enzo Cannizarro (ed)*, The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 25, 26.

steps to become a party in the future.[22] Although un-signing a treaty is uncommon there are notable examples. Following the Rome Conference in the summer of 1998 for the creation of the International Criminal Court (ICC) the US proclaimed that it would not sign the Statute. However, after fears that as a result of this stance the country would isolate itself from the proceedings of the ICC Preparatory Commission and create a negative international image[23] the US finally signed the text of the Statute on 31 December 2000. It subsequently withdrew its signature on 6 May 2002, making it clear that it had no intention of ratifying this instrument.[24] This was not a symbolic act, since it connoted that the US was no longer bound to respect the object and purpose of the treaty and from that moment onwards it openly adopted a hostile attitude towards it.[25]

When a state proceeds to sign a treaty, it is entitled to make interpretative declarations to pertinent provisions.[26] This entitlement is not available to states that have strongly contributed during the various drafting rounds, but which have not yet signed the treaty in question. States are well aware of this benefit, which allows them to express a unilateral act that may not necessarily be available at later stages of the life of a treaty, or otherwise the political advantage or momentum of an immediate declaration may later be lost, especially where the political currents have shifted. In the particular circumstances of the CRPD, there were several interpretative declarations upon signature. Some dealt with territorial and jurisdictional matters. Belgium, for example, declared that:

> This signature is equally binding on the French community, the Flemish community, the German-speaking community, the Wallone region, the Flemish region and the region of the capital-Brussels.

Egypt, on the other hand, entered into what it called an interpretative declaration pertaining to a substantive right under the Convention, but this was effectively a disguised reservation. Egypt clearly wished to test the waters by hoping that if there was no objection to its disguised reservation it would have one less obstacle towards signing it. It stipulated that with regard to article 12(2) CRPD, "persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under

[22] FINAL CLAUSES OF HANDBOOK, *supra* note 16, at 32.
[23] David J Scheffer, *Staying the Course with the International Criminal Court,* 35 CORNELL INT'L LAW J. 47 (2002).
[24] *See* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).
[25] Following its un-signing of the ICC Statute, the US concluded a number of bilateral treaties with ICC States parties and non-parties with the aim of precluding investigation and prosecution of US nationals accused of offences falling within the jurisdiction of the Court. These so-called 'impunity agreements' (or Article 98 Agreements) were signed in the majority by countries that had some form of economic dependency on the USA and could thus not resist turning down such a request. *See* Markus Benzing, *U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties*, 8 Max Planck Y.B. of U.N. L. 181 (2004).
[26] Rep. of the Int'l Law Comm'n, at 74, U.N. Doc. A/66/10, (2011) (highlighting the distinction between reservations and interpretative declarations). The commentary cites several international judgments in support of the thesis that the 'original intention' of the drafter of the reservation is crucial (i.e., as to whether there existed an intention to modify the legal effects of a treaty provision).

Egyptian law."[27] As this qualifies as a reservation, it should have been entered following ratification of the Convention. It is of no surprise therefore that it was resisted by other signatories.[28]

One should not underestimate the legal effects of capacity for signing treaties. The general rule is that states may be found in manifest breach of their treaty obligations, whether such breaches are substantive or procedural in nature. A state knowingly signing a treaty through an entity that did not have authorization may be held in manifest breach, but it is not clear whether such a breach in capacity has an adverse impact on other contracting parties. In *Cameroon v Nigeria*, the court held that the capacity to sign a treaty is a matter of constitutional law of fundamental importance. Even so, any limitation on a head of state and by implication on heads of government or ministers of foreign affairs is "not manifest in the sense of Article 46(2) VCLT, unless at least properly publicized."[29] The ICJ went on to emphasize that international law places no general duty on states to be apprised of pertinent constitutional requirements in other states and even though the constitutional requirement was public under Nigerian law did not entail that the breach was manifest.[30]

It should also be recalled that article 24(4) VCLT clearly specifies that several aspects of a treaty, including authentication of its text, establishment of consent to be bound, its entry in force, reservations and functions of depositary, "apply from the time of the adoption of its text" and not from the moment the treaty enters into force.[31] Although the adoption of the text of a treaty does not necessarily coincide with the signing of the treaty,[32] the two are usually conflated and in any event the signature of a treaty by most participating parties is an excellent indication that the text in question has been adopted.

II. THE 'ALL STATES' FORMULA

Certain multilateral treaties are open to 'all states' for signature, which is known as the 'all states formula'.[33] The other option is to open a convention for signature only to UN member states. The advantage of the latter is that the UN Secretary-General as depositary can easily assess

[27]For a list of reservations, *see* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>.

[28] Ilias Bantekas, *Reservations to the Convention on the Rights of Persons with Disabilities: Peer Engagement and the Value of a Clear Object and Purpose*, 33 N.Y. INT'L L. REV. 61 (2020).

[29] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, ¶ 265 (Oct. 10, 2002).

[30] *Id.* at ¶ 266.

[31] *See* s 5(2) of the UN Secretary-General's Bulletin, whereby once a treaty text (for which the Secretariat has been designated as depositary) has been formally adopted no further changes are permitted. UN Secretary-General's Bulletin, *Procedures to be followed by the departments, offices and regional commissions of the UN with regard to treaties and international agreements*, UN Doc ST/SGB/2001/7 (2001).

[32] The practical significance of Art 24(4) VCLT is with respect of matters arising from the adoption of the text until the treaty's entry into force. For many treaties, including several adopted by the ILC, this may amount to several decades. *See* VCLT art. 18, May 23, 1969, 1155 U.N.T.S. 331.

[33] U.N. OFFICE FOR LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, U.N. Doc. ST/LEG/7/Rev.1 (1999) 22; FINAL CLAUSES HANDBOOK, *supra* note 16, at 12-15*; see also* commentary to Art 43 CRPD which provides for the 'any state' formula in respect of accession to the CRPD. The two are functionally the same.

whether an aspiring signatory is, or is not, a party to the UN. On the contrary, the 'all states' formula provides the depositary with some degree of diplomatic controversy, as the Secretariat will have to take the political decision as to whether an entity, that is not otherwise a party to the UN, satisfies the criteria for statehood.[34] With the emergence of mini-states and break-away entities that possess de facto sovereignty,[35] even if not formal statehood - as well as entities whose status is wholly indeterminate but which function as states[36] - it seems to be in the interests of the international community to adopt the "all states' formula to multilateral treaties dealing with human rights. Political and territorial questions should not take precedence over and above the provision and protection of fundamental human rights. However, UN practice clearly demonstrates that the Secretary-General,[37] in his function as depositary, will not allow states to sign or ratify conventions such as the CRPD if they do not fall within the so-called 'Vienna formula'.[38]

A short history into the politicization of the signature debate in the context of the CRPD drafting committee is instructive. In the seventh session the Chairperson suggested modelling all final clauses in the CRPD after the final clauses in the Convention on the Rights of Children (CRC) and the Convention on the Elimination of Discrimination against Women (CEDAW).[39] During the seventh session the UN Office of the High Commissioner for Human (OHCHR) submitted a document on the final provisions of the CRPD following an invitation from the Chairperson of the Ad Hoc Committee. The OHCHR recommended two options, one encompassing 'all states' and another based on Article 38(1) of the Convention for the Protection of All Persons from Enforced Disappearances (CED), which would have rendered it open for signature only to UN member

[34] FINAL CLAUSES HANDBOOK, *supra* note 16, at 14.

