SECTION D

Law of Treaties
A Critical Look at the Law of Treaties: Giving Recognition to Informal Means of Treaty Adaptation

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Introduction

Treaties form a crucial part of the regulatory framework of international law. This, in turn, highlights the central importance of the 1969 Vienna Convention on the Law of Treaties (VCLT) – the “Treaty on Treaties.” Discussions on key topics of the law of treaties – ranging from reservations, to the status of lex specialis regimes, to treaty interpretation – have been on the rise in recent years, stirred further by debates on the fragmentation of international law. These discussions are also spurred by the fact that the VCLT does not (comprehensively) deal with certain treaty topics or distinctions, which, in light of present-day developments, require a deeper understanding, and are coming under increased scrutiny.

The present chapter will first consider the nature of the VCLT regime, and what – if anything – is “wrong” with the international law of treaties as enshrined in the Convention. It will then turn to the question of the extent to which the VCLT provides for the necessary processes and distinctions relating to one particularly crucial topic, namely, treaty adaptation. Treaties must help strike an adequate balance between stability and legal certainty on the one hand, and flexibility and adaptability of the law on the other. They must be able to undergo modernization and evolve in line with new policies, technological advancements, and emerging international institutions and actors, to continue fulfilling their purpose over time. Treaty adaptation thus allows for the effective regulation of international relations.

Finally, the chapter will look at one mechanism for treaty adaptation in particular: the process of tacit treaty modification by subsequent practice.

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