

**INTERNATIONAL AGREEMENTS AND THE REPUBLIC
OF LITHUANIA**

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S u m m a r y

International agreements are considered to be the main source of contemporary international law. As the number of concluded international agreements has increased, certain branches of international law, like international law of the sea, diplomatic law, consular law, law of treaties, have been codified into international agreements. Having regained its independence the Republic of Lithuania became a party to those treaties. Data of the register of international agreements of the Ministry of Foreign Affairs indicate that in 1990 the Republic of Lithuania concluded 11 treaties with other States, accordingly in 1991 – 25, 1992 – 84, 1993 – 87, 1994 – 74, 1995 – 77, 1996 – 67, 1997 – 57, 1998 – 53, 1999 – 56, 2000 – 40, 2001 – 53.

The law of treaties, as a branch of international law, governs conclusion of treaties, their coming into effect and performance, matters of accession, amendment, invalidity, registration, publication and other questions. All these questions are analysed exhaustively in the doctrine of international law. Nevertheless, attitude of separate States towards the administrative practice of treaties is not sufficiently analysed.

For a long time the doctrine of treaties in Lithuania has been under-developed. During the previous five years a number of research projects of various levels emerged. The doctoral dissertation by Eglė Radušytė defended in 2001 in the field of social sciences, titled “The International Agreements in the Legal System of the Republic of Lithuania” requires mentioning. Andrius Nevera analyzed aspects of territorial validity of criminal law treaties of the Republic of Lithuania in his doctoral dissertation of social sciences titled “Principles of National Criminal Jurisdiction and Their Consolidation in the Criminal Code of the Republic of Lithuania”. Prof. Kūris, Prof. Vadapalas, Prof. Katuoka, Doc. Jočienė, Dr. Radušytė have contributed to the doctrine with their articles on the questions of treaty law. Nevertheless, there is still an obvious lack of works analysing in detail Lithuanian position towards treaties, the practice of treaty performance by the Republic of Lithuania and the law on treaties of the Republic of Lithuania itself. This article will focus on certain aspects of the conclusion of treaties and the status of treaties in the legal system of Lithuania that have not been analyzed yet.

One of the primary questions in the law of treaties is the question of the concept of treaty. This question is analyzed in the context of the concept of treaties provided by scholars in their works on the law of treaties.

This article will consider only one aspect of the concept of treaty. I would agree with the opinion of Dr. Radušytė that the concept of treaty may be analysed considering three possible sources: the doctrine of international law, instruments of international law and the laws of the Republic of Lithuania [1, p. 14-35]. The concept of treaty existing in the doctrine reflects the variety of opinions, disclosing the subjective views of scholars on the features of treaty. However, I find it difficult to agree that concepts of treaty provided in the instruments of international law and national laws may differ. In my opinion, the concept of treaty should be understood identically in both legal systems. This opinion is based on the coordination theory of international and national law. According to this theory, priority should be given to the concept of treaty as defined in the international instruments, whereas national law should only follow the definition provided by an international instrument. The Republic of Lithuania followed this doctrine in 1999 when the law on treaties of the Republic of Lithuania was adopted. The concept of treaty submitted in this law is identical to the concept provided in the 1969 Vienna Convention "On the Law of Treaties". This convention came into force in the Republic of Lithuania on February 14, 1992. It is interesting to note that the definition of treaty provided by the law "On treaties of the Republic of Lithuania" of 1991 was different from the definition provided by the Vienna Convention. It needs to be emphasized one more time that the international community of States should view the concept of treaty in the same way. Prof. V. Vadapalas notes that international law takes national law as a simple fact – [2, p. 49], therefore national law cannot amend the concepts that are already defined in treaties.

In my opinion, amendments introduced in articles 3 and 4 of the Law on Treaties of the Republic of Lithuania of 1999, regulating the right of initiative to conclude treaties and the question of expediency of their conclusion, is a positive development. The law on treaties of 1991 similarly vested the right to present suggestions concerning expediency of conclusion of treaties with permanent commissions of the Supreme Council or relevant Ministries after consulting the Government.

The law on treaties of 1999 lists the subjects having the right of initiative to conclude treaties. These are the President, the Prime Minister, the minister of foreign affairs, Government of the Republic of Lithuania or the ministries and Government agencies when they act in accordance with the procedure established by the Government. However, the law does not disclose what the legal scope of the right to initiative to conclude treaties is. This leaves the question open whether the content of the right of initiative includes only the question of becoming a party to a treaty, or whether this right also encompasses the question of possible reservations to treaties. Finally, it is open to interpretation whether the right of initiative also includes the question of denunciation of treaties. Since the answers to these questions are not apparent from the law, it remains to wait and see how they will be settled in practice. In my opinion, it would be rational for the law to provide for a wider right of initiative to conclude treaties that would encompass the aspects raised above.