[35] Somaliland is very much treated as a de facto state, even if its constitution says otherwise. Brad Poore, *Somaliland: Shackled to a Failed State*, (2009) 45 STAN. J. OF INT'L L. 117. Equally, in 2009, Kosovo declared its unilateral secession from Serbia while still under international administration. Although itseustatus is still not entirely clear, a number of countries objected to the legitimacy of its declared statehood and made their position known to the ICJ, which by 2009 had been asked to determine whether the unilateral declaration was consonant with international law. Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 2010 I.C.J. 404, ¶ 78-121 (July 22).

[36] *See also* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95 (Feb. 2019) (confirming that while self-determination is a fundamental human right, there is little support for its application to situations of secession (*e.g.* Catalunya, Kosovo), albeit a safety valve is possible where people are grossly oppressed).

[37] FINAL CLAUSES HANDBOOK, *supra* note 16, at 14-15

[38] FINAL CLAUSES HANDBOOK, *supra* note 16, at 14-15; *But see* U.N. OFF. FOR L. AFF., SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, U.N. Doc. ST/LEG/7 Sales No. E.94.V.15 (1999) [Summary of Practice of the Secretary-General as Depositary] at 23 (suggesting that in past practice the Secretariat would seek 'explicit directives' from the General Assembly on the ground that such a determination fell 'outside his competence'. He would only decide on his own initiative if the state in question fell within the 'Vienna formula', that is, if it were a party to the UN, a specialized agency or the ICJ Statute); *Id.* at 29 (noting that the subsequent practice of the General Assembly has been sparse, but it is now firmly understood, especially in the Summary of Practice that the chief criterion is conformity with the Vienna formula); On the 'Vienna formula' *see also* FINAL CLAUSES HANDBOOK, *supra* note 16, at 15-20.

[39] Chairman of the Ad Hoc Comm. on a Comprehensive and Integral Int'l Convention on the Prot. and Promotion of the Rights and Dignity of Pers. with Disabilities, Letter dated Oct. 7, 2005 from the Chairman to all members of the Committee, ¶ 10, U.N. Doc. A/AC.265/2006/1 (Oct. 7, 2005).

states.[40] The UN's Office of Legal Affairs (OLA) disagreed with the latter option and suggested that the Convention should not be opened for signature immediately following its adoption:

> as the preparation of the authentic text and the certified true copies, and the distribution of the certified true copies may take up to six weeks. These are functions required to be performed by the depositary. Our experience suggests too many difficulties and the waste of resources where a different approach is adopted.[41]

In theory, there is nothing preventing the Conference of States Parties (COSP) of the CRPD from making such political determinations and in this manner effectively either bypassing this particular function of the depositary or directly dismissing it by means of a decision. This discussion perhaps assists in clarifying why the Palestinian signature was unequivocally accepted. Despite significant dissent, the signature was accepted because Palestine is a member of other UN specialized agencies.[42] Palestine, in fact, proceeded to ratify the CRPD without first signing it, through what is known as an act of accession.[43]

It should also be emphasized that the adoption of the 'UN member states' formula engages a particular function of the depositary of a treaty, which is typically the UN Secretary-General through the Secretariat.[44] In terms of signatures and ratifications, the function of the depositary is of a two-fold nature. The first is of an administrative one, in the sense that the designated depository is deemed the custodian of the original or authentic text(s)[45] and hence in the event of dispute, the text held by the depositary will be considered authentic.[46] The depositary equally receives any signatures to the treaty, as well as any additional instruments, notifications and communications relating to it.[47] Under customary international law, depositaries possess the power

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[40] *Id.* at ¶ 10.

[41] Off. of the U.N. High Comm'r for Hum. Rts., Draft Final Provisions for the Disability Convention (2006) http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndconv.html.

[42] Palestine acceded to a membership in UNESCO in 2011 and the International Criminal Court in 2015. In 2012, UNGA Res 67/19 (29 November 2012) accorded Palestine 'non-member observer state' status in the UN, with 138 votes in favor, 9 against and 41 abstentions. Despite the matter being frozen at the level of the Security Council, the UN now refers to the State of Palestine and as such it may accede or ratify treaties under the aegis of the UN; *see Status of Palestine in the United Nations*, UNGA Res. 67/19 (Nov. 29, 2012).

[43] S*ee* FINAL CLAUSES HANDBOOK, *supra* note 16, at 27 (discussing the matter of participation by entities other than states and international organizations).

[44] *See* VCLT, art. 76(1), Jan. 27, 1980, 1155 U.N.T.S. 331(noting that the designation of the depositary of a treaty may be made by the negotiating states, either in the treaty itself or in some other manner). Practice, as is the case with article 41 CRPD, suggests that depositories are designated in the body of the treaty. In respect of multilateral treaties, the function of depositary is typically assumed by an organ (e.g. the Secretary-General in respect of the UN) of the international organisation under whose aegis the treaty in question was adopted, although this is not automatic. Some treaties suggest that there may as well exist joint depositaries, although where the parties to a multilateral treaty intend to confer this function to the UN Secretary-General the designation shall not be to any other person in the UN and there shall not be any other co-depositary. *See* FINAL CLAUSES HANDBOOK, *supra* note 16, at 3-5. *See also* Richard B. Lillich, *The Obligation to Register Treaties and International Agreements with the United Nations*, 65 AM. J. INT'L. L. 771 (1971).

[45] VCLT, *supra* note 14, at Art. 77(1)(a).

[46] In UN practice there is usually one original copy, that held by the depositary and that is why the Secretariat is generally tasked with safeguarding that copy free from errors and defects. *See* Shabtai Rosenne, *The Depositary of International Treaties,* 61 AM. J. INT'L. L. 923 (1967).

[47] VCLT, *supra* note 14, at art. 77(1)(c); *See* FINAL CLAUSES HANDBOOK, *supra* note 16, at 6-9.

to examine all relevant instruments and signatures appended thereto as to their proper form and inform states regarding any omissions or other errors.[48] Any instrument sent to and deposited with the depositary constitutes a unilateral act on the part of the dispatching state and hence any statements included within such instruments produce legal effects.[49] UN practice since the 1960s suggests that where there is an error in the text of the treaty, it is the responsibility of the depositary to 'notify the signatory states and the contracting states of the error and [inform them] of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised'.[50] Each error must be scrutinized by the depositary, which must subsequently communicate the proposed corrections to the states parties.[51] In equal measure, a translation that departs from the object or purpose of the CRPD, or which makes the Convention ineffective, will engage the responsibility of the concerned state and may potentially be considered a reservation by the UN Secretary-General, in his function as depository.[52]

The UN Secretary-General, as depositary will have to assess whether an applicant satisfies the criteria for statehood and membership to the UN and the same is true of international organization aspiring to membership.[53]

A. Correction of Errors in Treaty Text by Signatures

The text that fails the test of article 33(4) VCLT is considered erroneous. Article 79 VCLT envisages two mechanisms for correcting errors in treaties. Paragraph 1 stipulates that both signatory and contracting parties may agree to correct the error in the text by means of duly authorized signatures next to the correction, by an exchange of instruments or by the same procedure envisaged for the original treaty. Where a depositary has been designated he shall notify the signatory and contracting parties of the error and propose appropriate correction within a specified time limit. If on expiry of the time limit:

> (a) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a process-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

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[48] VCLT, *supra* note 14, at art. 77(1)(c); Such a power does not, however, extend to an examination as to the satisfaction of the constitutional arrangements of depositing states.

