P. Šturma, V. Balaš, J. Syllová, V. Jirásková:
Selected Problems of Negotiation and Application of International Treaties
[Vybrané problémy sjednávání a provádění mezinárodních smluv]
Charles University in Prague, Faculty of Law, Prague, 2011, 162 p.

The present study was written by professors and researchers from the Department of International Law and the Department of Constitutional Law at the Faculty of Law at Charles University in Prague within a research project of the Ministry of Foreign Affairs. The authors deal with the relationship between international and national law in relation to the negotiation and implementation of international treaties from the perspective of international and constitutional law (incl. constitutional comparisons), which makes this publication a unique undertaking.

The study is devoted to two main issues: the provisional application of international treaties and the role of internal State bodies in the negotiation and approval of international treaties in the Czech area, as well as in other selected countries. The division of the study is based on this fact, i.e. a division into two parts.

In part I. of the publication, the authors from the Department of International Law (Pavel Šturma and Vladimír Balaš) give the reader a very clear and understandable introduction to the provisional application of international treaties. They define the notion of provisional application and address its international legal codification, which is in Article 25 of the Vienna Convention of the Law of Treaties, and also address the history of such codification. The authors admit that although the institution of provisional application invokes some theoretical issues in international law (due to the required formalities of consensus), it is used in practice. Major problems can arise, however, in relation to national law. From the point of view of international law, the consent of contracting States is decisive. According to the authors, the consent of a State to the agreement on provisional application included in a provision of the treaties themselves means that the State may not invoke provisions of its internal law as justification for a failure to perform the international obligation.

The answer to this question was set forth in the following subsection: What are the legal effects of provisional application? This was ascertained also with references to the relevant decisions. Major cases were subsequently described in the section which is devoted to practical examples of provisional application. For example: The provisional application of the General Agreement on Tariffs and Trade (GATT 1947) in Czechoslovakia, or the provisional application of the Energy Charter Treaty (1994), which was analyzed in the light of international investment arbitrations: *Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) and PCA Case No. AA 227, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (30 November 2009).

These references offer readers an extensive description of factual and legal matters, with the opinions of international law experts involved in the cases. From the recent international investment arbitrations, the authors draw the conclusion

that the State should declare whether and to what extent it is unable to provisionally apply the treaty. In the case of an inconsistency clause it is important to invoke a direct inconsistency with internal laws.

A separate subsection focuses in detail on the provisional application of Protocol No. 14 (13/ 5/2004) and No. 14bis (27/5/2009) to the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) by the Member States of the Council of Europe, where the situation can be more difficult than with the provisional application of economic treaties, because Protocol No. 14 and No. 14bis come under the category of contracts containing self-executing provisions.

The final section of part I. is devoted to examining and comparing the Member States of the Council of Europe in relation to the institution of provisional application of treaties. States are divided into three groups (A-States: the authority which has competence to conclude the contract is entitled to decide on provisional application; B-States: the executive body is competent to decide on provisional application; C-States do not allow for the provisional application of international treaties).

The authors emphasize that the Czech Republic lacks a precise domestic legal regulation of the provisional application of international treaties or a legislative delegation of powers in this matter to the Government. However, a similar situation can be seen in other European States. The researchers of part I. mention different opinions of other researchers on the discussed issues which occur in the Czech professional community and express their views on them (e.g. page 17 by Prof. Vladimír Týč).

Part II. of this study focuses on the role of internal State bodies in the negotiation and approval of international treaties. The author (Jindřiška Syllová) begins the constitutional interpretation of the current relations between the highest internal State bodies in relation to treaty law-making with a thesis by Prof. Weyr, which the researcher complements with short comparisons between selected states: Austria, Italy, Germany and Ireland.

The following subsections are more analytical and focused on the position of the Government, the President and Parliament in the negotiation of international treaties in the Czech context. The analysis is based on the "doctrine of government responsibility for foreign policy" and on the "doctrine of common and loyal foreign policy". It is useful to note that subsection II.1.3. offers readers an explanation of legal terms (e.g. negotiation, ratification) from the point of view of constitutional law.

In the final subsections, the authors (Věra Jirásková and Jindřiška Syllová) discuss various aspects and ways of resolving interpretation problems in relation to the negotiation of international treaties. On the one hand, it would be appropriate to complete the general framework in the Constitution [i.e. Art. 1(2), 10, 10a, 39(4), 49, 63(1), 87] by including a law on international treaties. This way would work better in legal practice than Guidelines of the Government. According to the authors, this law should also include rules on the provisional application of all or some categories of international treaties and an obligation of the Government to

inform the Parliament and to control powers for the Parliament. This solution is compared with legislative regulations in other European States. The result of the comparison shows that a legislative regulation does not provide a sufficient and long-term certainty and a stabilization of the relations between internal State bodies. The problems of relations between State bodies are settled *per partes* by the Constitutional Courts. On the other hand, it would be beneficial to reform the relations between internal State bodies by changing political practices, e.g. by fixing deadlines in internal directives of the MFA or Guidelines of the Government. However, as was shown, the European States which did not adopt the legislative way have problems in relations between internal State bodies as well.

The authors of the reviewed study are inclined to believe that a better solution for the traditional parliamentary character of the Czech Republic would be the legislative way. This is also consistent with the principle of legal certainty.

The reviewed publication is intended primarily for legal professionals working in the international and/or constitutional law area in the Czech Republic. It can be a tool for the staff of the MFA and other bodies involved in the negotiations and internal discussions of international treaties, or an impetus for future legislative work. It can also serve as a textbook for teaching specialized courses of International Law, Constitutional Law and for teaching Ph.D. programs at law faculties. Readers may find it very interesting that part of the study features a comparative table of the laws of some central and eastern European States (Slovenia, Lithuania, Latvia, Estonia, Poland, Russia) as well as the laws on international treaties (the part titled Attachments).

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