I would agree with the opinion that the right of initiative to conclude treaties could be viewed by analogy as a right of legislative initiative. The right of legislative initiative is the right of competent institutions and persons to suggest adoption of legal rules, their amendment or recognition that legal rules have lost the juridical power [3, p. 5]. It is natural that absolute analogies cannot be made between the right of initiative to conclude international agreements and the right of legislative initiative, because of the specific character of international law as the regulator of international relations. E.g. unilateral acts attempting to change the provisions of a treaty without the agreement of the other parties to the treaty are hardly possible.

Decisions on the expediency of conclusion of treaties are vested with the President, the Prime Minister, the Minister of Foreign Affairs of the Republic of Lithuania, and the

Government of the Republic of Lithuania or, in accordance with the procedure established by it, ministries of the Republic of Lithuania and Government agencies. It would be interesting to learn the arguments why these subjects have been chosen. The fact that the same subject is entrusted to exercise a right of initiative to conclude a treaty and to take a decision whether conclusion of such a treaty is expedient raises concerns. I think that articles 3 and 4 of the law on treaties first of all are a kind of political protectors, having an aim to conclude only such international agreements, which would answer the interests of the Republic of Lithuania. When the question of the expediency of treaties is decided, it must be discussed whether the provisions of treaty are compatible with the Constitution of the Republic of Lithuania, the aims of Lithuanian foreign policy and national security, principles and norms of international law – it is shown in article 4 of the law on treaties of the Republic of Lithuania.

Apparently, criteria for the expediency of treaties vary. Without a doubt a question whether the suggested treaty is not in conflict with the Constitution of the Republic of Lithuania is the most important one. Problematic aspects of this question are examined in detail by Dr. Juozas Žilyys, who distinguishes between two types of constitutional review concerning conclusion of treaties: prior to ratification and after ratification [4, p. 166-167]. The function of review is vested with the Constitutional Court of the Republic of Lithuania. Article 106 of the Constitution of Lithuania establishes that the *Seimas* and the President may request a conclusion from the Constitutional Court whether a treaty is in conflict with the Constitution. As Dr. Juozas Žilyys notes, the number of initiators of constitutional review of treaties is limited: the *Seimas* and the President of the Republic of Lithuania. I will only remind that the law on treaties provides that decisions on the expediency of conclusion of treaties of the Republic of Lithuania shall be taken, in accordance with the requirements of the Constitution of the Republic of Lithuania, by the President, the Government of the Republic of Lithuania or the Ministry of Foreign Affairs on the instruction of and according to the procedure established by the Government. Bearing in mind that the list of subjects provided in the law is wider than the list provided by the Constitution, the question whether the law on treaties is in conformity with the Constitution of the Republic of Lithuania may arise. Also attention must be paid to the fact that when provisions of articles 3 and 4 of the law on treaties are applied, the laws of Lithuania do not elaborate on the question how the competence is shared between State institutions and officials when the questions of the initiative and expediency of treaties are decided.

One of the essential questions addressed in all countries is the question of status of international agreements in the national legal system. Lithuanian scholars addressing this question usually refer to the third part of Article 138 of the Constitution of the Republic of Lithuania, which provides that international agreements, which are ratified by the *Seimas* of the Republic of Lithuania, shall be a constituent part of the legal system of the Republic of Lithuania. This Article of the Constitution is analyzed by Dr. Radušyte, Prof. Vadapalas, Dr. Žilyys. This Article was also analyzed by the Constitutional Court in its ruling Nr. 8/95 “On the compliance of the law on treaties of the Republic of Lithuania with the Constitution of the Republic of Lithuania”. The ruling was delivered on October 17, 1995. The Constitutional Court held that according to the Constitution legislator by way of ratification might decide which instrument of international law shall be the constituent part of the legal system of the Republic of Lithuania having the force of law. Because only the *Seimas* has the exclusive right to adopt laws, the expression “has the power of law” is applicable only to those treaties that have been ratified by the *Seimas*. I find the legal and logical argumentation of the Constitutional Court persuasive.

Article 11 of the Vienna Convention on the Law of Treaties envisages various means of expression of consent to be bound by the treaty. The State can express its consent to be bound by a treaty by signature, exchange of instruments making up the treaty, ratification, acceptance, approval or accession, or by any other means. Analysis of the text of this Article

allows asserting that there are various means to express that the treaty is binding, and secondly, the list of means to acknowledge the treaty as binding is not exhaustive. Lithuania often chooses accession as a way to express consent to be bound by treaties, e.g. data of the register of treaties of the Ministry of Foreign Affairs of the Republic of Lithuania shows that by the end of 2000 Lithuania acceded to 232 multilateral treaties.