[49] See *ILC Guiding Principles applicable to the unilateral declarations of states capable of creating legal obligations,* YBILC, vol II, Part 2, 369ff (2006).

[50] VCLT, *supra* note 14, at art. 79(2).

[51] U.N. Office for Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/7 Sales No. E.94.V.15 at 13 (1999) [hereinafter Summary of Practice].

[52] The depositary is generally tasked with notifying member states of any new ratification, accession, denunciation, reservation or other unilateral act relating to the treaty. This is known as depositary notification. VLCT, *supra* note 14, at art. 77(1)(d) ("[states that may] examine whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question"). Although the FINAL CLAUSES HANDBOOK, *supra* note 16, is cursory on this matter, this author is of the opinion that 'communication' in this respect could be a notification by a state party concerning a disguised reservation in the form of an improper translation.

[53] *See e.g.*, CRPD Art 44(1) in respect of international organizations aspiring to membership of the CRPD.

> (b) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States. [54]

The detection and correction of errors in treaties is one of the important powers of depositaries.[55] The procedure noted in this subsection underscores the fact that signature remains an important aspect of treaties and that signatory parties retain significant clout in the evolution of treaties, even if they intend to avoid legal obligations.

III. INDEFINITE SIGNATURE DURATION

Those multilateral treaties whose chief aim is to attract the widest possible participation, such as human rights treaties, remain open for signature indefinitely.[56] This is not, however, the norm, as the practice of treaties adopted within the UN is to allow only a specified period within which interested states may append their signature.[57] In such cases, following the expiration of the deadline for signatures, aspiring states can no longer authenticate the final text through their signature. Their only option remains accession to the treaty in question. Accession possesses the advantage of bypassing the political sensitivities associated with definitive signature, since the executive can first secure legislative/parliamentary ascent before proceeding to accede to the treaty. Accession further allows entities not universally recognized as having attained statehood to bypass pertinent political hurdles, as has been the case with Palestinian accession to fifteen multilateral treaties on 1 April 2014. However, the key disadvantage of accession is that the acceding state does not participate in the negotiation and adoption of the treaty.

IV. DEFINITIVE SIGNATURE

Whereas ratification entails a two-step process, accession is a one-step process and is available only to those states that have not already signed the treaty.[58] Accession is not an implicit or automatic right of non-signatory states. Rather, it must be explicitly provided in the text of the treaty.[59] The reason for this is that the signatories might have agreed special privileges and voting rights to those states that participated in the negotiation and signing of the treaty, which they do not wish to automatically confer to subsequent newcomers. The legal effect of an act of accession in the international sphere, effected through the deposit of an instrument of accession, is that the treaty is considered both signed and binding upon the acceding state (two in one), but this should not be confused with the process of a 'definitive signature', which is explained below in this section.

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[54] VCLT, *supra* note 14, at art.79(2).
[55] Summary of Practice, *supra* note 51, at 14 (A minor difference from the procedure in Art 79(2) is found in the Summary of Practice of the Secretary-General as Depositary, whereby he is to bring the error to the attention of 'all states' and not merely signatories and contracting states).
[56] Summary of Practice, *supra* note 51, at 34.
[57] FINAL CLAUSES HANDBOOK, *supra* note 16, at 30; *see e.g.*, Art 28 of the UN Convention on Jurisdictional Immunities of States and their Property.
[58] FINAL CLAUSES HANDBOOK, *supra* note 16, at 10 (the UN Secretary-General, as depositary, treats instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned are advised accordingly).
[59] VCLT, *supra* note 14, at art 15.

Article 43 of the CRPD makes it clear that the Convention is open for accession to 'any state' that has not already signed it. There exists no substantive difference between the 'all states' formula available to signatures under Article 42 of the CRPD and the 'any state' formula in respect of accession.[60] Accession is typically available after the day the treaty is closed for signature, although in recent treaties of a humanitarian nature, such as Article 128(3) of the International Criminal Court Statute, accession is available without explicitly specifying when or what action should be taken.[61]

A 'definitive' signature establishes the consent of the state to be bound by the treaty without further action.[62] Definitive signatures are available in respect of many bilateral treaties as well as those (few) multilateral treaties that are not subject to ratification, acceptance or approval procedures. The norm, however, is reflected in Article 10(1)(b) VCLT, which stipulates that in the absence of a specified procedure, the authentication of a treaty's text (as being definite) is achieved 'by the signature, signature *ad referendum* or initialing by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text'. This non-binding signature is known as a 'simple signature'.[63] The opinion of this author is that in the absence of any authority in the *travaux* and in light of the exceptional use of definitive signatures in multilateral treaties, such signatures should generally be viewed as not contemplated in the vast majority of treaties. Even so, if a state intended to make use of a definitive signature, the depositary may accept it subject to the approval of the COSP or other state parties to the treaty in question.[64]

V. SIGNATURES BY REGIONAL INTERNATIONAL ORGANIZATIONS

It is not disputed in theory or practice that international organizations may become signatories to treaties, where a treaty so allows.[65] In fact, it is now common place for several multilateral treaties to reserve a special place for such organizations, chiefly because many of these, such as the EU, have allocated pertinent powers to the entity of the organization.[66] Although these conventions set out certain conditions for the signature of international organizations, there is a growing trend, especially in respect of environmental treaties,[67] commodities agreements[68] and others. Several multilateral agreements, especially in the fields of energy and trade, are open to

[60] *See generally* FINAL CLAUSES HANDBOOK, *supra* note 16, at 12-20.
[61] *Id.* at 39-41.
[62] TREATY HANDBOOK, *supra* note 5*,* at 6.
[63] TREATY HANDBOOK, *supra* note 5*,* at 5.
[64] *See* FINAL CLAUSES HANDBOOK, *supra* note 16, at 35.
[65] FINAL CLAUSES HANDBOOK, *supra* note 16, at 20-21.
[66] U.N. Convention on the Law of the Sea, annex IX; Constitution of the Food and Agriculture Organization of the U.N., art. II (as amended by Conference Res. 7/91, adopted Nov. 18, 1991); Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission, art. I, ¶ 7, June 11, 1999.
[67] *See*, *e.g.*, Convention on the Conservation of Migratory Species of Wild Animals, art. XV, June 23, 1979; Convention on Biological Diversity, art. 34, ¶ 1; U.N. Framework Convention on Climate Change [hereinafter UNFCCC], art. 22, ¶ 1, (May 9, 1992); Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 24, ¶ 1, (1998); Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. 21, Apr. 30, 1983.
[68] *See, e.g.*, International Coffee Agreement, art. 40, (2007); International Sugar Agreement, art. 41, (1992); International Cocoa Agreement, art. 4, ¶ 5, (2010).

