TREATY MAKING PROCESS
Outline of Presentation

- What is a Treaty?
- How to make a Treaty?
- How to conclude a Treaty?
- How to change or stop a Treaty?
What?

- Article 2(1) defines a ‘treaty’ as:

  “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”
6 elements of a Treaty

“an international agreement”

“concluded between states”

“in written form”

“governed by international law”

“whether embodied in a single or more number of instruments”

“whatever its designation”
“an international agreement”

- International character
- Inter-state, inter-governmental, inter-ministerial, international organisations
- Universal or regional
- Bilateral, multilateral or plurilateral
“concluded between States”

- State and another State
- State and an international organisation
- State and international or multinational company
- Non-state institution and foreign non-state institution
“in written form”

- Excludes oral agreements
- Allow for modern technology eg. Fax, email
- Permanent and readable form
“governed by international law”

- Two aspects:
  1. Rights and obligations created under international law
  2. Distinct from rights and obligations under domestic law
“whether embodied in a single instrument or in two or more related instruments”

- Framework Agreement
- Additional Protocols
- Annexes, appendices and schedules
- Side letters and exchange of notes
“Whatever its particular designation”

- No systematic use of titles
- Convention, Agreement, Treaty
- MOUs, Declarations, Exchange of Notes
- Content is more crucial
Differences with MOU

- Publicly available
- Specific rights and obligations
- Formal
- Dispute settlement
- Funding involved
Drafting Process

- Negotiations
  - Bilateral: e.g. BJEPA, Visa Exemptions
  - Multilateral: UN Conventions
  - Plurilateral: Trans Pacific Partnership Agreement
  - Regional: ASEAN
## Drafting Terminology

<table>
<thead>
<tr>
<th>Treaties (Legally Binding)</th>
<th>MOUs (Non Legally Binding)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shall</td>
<td>May</td>
</tr>
<tr>
<td>Have agreed as follows</td>
<td>Have entered into the following undertaking</td>
</tr>
<tr>
<td>Agree</td>
<td>Accept/approve</td>
</tr>
<tr>
<td>Done</td>
<td>Signed</td>
</tr>
<tr>
<td>Article</td>
<td>Paragraph</td>
</tr>
<tr>
<td>Enter into force</td>
<td>Come into effect</td>
</tr>
</tbody>
</table>
How to Conclude

“How Consent to be Bound”
Vs
“How Entered into Force”
How to Conclude

- Legal Scrubbing
- Powers to Conclude
- Signature
- Ratification
- Accession
Legal Scrubbing

- Drafting Guidelines
- Editorial amendments
- No substantive changes
Powers to Conclude

- Full Powers
- Automatic:
  - Heads of States, Govts and Foreign Ministries
  - Heads of diplomatic missions
  - Accredited representatives
Consent to be bound

- Article 11, VCLT

“The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”
### Signature

<table>
<thead>
<tr>
<th>Definitive</th>
<th>Simple</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bilateral/ few members</td>
<td>More than 6 member states</td>
</tr>
<tr>
<td>No need for parliamentary approval</td>
<td>Some or all states need to obtain parliamentary approval</td>
</tr>
<tr>
<td>No need for new implementing laws</td>
<td>Further action needed before entry into force</td>
</tr>
</tbody>
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Public Officers’ Law Seminar: Understanding the Law
26<sup>th</sup> and 27<sup>th</sup> October 2016
Ratification

- Display of “consent to be bound” on the international plane
- Different from need for parliamentary approval
- AGC’s position: “ratify ready”
Ratification

- Why more time?
  - Require legislation
  - Require Parliamentary Approval
  - Consider any implications
Ratification

- Instrument of Ratification (MOFAT)
- Full Powers

- Must identify:
  - Title
  - When & where Concluded
  - Who is signing
  - When & where issued

- Treaty Depository
Accession

- Usually, where State unable to sign
- Multilateral treaties
- Instrument of Accession
Entry into force

- Legally bound
- Only on countries who have expressed CTTB
- Manner of entry into force:
  - Specified date
  - After a certain number of countries expressed CTBB
  - Proportion of GDP
Amendment

- Bilateral
- Multilateral
- Supplementary Treaties (amending Protocols)
Duration

- Specified time period
- Automatic renewal vs Review process
- Extension of Treaties
Termination

- Conclusion of implementation
- Renewed by a new Treaty
- Breach
- Supervening impossibility of performance
- Fundamental change of circumstances
THANK YOU