I will now elaborate on the means of accession as a way to be bound by a treaty. Article 15 of the Vienna Convention on the Law of Treaties indicates that the State expresses consent to be bound by a treaty by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

It must be noticed that the law on treaties of the Republic of Lithuania does not establish the procedures to find the treaty as legally binding. For example, some decisions to accede to the treaties have been taken adopting a decree of the Government of the Republic of Lithuania, other decisions to accede to the treaty have been taken by the *Seimas* of the Republic of Lithuania adopting a law on the matter of accession. Constitution of the Republic of Lithuania and the law on treaties enumerates which treaties should be ratified, e.g. it is indicated that the *Seimas* should ratify multilateral and long-term treaties. However, Lithuania became a party to the majority of such treaties by way of accession. These treaties include the 1969 Vienna Convention on the Law of Treaties, 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations. In some instances Lithuania acceded to a few conventions and they became effective in Lithuania, nevertheless, they were ratified later, e.g. Lithuania acceded by the governmental decree on January 8, 1992, Nr.11 to the UN Convention of the Rights of the Child, and it entered into force on March 1, 1992. This Convention was ratified on July 3, 1995.

Some treaties anticipate that it is possible either to accede to the treaty or the treaty may be ratified. In my opinion, it would be reasonable for Lithuania to ratify all multilateral agreements, which envisage the alternative means of expressing agreement to be bound by either accession or ratification. The legal system of the Republic of Lithuania grants legal force of law only to the ratified treaties and consequently this provides with more certainty that such treaties will be performed, and thus Lithuania will fulfil its *pacta sunt servanda* obligation.

Dr. Radušytė considers that if Lithuania accedes to a treaty by the decision of the *Seimas* of the Republic of Lithuania when it adopts a law, such a procedure of accession can be equated to the ratification [1, p. 68]. I would agree with this opinion because in this case the will of the legislator is expressed.

The examples provided concerning expression of agreement to be bound by a treaty show that it is necessary to consider carefully the treaty itself in order to choose the most appropriate means to express an agreement to be bound by it. It sometimes happens that treaties are both acceded to and ratified. This shows that either the institutions did not have a clear position on this matter, or the public servants at these institutions were not sufficiently skilled in international law.

The dominant opinion in Lithuanian doctrine of international law is that in cases of conflict between treaties and national laws, constitutional provision should enshrine that a treaty prevails. Such an idea was examined by Dr. E. Radušytė, Dr. A. Nevera and other scholars. They suggest very similar formulations of constitutional norms on this question.

Dr. Radušytė suggests that the Constitution should contain the following provision: "If a proclaimed treaty which has entered into force and has been ratified by the *Seimas* of the Republic of Lithuania establishes a different provision than the laws and other legal acts of

the Republic of Lithuania, either valid at the moment of the conclusion of the treaty, or after, the provisions of the treaty apply” [1, p. 121].

Dr. Nevera in turn offers the following formulation of the constitutional norm: “Universally recognized norms of international law and treaties ratified by the *Seimas* of the Republic of Lithuania are the constituent part of the legal system of the Republic of Lithuania and have priority against national laws, and create rights and duties for all persons on the territory of Lithuania [5, p. 17]. The author grounds this formulation on the corresponding provisions of the Constitution of the Russian Federation and German Constitution of 1949.

It is important to note that the formulation of the constitutional norm suggested by Dr. Radušytė is very close to the formulation contained in Article 11(2) of the Law on treaties, which provides as follows:

“If a ratified treaty of the Republic of Lithuania which has entered into force establishes norms other than those established by the laws, other legal acts of the Republic of Lithuania which are in force at the moment of conclusion of the treaty or which entered into force after the entry into force of the treaty, the provisions of the treaty of the Republic of Lithuania shall prevail”. [1, p. 170].

Merit of the author is that she suggests transferring this provision into the Constitution of the Republic of Lithuania. However, such a mechanical transfer of the legal provision into the Constitution is hardly advisable. First of all, the provision of article 11(2) of the law on treaties should be assessed as the rule of conflict (Conflict of laws is the system of legal rules determining which legal rule is applicable in case of conflict between rules governing the same legal relationships [6, p. 103]). On the basis of such a rule the conflict between a treaty and national law may be solved. I would think that the rule of conflict does not grant priority to treaties, but only determines which provision is applicable in the case of conflict. The question of supremacy of treaties is so important that it is not sufficient to be left for the law to determine. It is worthy of regulation by the Constitution, which is the main law in Lithuania. Therefore the question of the priority of treaties can be solved only on a constitutional level. Already in 2000 in one of the conferences I emphasized that it would be reasonable for the Constitution to recognize supremacy of ratified treaties of the Republic of Lithuania [7, p. 45]. This opinion has been also expressed by Dr. Lapinskas [8, p. 64] and Prof. Vadapalas [9, p. 18].