regional international organizations, although in practice only the EU is typically able to become a member where its EU member states have conferred pertinent powers to the EU.[69]

Article 42 of the CRPD is unique among human rights treaties in allowing regional integration organizations to become parties thereto.[70] Article 42 of the CRPD does not distinguish between the signature of a state and that of a regional integration organization. While states must seek formal approval of treaties they have signed through their parliamentary bodies in accordance with their constitutional procedures, such a two-step procedure may seem redundant for international organizations. Customary international law suggests that just like state entities, international organisations may apply a two-step procedure in their adoption of treaties.[71] Article 43 CRPD, which discusses consent to be bound by the CRPD, distinguishes between ratification (for states) and 'formal confirmation'[72] by signatory organisations, thus clearly suggesting that the signing of the CRPD by regional integration organisations is 'simple' as is the case with states. No doubt, the pertinent bodies of international organisations (e.g. internal courts, assemblies) may ultimately decide whether accession (formal confirmation) is in the interests of the organization.[73] The EU signed the Convention on 30 March 2007 alongside many other states. The CRPD entered into force for the EU ON 22 January 2011, following the adoption of Council Decision 2010/48/EC[74] and the subsequent deposit of the instrument of ratification to the UN Secretary-General.[75] The *Final Clauses Handbook* refers to the powers exercised by the EU over its member states as follows:

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[69] The EU is a signatory to the Energy Charter Treaty on behalf of its Member States. In a recent turn of events, It has been argued that the EU's climate ambition sits uneasily with its ECT membership, whose framework was devised for energy systems driven largely by fossil fuels. Prominent environmental organizations have urged a coordinated EU withdrawal from the ECT. Governments in some EU countries (France, Spain and Luxembourg) have called for the EU and its Member States to withdraw from the ECT, unless it can be radically reformed as part of the ECT Modernization negotiations. A leaked diplomatic cable has underlined some EU Member States' desire to exit given the difficulty in adapting the ECT to the Paris Agreement. *See* Jennifer Ranking, *Young people go to European court to stop treaty that aids fossil fuel investors*, THE GUARDIAN (June 21, 2022), https://www.theguardian.com/environment/2022/jun/21/young-people-go-to-european-court-to-stop-treaty-that-aids-fossil-fuel-investors.

[70] *See generally* MARIA BO GIUPPONI, RETHINKING FREE TRADE, ECONOMIC INTEGRATION AND HUMAN RIGHTS IN THE AMERICAS (2017) (accounting other regional integration organizations in the Americas).

71 VCLT, *supra* note 14, at art. 10-12 (suggesting that the same principles enunciated in the VCLT apply mutatis mutandis in respect of treaties entered into by international organisations).

[72] VCLT, *supra* note 14, at Art 2(1)(b)(bis) (stating that the term 'formal confirmation' is the equivalent of ratification in respect of international organisations).

[73] *Opinion 2/13 pursuant to Article 218(11),* ECLI:EU:C:2014:2454, European Union: Court of Justice of the European Union (18 December 2014) (discussing how CJEU was critical of the EU's draft accession agreement to the European Convention on Human Rights (ECHR) because, inter alia, in its opinion it did not ensure the primacy of EU law in relation to the possibilities conferred by Art 53 of the EU Charter of Fundamental Rights as regards stronger fundamental rights in member states' constitutions).

[74] Council Decision 2010/48/EC of Nov. 26, 2009, Concerning the conclusion by the EU of the UN CRPD, 2010 O.J. (L 23) 35-61.

[75] The CRPD is binding on the EU pursuant to Art 216 TFEU. However, each member state must ratify the CRDP in its independent capacity because it is a mixed agreement whereby competence lies with both the EU and member states. Their respective commitments are spelt out in a declaration submitted under Art 44(1) CRPD, which shall be updated as the EU *acquis* evolves. *See* Declaration concerning the competence of the EC with regard to matters governed by the CRPD, Annex II to Council Decision 2010/48/EC, OJ L 23 (27 January 2010)

> [The EU] has the capacity to bind its members at the level of international law and to ensure that the provisions of treaties are implemented at the domestic level in those areas that its member States have transferred competence. It also has the power to enact legislation to ensure that its obligations under a treaty are implemented without additional approvals by the legislatures of its member States.[76]

It is clear that the most complex and vexing issue in the signatures of international organizations concerns the internal mechanism for conferring power to sign. Moreover, in the context of the EU there is significant uncertainty, at least from the perspective of third parties, concerning treaties entered by member states in their individual capacity, the subject matter of which subsequently came within the authority of the EU Commission. Bilateral investment treaties (BITs) constitute a particularly poignant example that troubled EU institutions for some time.[77]

As will be demonstrated in subsequent sections, international organizations typically enter into treaties only when such authority has been vested upon them by their member states, as is the case with the EU. Given that organizations generally perceive their role as that of implementor and executor of broad mandates, it is felt that treaty-making is antithetical to their function and mandate. It is therefore rather common for international organizations to enter into non-binding agreements, even if this entail the risk that some parties may not honor their 'commitments'.

VI. A TECTONIC SHIFT OF LEGAL SPHERES

In this article transnational law is perceived as the manifestation of a tectonic shift of legal spheres.[78] Two legal spheres exist, namely domestic laws and international obligations of states, expressed through the term (public) international law.[79] The sphere of domestic law encompasses statutes, common law and any form of sub-law that is permitted by the aforementioned proto-laws.[80] This includes customary (tribal) law,[81] contracts and party autonomy[82] and others. International law, on the other hand, is a sphere consisting of obligations assumed by states vis-à-vis other states and such obligations are typically found in unilateral acts, treaties, custom, or

55-60. A dedicated Code of Conduct between the Council, member states and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the CRPD provides details of the internal coordination arrangements required. OJ C 340 (15 December 2010) 11-15.

[76] FINAL CLAUSES HANDBOOK, *supra* note 16, at 22.

[77] *See* Council Regulation 1219/2012, 2012 O.J. (L 351) 40. (this established transitional arrangements for BITs between EU countries and non-EU countries). *See also* the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 2020 O.J. (L 169) 1. ("Termination Agreement") (effectively deprives all intra-EU BITs of their legal effect.) It is an implementation of the CJEU's judgment in Slovakia v. Achmea BV, Case C-284/16 (Mar. 6, 2018), which affirmed the incompatibility of investor-state arbitration in intra-E.U. BITS and E.U. law.

[78] *See* Herbert Kronke, *Methodical Freedom and Organisational Constraints in the Development of Transnational Law*, 51 LOY. L. REV. 287 (2005).

[79] *Id.*

[80] *Id.*

[81] *See* Matthew L. M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701 (2006); Alan Watson, *An Approach to Customary Law*, 3 U. ILL. L. REV. 561 (1984).

[82] Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 BROOK. J. INT'L L. 1123 (2014).

private agreements governed by at least one domestic law. These two spheres interact and collide, not without their own share of problems, but there is now a distinct body of rules, chiefly of a constitutional nature, that serves to bridge the interaction between the two with the least amount of friction.[83] These rules dictate: a) the relationship between domestic and international law and; b) the transposition of international law into the domestic legal sphere.[84]

Transnational law in its "private" dimension is an attempt to create a new regulatory space. However, if the combination of international and domestic law accounts for 100 per cent of all (possible) regulatory space, then the creation of a third sphere of regulation cannot by definition be additional to that of its two predecessors. Rather, it can only be shaped by being grafted from the mold or essence of these two. That is, transnational law as a third sphere of regulation must occupy existing and not new regulatory space. For this to happen, the two existing spheres must carve out space from within, which requires consent from the gatekeepers of these spheres.

There are several arguments about why such consent was granted. The first is a public policy shift towards relative self-regulation in favor unified industries by means of deference to the industry's advanced internal regulation.[85] While the state gives up a small part of its regulatory authority, there is a significant decrease in transaction cost through the elimination of red tape and bureaucracy. In addition, the industry gets to pick up the bill not only for enacting its internal rules but for enforcing them against recalcitrant members. Quite obviously, this is only a temporary and partial conferral of authority since the state (or states) can at any time strip the industry from its power to self-regulate. The only problem here is that the longer an industry is allowed to self-regulate the more intertwined its internal rules become with the legal system from which it derives its authority. By way of illustration, if arbitration was unanimously abolished tomorrow by all states, it would take a good twenty years to rid the millions of contracts globally from their arbitration clauses. The legal uncertainty that would ensue would be colossal and it is unlikely that the participants would venture back to national courts.

A second argument suggests that states are as eager to populate a new regulatory space free of bureaucracy, as much as private actors. This might at first glance seem disingenuous given that states are effectively giving up their own power to legislate in favor of private rule-making, but it should be remembered that: a) as already mentioned, such private rule-making authority is always partial and temporary; b) the transnational sphere ensures speed and confidentiality and; c) it is at the heart of international financial markets where states are free to act as investors and traders.[86] This second argument is predicated on a very practical set of facts. If a state cannot generate income as an attractive trading or investment destination in and by itself, its laws are of little

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[83] *See* Pierre-Hugue Verdier & Milla Versteeg, *International Law in Domestic Legal Systems: An Empirical Perspective*, 108 PROC. AM. SOC'Y INT'L L. 376 (2014).

[84] Francesco Francioni, *International Law as a Common Language for National Courts*, 36 TEX. INT'L L.J. LAW 587 (2001).

[85] *See* S. FISH, IS THERE A TEXT IN THE CLASS, THE AUTHORITY OF UMPERATIVE COMMUNITIES (Harvard Univ. Press ed., 1980) (who coined the theory of interpretative communities).

[86] Qatar Investment Authority (QIA), *Sovereign Wealth Fund in Qatar, Middle East*, SWFI, https://www.swfinstitute.org/profile/598cdaa60124e9fd2d05bc5a (stating that for Qatar its investment vehicle is the Qatar Investment Authority (QIA). Although financial data is missing from its website, its estimated assets are 461 billion USD, which ranks it 11th among all sovereign wealth funds according to the Sovereign Wealth Fund Institute).

financial value. This is true not only of democratic states desirous of becoming attractive investment destinations, but also of authoritarian regimes eager to sell or trade their national commodities or natural resources.[87] Oil-rich countries such as Azerbaijan have set up trust funds for the sale and investment of their proceeds in financial markets, albeit these are non-transparent, and all contracts thereto are confidential.[88]

A third possible argument is that the growth of international trade and commerce is far too exponential, speedy and advanced as compared to the ability and efficiency of national laws and institutions to regulate it. Lobbying for self-regulation is therefore a natural extension of such divergency in capacity. It is true, of course, that research and development for new drugs can only be undertaken by pharmaceutical giants and mega-construction and is only possible through a consortia of large banks and construction multinationals. Their combined expertise has led to the creation of industry rules based on best practices, albeit if left unchecked the likelihood of abuse is rife.[89] This third argument is often rightly conflated with pre-emptive self-regulation by powerful and largely unified industries, with the sole purpose of avoiding formal state regulation. It is assumed that states generally consent because they lack the expertise and mechanisms to impose any better solutions of their own.[90]

A fourth argument is that the absence of regulatory convergence (both in terms of domestic law as well as international law) among states in the sphere of cross-border private law, particularly between superpowers such as the EU, China, Russia and North America has necessitated a neutral

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[87] Ted Kemp, Spencer Kimball & Joanna Tan, *Saudi Aramco will offer less than 1% of shares to individual investors in IPO*, CNBC, (Nov. 9, 2019, 4.04 PM), https://www.cnbc.com/2019/11/09/saudi-aramco-ipo-prospectus-released.html (stating that it is true even of wealthy, resource-rich states, like Saudi Arabia, which in 2019 put up to a public offering a small amount of shares in Saudi Aramco, with a view to raising liquidity and financing Aramco's future projects. Saudi Aramco's website provides restricted access to its initial public offering (IPO) documents. In mid-2020, the same country woke up to the post-Covid 19 realization that its excess production in oil was a liability because of the cost of storage and transport during a global slump in consumption).

[88] BCB Holdings Ltd. and Belize Bank Ltd. v. Attorney-General of Belize, CCJ Appeal No. CV 7 of 2012, Arbitration Award Enforcement, Caribbean Court of Justice (July 26, 2013) (this case is emblematic of this approach. There, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles'. It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded). *See also* Gov't of Belize v. Belize Social Development Ltd., 191 F. Supp. 3d 26 (D.D.C. 2016) and BCB Holdings Ltd. v. Gov't of Belize, 232 F.Supp.3d 28 (2017).

[89] *See* Haik & Bantekas, *Nanodrug Clinical Trials: Informed Consent and Risk Management through Blockchain,* 21 PITT. J. TECH. L. & POL'Y 21 (2021).

[90] I. Bantekas, *The International Law of Terrorist Financing,* 97 AM. J. INT'L. L., 315, (2003) (demonstrating how the lending industry mobilized within days of the 9/11 disaster to self-regulate with a view to mitigate or even avoid formal legislation).

sphere where interaction between sophisticated actors is possible.[91] In the absence of predictable and uniform private laws, conflicts of laws rules and business norms, transnational principles, such as the UNIDROIT Principles of International Commercial Contracts,[92] have found fertile ground as well as arbitration and ADR.[93] This is clearly a sleeping giant no one desires to awake.