While deliberating civil cases the Supreme Court of the Republic of Lithuania often invokes treaties. As observed in the decision Nr.5 of the Senate of the Court of June 13, 1997, treaty application is based on the fact that “treaties of the Republic of Lithuania, also conventions and protocols, to which Lithuania is a party, are the constituent part of the legal system of Lithuania and they are applied directly”. The Senate also points to the fact that according to Article 1.13(1) of the civil code and Article 482 of the code of civil procedure, “In case of conflict between provisions of treaties, conventions or protocols and the civil code and the code of civil procedure, the provisions of treaties apply” [10, p. 248-249]. In view of this it follows that the Senate of the Supreme Court considers the rules discussed as rules of conflict. A number of cases decided by the Supreme Court and concerned with application of treaties deserve to be mentioned. E.g. in the civil case “Petronele Rozeviciene v. Panevezys City Council, Joana Miseviciene, Povilas Grigaliunas, Vilhelmas Grigaliunas, Albinas Imbrasas, Stasys Kropas” Nr. 3k-3-384/99 the Supreme Court held that the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms is the constituent part of the Lithuanian legal system, therefore the courts must construe and apply national law consistently with the Convention, and in the case of conflict between national law and the Convention, to grant priority to the Convention. In my opinion the expression ‘to grant priority to the Convention’ is not legally correct from the point of view of Lithuanian laws. Such proposition would be correct if the Constitution of Lithuania had established supremacy of the treaties. I would agree with a formulation of the constitutional provision, which would establish priority of treaties against national law. This is the way followed by the

majority of democratic States and supported by the practice of international courts and arbitrations.

I find that such constitutional provision would fill in the gap of the question of relationship of Constitution of the Republic of Lithuania as the main law of the land, and treaties of the Republic of Lithuania.

The question of performance of treaties is very important. Being the executive power of the country, the Government must ensure the performance of treaties binding on Lithuania. Such an obligation is imposed on the Government by Article 12 (3) of the law on treaties.

The performance of treaties concerns practice of various state institutions, including the practice of courts. Because the courts of the Republic of Lithuania apply treaties, they also ensure that treaties were performed. Some treaties establish a mechanism of control of the State concerning the provisions of the treaty, e.g. the European mechanism for the protection of human rights and fundamental freedoms. This mechanism provides the right to the persons under the jurisdiction of the Republic of Lithuania to file petitions against Lithuania. Eleven cases have already been won against Lithuania. I emphasize this, because lost cases and the ensuing situation show that no state institution has undertaken the initiative to ensure that such cases would not arise at all and that the state institutions would not repeat the violations of the European Human Rights Convention on the European institutions in the future. Because European Court of Human Rights in the framework of the European Council is one of the most important institutions of international human rights protection, the State should have a specialized institution, which in terms of its competence would ensure that lost cases were properly analysed and would undertake an initiative itself to amend the existing situation. In my opinion, besides the Ministry of Justice it is also the Supreme Court which should undertake this task, of course, not exceeding the limits of its competence and functions.

Conclusions and suggestions

1. It is submitted that in order to disclose the concept of treaty it is possible to refer to the doctrine of international law, instruments of international law and national laws. There cannot be any inconsistencies between national laws and the instruments of international law with respect to the definition of the concept of treaty. Priority should be given to the concept of treaty provided in international instruments. Therefore on the basis of the theory of coordination between two legal systems a single concept of treaty should exist both in the law of treaties and national law.

2. Articles 3 and 4 of the 1999 law on treaties of the Republic of Lithuania reflect a positive development governing initiative to conclude treaties and the question of expediency of treaties.

3. It is a shortcoming of the law on treaties to provide that the same two subjects are vested both with a right to take decisions on the expediency of conclusion of treaties and possess the right of initiative to conclude treaties. Decision on the expediency of treaties is a political protector, which in my opinion cannot be successfully decided by the same subject.

4. The legislator should abolish the gap and include provisions as to the legal content of the right of initiative. I would consider that this right should be described using the analogy with the concept of the right of legislative initiative. Of course, this concept should be applied duly considering the specific character of international law.

5. If international treaties allow for multiple ways to express an agreement to be bound by them, the most appropriate mean of expressing the agreement to be bound for the Lithuanian legal system should be chosen. As far as possible treaties should be ratified. On the basis of Lithuanian legal norms, a conclusion may be made that treaties ratified by *Seimas* are a part of Lithuanian legal system and have the status of law.

6. If Lithuania accedes to a treaty adopting a law, such a treaty should be considered to have the same legal status as if the treaty were ratified.

7. I agree with the opinion of the scholars that the Constitution of the Republic of Lithuania should contain a provision determining the priority of treaties in cases of conflict with national law. It should also address the question of relationship between Constitutional provisions and treaties.



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