VII. INFORMALITY IN INTERNATIONAL AGREEMENTS

This article is not concerned with Memoranda of Understanding (MoU) and their designation as international agreements and their at times binding character. Rather, the question raised here is whether and to what degree the MoU model effectively serves to eliminate the two-tier process of consent to be bound exhibited in treaty-making. The discussion above on treaties does not in any way tell us that states are weary of appending signatures to treaties. Instead, despite the fact that the process of signing a treaty is rational and entails political benefits, in practice there are few occasions where it has really made a significant contribution in law or fact. In equal measure, while ratifications produce far reaching constitutional and international law consequences, they are time consuming and not always forthcoming. It is no accident that states are gradually, where available and possible, entering into agreements, whether binding or non-binding that lack the formality of signature. This is hardly a novelty, given that contracts involve a single-tier process, whereby offer and acceptance are met with a mutual intention to be bound. While the actual expression of such intention is not always evident,[94] the law assumes its existence under particular circumstances.[95] Such common intention very much corresponds to ratification in

[91] China lacks bilateral and multilateral agreements for the enforcement of judgments. Reciprocity is a statutory ground under Chinese by which to recognize a judgment of a foreign court and until recently no definition was provided. In practice, de facto reciprocity came into play if a foreign court had recognized a judgment rendered by Chinese courts. In December 2021, the Supreme People's Court of China ("SPC") published the Minutes of the National Working Seminar of Court on Adjudicating Foreign-related Commercial and Maritime Cases ("SPC Minutes"). According to the SPC Minutes, "de jure reciprocity" is the new norm. According to this, Chinese courts may recognize a foreign judgement so long as the law of such foreign jurisdiction allows its court to recognize Chinese judgements. By applying de jure reciprocity, for the first time the PRC court recognized judgment rendered by an English court because of the reciprocal recognition of a Chinese judgment in Spliethoff Bevrachtingskantoor BV v. Bank of China Ltd. [2015] EWHC 999 (Comm).

[92] The Swiss Federal Supreme Court in Chemical Products case, no 4A_240/2009, Judgment (16 December 2009), held that it was valid for an arbitral tribunal to supplement the parties' chosen law with the UNIDROIT Principles of International Commercial Contracts. See also Ilias Bantekas, 'Transplanting the UNIDROIT Contract Principles in the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants?' (2021) 26 UNIF. L. REV. 1.

[93] *See* John Linarelli, *The Economics of Uniform Laws and Uniform Law Making,* 48 WAYNE L. REV. 1387 (2003).

[94] Indeed, in their search for the proper/governing law of an arbitral agreement, the courts have never tried to specifically ascertain the parties' intention. In BNA v BNB [2019] SGCA 84, the Singapore Court of Appeal expounded three layers concerning the parties' choice of law framework: a) this may be express, in which case common intention is easily identifiable; b) absent an express choice, the court or tribunals will endeavor to ascertain their implied intention; c) where the first two are absent, the courts or tribunal adopts the arbitration agreement's proper law or the system of law with the closest connection to it. The same approach was favored by the English Court of Appeal in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA (Civ) 6.

[95] It is not uncommon for some courts to impute an express contractual choice to a clause that lacks an intent. See Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings, [2012] EWHC (Comm) (Eng.)., where the

the law of treaties (although in a single action alongside offer and acceptance). The analogy of 'signature' in the law of treaties is missing in the law of contract and is typically conflated with the offeree's acceptance. The absence of an additional tier of signature prior to the formation of common intention is emblematic of the informality of contracts and their attendant advantages. For our purposes, this is instructive of the burdensome character of signatures, although the politics of ratification should not be underestimated.

It should not be assumed that states and international organizations are always interested in producing agreements that are binding. It is felt that several issues are best dealt through instruments framed by reference to political commitments, hortatory language and indeterminate international obligations, even if the same issue could just as well have been regulated by a treaty or other binding agreement. By way of illustration, the conditionalities set out in the post-2008 restructuring of the Greek debt were contained in memoranda of understanding (MoU), the aim of which was to render any issues arising therefrom inadmissible from local or international courts.[96] In addition, the authority of the administering authority (the so-called troika) established by the MoU was exceptionally broad and in practice could sanction any policy or law, even if not directly related to the Greek debt-restructuring plan. Despite the absence of a formal definition of MoU in international law,[97] it was clear to the parties that such types of instruments typically comprised agreements lacking the element of compulsion and were otherwise premised on the good will of the parties that they will carry out the commitments contained therein. Depending on the subject matter their "informal" nature is preferred over the formal character of treaties because they are easier and faster to conclude and as a result entail smaller transactional and political costs. Exceptionally, the parties may prefer the choice of a MoU for an agreement they would otherwise consider binding and which would ordinarily have taken the shape of a treaty for the sole reason that a treaty would have to be ratified by the legislature and become public.[98] Under the latter set of circumstances MoU may, but not always, verge on the border of unconstitutionality, but naturally this depends on the particular constitutional arrangements of each nation.[99] Of course, one should not disregard the fact that irrespective of the designation given by the parties to a particular type of agreement, its classification as binding or otherwise necessarily depends on the

court held that express terms do not stipulate only what is absolutely and unambiguously explicit and hence the court had no problem imputing the parties' clear intention in two clauses that the contract be governed by English to another clause that was silent on this issue.

[96] It was only in *Eugenia Florescu and Others* v *Casa Jude ̧teana ̆de Pensii Sibiu and Others* that the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. *See* Case C-258/14, Eugenia Florescu and Others v. Casa Jude ̧teana ̆de Pensii Sibiu and Others, ECLI: EU: C: 2017:448, ¶ 36 (June 13, 2017).

[97] *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L AND COMPAR. L. Q. 787–812 (1986); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, at 23, 25-27 (Cambridge University Press, 2d ed. 2010).

[98] *See* Efthymios Papastavridis, *'Fortress Europe' and FRONTEX: Within or WIthout International Law?*, 79 NORDIC J. INT'L L., 75 (2010).

[99] Art 14(5) of the Uzbek 1995 International Agreements Act introduces an important exception to Art 78(21) of the country's Constitution, which requires parliamentary approval of all treaties. This exception stipulates that international loan and guarantee agreements with international financial institutions, such as the World Bank group are in force upon signature by the executive branch of government. *See* International Agreements Act 1995, art. 14(5) (Uzb.).

nature of the commitments undertaken therein.[100] If said commitments can only be construed as entailing mutual obligations and give rise to concrete liabilities or sanctions in case of non-performance, then one may be justified in claiming that the agreement possesses the attributes of a treaty, if governed by international law.

On the basis of these MoU the IMF, ECB, as well as informal EU institutions, such as the EuroGroup, replaced the authority of the Greek government to adopt policy and laws in a sovereign manner, even though the latter was found not to be accountable under EU law.[101] In fact, no entity in the family of lenders, including facilitating institutions, such as the EC Commission, retained any kind of liability in its contractual or extra-contractual dealings with borrower states.[102] As a result of these broad-ranging powers, the Court of Justice of the EU (CJEU) emphasized that the EU Commission must 'refrain from signing an MoU whose consistency with EU law it doubts.'[103]. In equal measure, there is growing case law by domestic courts who view certain MoU as giving rise to concrete obligations.[104] What is important here is that through these MoU the parties eliminated both the signature and ratification process inherent in treaties.

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[100] VCLT, *supra* note 14, at art. 2(1)(a). This was certainly the unequivocal conclusion reached by the ICJ in Qatar v. Bahrain (Maritime Delimitation and Territorial Questions between Qatar and Bahrain), Judgment 1994 ICJ 112, at ¶ 25, (July 1) where it held that the recorded minutes of a meeting constituted a binding agreement between the two sovereigns because they encompassed "a reaffirmation of obligations previously entered into ... and enumerate the commitments to which the parties have consented." The name and form of an agreement, the Court concluded, may be diverse. Thus, what makes it binding is the "creation of rights and obligations in international law for the parties."

[101] *See* Joined Cases C-105-109/15 P, Konstantinos Mallis v. European Commission and European Central Bank, EU:C:2016:702, ¶ 47 (Sep. 20, 2016), where the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers and as a result its acts could not be attributed to the Commission or the ECB. *But see*, Joined Cases C-8-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank, Joined Cases C-8/15 P to C-10/15 P, EU:C:2016:701, ¶ 59 (Sep. 20, 2016), where the CJEU held that where the EC Commission is involved in the signing of MoU within the framework of the European Stability Mechanism it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

[102] *See* Case T-531/14, Leïmonia Sotiropoulou v. Council of the EU, EU:T:2017:297, ¶ 72 (May. 3, 2017), which entrenched the non-contractual liability of the EC Council concerning Decisions adopted within the framework of arts 126 and 136 TFEU (Excessive Deficit Procedure).

[103] *See* Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising v. European Central Bank, ECLI:EU:C:2016:701, ¶ 59 (Sep. 20, 2016). *See also* Paul Dermine & Menelaos Markakis, Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu, 55 CML REV. 643.

[104] *See* AngleWorld LLC 与江苏贝尔装饰材料有限公司申请确认仲裁协议效力民事裁定书 (Angle World LLC ("Angle") v Jiangsu Beier Decoration Materials Co., Ltd. ("Jiangsu Beier")), AIQICHA (Dec. 26, 2019), https://aiqicha.baidu.com/wenshu?wenshuId=22ff3d34fc08f996ca1a5f93106248f8b4ad8ac8., where the parties had entered into an MoU containing an arbitration clause. CIETAC agreed that the clause was valid and Angle applied to the Chinese Fourth Middle Court to set the award aside on the ground that no valid arbitration clause can exist in a non-legally binding instrument. The Chinese court disagreed, arguing that Parties concluded and amended agreements through emails during their long-term business practice, and the MOU was also handled in such manner. Therefore, the Court inferred that Angle accepted the arbitration clause. The Court also found that in fact both Parties had actually performed the terms of the MoU. Therefore, the Court held that the MoU in question was in fact an agreement which had come into effect, and the arbitration clause contained therein was valid and binding. Judgment (2019) Jing 04 Min Te No.588, available in Chinese at: https://www.bjcourt.gov.cn/cpws/paperView.htm?id=00000000000000000000100906483109&n=1

In practice, there exist several types of agreements and actions resembling a treaty, but which the parties modified, wholly or partially, with a view to stripping it from treaty attributes. By way of illustration, states may choose to set up mechanism (i.e. GEF) by an MoU but at the same time subject its survival and operation to a series of instruments of participation, which are treaties of a bilateral nature (i.e. between the contracting state and the entity/organisation).[105] The idea, again, is to avoid a lengthy process setting up the desired entity. This allows it to function while at the same time gives space to all nations to participate (and to convince their national parliaments) based on the good work of the entity. If the operation of the entity were to require participation by all, it would not even get set up. One would think that the agreement by which an entity is appointed as a trustee of monies and other assets donated by States would by necessity assume only a single legal form; that of a treaty. This, however, has not occurred and the appointment of trustees has been achieved through varied legal formulas. Treaties remain the standard form of agreement where the institutional rules of the trustee, as in the case of the World Bank, require the adoption of a (binding) agreement with the donor,[106] or where the UNDP has institutionalised the use of model administration agreements with prospective donors. Given that both the UN and its specialised agencies do not require a treaty format for concluding trustee (administration agreements) or donor agreements – in fact, the relevant Financial Regulations do not stipulate the two as separate contracts – it is not surprising that several MoU have appeared in this respect. Typical examples, albeit not as trust agreements, are the MoU between the Conference of Parties (COP) of the Convention to Combat Desertification and the International Fund for Agricultural Development (IFAD) regarding the Modalities and Administrative Operations between the Global Fund,[107] as well as the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[108] The GEF and IFAD serve as financing mechanisms for the purposes of these conventions and not as trustees. Their role is to finance part or all of the projects decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[109] and the GEF. In the case of the COP-GEF MoU one may

[105] These instruments of ratification serve the function of so-called implementation agreements under international law, whose role is to render a treaty operative. These agreements may either be stipulated in the original treaty, or independently at a later date, although the former eventuality is generally the case. They can affect the legal relations of the parties in two ways: a) as an amendment that modifies the original treaty between all the parties, and; b) as an *inter se* agreement, which modifies relations between particular parties only. Implementation agreements have been extensively employed in the context of the 1982 UN Law of the Sea Convention (UNCLOS), (1982) 21 ILM 1261. *See* Louis B. Sohn, International Law Implications of the 1994 Agreement, 88 AJIL 696, 696-705 (1994) (discussing the role and use of implementation agreements).

[106] *See* Operational Policy (OP) 14.40 (Jan 1997) [Trust Funds], Art 1; *See also* the authority of the IDB to set up and receive donations for trust funds through the conclusion of treaties is prescribed in Res DE-51/91 (20 March 1991) and IDB Doc GN-1808 (5 Feb 1991).

[107] Distr. General, memorandum of understanding between the conference of the parties to the convention on biological diversity and the council of the global environment facility regarding the institutional structure operating the financial mechanism of the convention, art. 2, U.N. Doc. UNEP/CBD/COP/3/10 (Oct. 11, 1996).

[108] Distr. General, consideration of, with a view to adopting, the revised draft memorandum of understanding between the conference of the parties and the international fund for agricultural development, art. II(C), U.N. Doc. ICCD/COP (3)/10 (Aug. 30, 1999).

[109] According to art. 2 of the 1976 Agreement Establishing the IFAD, "[t]he objective of the Fund shall be to mobilise additional resources under concessional terms for agricultural development in developing member States. This involves projects designed to introduce, expand or improve food production systems and to

obviously argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possesses sufficient legal personality such that would enable them to conclude a treaty, or other binding agreement.[110] In any event, while the parties to such MoU are generally presumed to have intended to desist from assuming any binding obligations, the non-binding character of these instruments may, nonetheless, be questioned on several grounds. Firstly, and in respect to trust agreements established by MoU, the trustee is appointed as the account holder (where applicable) and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation and the trustee owes particular duties to the donors, which can hardly be assumed on a non-binding basis. As most of these duties stem from widespread practice in the field of international law trust funds it is not out of the question to posit that they have become part of customary international law between States and trustees, and as such are binding and not merely voluntary. Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated. It would thus be absurd for the trustee and the donors to appoint the trustee without either of these entities owing any obligations to the beneficiaries at any stage of the trust process.

It has already been made clear that the term 'agreement' is broader than its 'treaty' counterpart.[111] Unlike treaties whose formal requirements are fairly well circumscribed, an agreement may just as well consist of a committed unilateral act that is accepted through conduct by other states. Irrespective of the nature of the agreement, its particular circumstances and the parties' intentions are paramount. In international relations states converse through a variety of processes, many of which ultimately reflect some kind of agreement. This may manifest itself in the form of agreed minutes. There is no question that such minutes cannot constitute an agreement, but a conclusive outcome will depend on factors such as the parties subsequent conduct (e.g. registration with the UN, protest by the other party etc), although none of these on their own is necessarily definitive.[112] In another case, the International Tribunal for the Law of the Sea (ITLOS) determined that the Agreed Minutes between Bangladesh and Myanmar which served as the basis for delimiting their maritime boundaries did not constitute an agreement.[113] In the Aegean Sea Continental Shelf case, Greece attempted to entertain the ICJ's jurisdiction by reference to a joint communique between the Greek and Turkish Prime Ministers.[114] In rejecting its normative character, the ICJ emphasised that whether or not a communique or other instrument [including

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strengthen related policies, taking into consideration the need to increase food production in the poorest food-deficit countries, the need to increase food production in other developing countries and the importance of improving the nutritional level of the poorest populations." Agreement Establishing the International Fund for Agricultural Development, art. 2, June 13, 1976, 1059 U.N.T.S 191. IFAD has entered into an agreement with the UN under art. 57 of the UN Charter and is a specialised agency thereof. *See* IFAD Lending Policies and Criteria, adopted by IFAD Governing Council on Dec. 14, 1978 (as recently amended by Res 106/XXI (Feb. 12, 1998)).

[110] Nele Matz, *Financial Institutions between Effectiveness and Legitimacy: A Legal Analysis of the World Bank, Global Environmental Facility and Prototype Carbon Fund*, 5 INT'L ENV'T AGREEMENTS 265, 285 (2005).

[111] Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRIT. Y.B. INT'L L. 117 (1979).

[112] Maritime Delimitation and Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment 1994 I.C.J. Rep. 114 ¶ 29 (July 1); *see* Danai Azaria, *Secret Treaties in International Law and the Faith of States in Decentralized Enforcement* 111 Am. J. Int'l L. Unbound 469 (2017).

[113] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh v. Myanmar, Judgement, 2012 ITLOS Rep. 4 ¶ 99 (Mar. 14).

[114] Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, 1978 I.C.J. Rep. 3 (Dec. 19).

for our purposes MoU] constitute a binding agreement "essentially depends on the nature of the act or transaction to which [it] gives expression" "as well as its actual terms and the particular circumstances in which it was drawn up."[115]

There have been relatively few occasions whereby international courts and tribunals have encountered MoU with the aim of at least one party to endow it with binding authority. In *Somalia v Kenya*, the parties entered into an MoU, which Kenya registered with the UN Secretariat, to which Somalia made no protest.[116] When a dispute arose, Kenya sought relief from the ICJ, which subsequently was asked to decide the MoU was a treaty in force so as to confer it jurisdiction. The ICJ ultimately held that the MoU was a binding agreement on account of several factors, namely: a) that its terms were sufficiently indicate as to the assumption of obligations and; b) Somalia had not protested to the registration of the MoU as a treaty by Kenya for a period longer than five years; c) the MoU contained a clause providing for its entry into force upon signature.[117] It is evident that international courts and tribunals have not carved out a special place for MoU as distinct from other irregular instruments such as joint communiques or agreed meetings. As a result, the same criteria are mutatis mutandis applicable.

CONCLUSION

While the VCLT remains a useful point of reference for the function and legal significance of signatures to treaties, the latter form of agreement is no longer prevalent in all inter-state interactions.[118] We have shown in what manner the practice of treaty signature has evolved and become more flexible as compared to past time, which is very much the result of increased treaty making during the Cold War, which in turn prompted the majority of multilateral treaties in force today. During the post-Cold War era there was a flurry of multilateral treaties in areas of common global interest, chiefly with a focus on environmental protection and crime prevention. However, there is a clear trend in favour of speedier, flexible and less bureaucratic forms of agreement since the early 2000s, which reflects to a large degree the transformation of states from unitary entities operating solely within the confines of public international law. Since the early 2000s states no longer appear as unitary entities, but are happy to operate as discreet sub-entities, whether in the form of investors, traders or other.[119] This turn to transnational law is a definitive feature of the

[115] *Id., ¶ 96; see also* The "Hoshinmaru" Case (Japan v. Russian Fed'n), Judgment, 2007 ITLOS Rep. 18, ¶ 86 (Aug. 6); Qatar v. Bahrain, *supra* note 110 at ¶ 29.
[116] Maritime delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections Judgment, 2017 I.C.J. Rep. 4, ¶42 (Feb. 2).
[117] *Id.*
[118] Indeed, in general transnational practice, agreements, whether between private entities or between the latter and states there is a preference for the contractual type governed under English law, *see* Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations* 137 L.Q. REV. 130 (2021).
[119] *See* Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation,* 19 INT'L J. CONST. L. 798 (2021) (who argues that when capitalism was left to its own devices it bred injustice and inequality. The focus of the article is on Chinese capitalism and hence Alter takes the view that multilateralism led by liberal states is beneficial).

modern era and is largely responsible for reframing the traditional construction of party autonomy in the field of contracts and dispute resolution among others.[120]

Although treaty signatures pale in significance to actions that render a treaty in force (namely ratification), transnational legal processes are certainly eliminating the need for signatures altogether.[121] Simplified agreements, such as MoU, executive agreements, or even private contracts under the law of a state or principles of law, are gradually replacing treaties and the various tiers involved therein.[122] There is a return to the notion of informality of contract, which is a long-held principle in the sphere of private law, but which for a variety of reasons could not historically apply to treaties. The idea was that unlike private contracts, treaties are not confidential and do not apply *inter-partes* only but produce legal consequences on the population of the signatory states, if not also to other states. Formality of treaties, including the special status of signatures, was therefore meant as a chilling or cooling-off period in order for signatory states to assess the impact of the treaty in their domestic legal order. The exigencies of contemporary communications and the multifaceted role of the state as investor, financier, trader and provider of social safety nets, among others, necessary suggest that it must compete at the same pace as all its other global competitors. While some matters will have to be regulated by the formalities imposed on treaties, many others need not succumb to such formalities. Although there is always the risk that states will be tempted to sacrifice constitutional supremacy with speed and efficiency, there is little doubt that we are moving towards a privatised (or transnational) international legal order.[123] In this legal order, the practice of signatures (in the treaty sense) is no longer acceptable and substituted with the kind of party autonomy one generally finds in liberal private law traditions. Only time will tell if this trend will engulf other areas typically regulated by treaty, or whether things will generally remain as they are. While treaties must remain a medium of agreement among the community of states on important international matters, with the role and function of signatures playing a significant constitutional role, the reality of informal agreements lacking formalities cannot be ignored.

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[120] *See* Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum,* 22 PENN . ST. INT'L L. REV. 397 (2004) ; Herbert Kronke, *Methodical Freedom and Organisational Constraints in the Development of Transnational Law*, 51 LOY. L. REV. 287 (2005).

[121] *See* Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671 (1999) (There is a line of thinking suggesting that harmonization incurs higher transaction costs because it leads to the adoption of vaguely drafted rules with a view to reaching a political compromise).

[122] *See e.g.* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions,* 99 MICH. ST. L. REV. (2001) ; Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry,* 21 J.L.S. 115 (1992).

[123] *See* Francesco Francioni, I*nternational Law as a Common Language for National Courts*, 36 TEX. INT'L L.J. 587 (2001) (some international lawyers have suggested that the common language among states and private institutions is international law).