A comprehensive treatment of the law of treaties written from the viewpoint of an experienced practitioner: the first book of its kind. Aust provides a wealth of examples of the practical problems experienced with treaties on a daily basis, not just when the treaty is the subject of a court case. The book contains numerous recent precedents of treaties and other treaty-related documents, which will be invaluable for the practitioner. Aust aims to supply the reader with a full understanding of treaties. He avoids technical language as far as possible, making his work accessible to non-lawyers. Although not primarily an academic work – it describes the treaty-making and treaty-using processes from the point of view of a practitioner of thirty years' experience – there is plenty to interest and inform students and academics, including those specialising in political science, international relations or diplomacy.

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MODERN TREATY LAW AND PRACTICE

ANTHONY AUST

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For Katie and Sophie

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FOREWORD

The law of treaties is one of the branches of international law whose roots go back furthest in time. With the emergence of political communities came the need for them to deal with each other, to settle questions in dispute without having to go to war, to arrange the consequences of success or failure after a war had been fought, to strike alliances, organise matters of trade, settle territorial limits to their power, and so on. For such matters they needed from early times some accepted rules covering two matters, the sending of envoys and the making of agreements. Both have remained central to the conduct of what we now call international relations.

Over centuries the rules and practices governing those agreements have evolved into the modern law of treaties. The evolutionary process is a continuing one. A book on the law of treaties written at the end of the nineteenth century is recognisably about the same subject as its equivalent written today. Yet, while the general body of the law remains broadly stable, times change and bring with them changes in the law. International organisations have emerged as significant actors in the treaty-making process; multilateral treaties are nowadays concluded more frequently, and have more parties, than used to be the case – a reflection of the enormous increase in the number of states during the course of the present century – and there have been great technological changes, especially in communications, which have noticeably affected the process by which treaties are negotiated and concluded.

The modern law is now authoritatively set out in the Vienna Convention on the Law of Treaties 1969, and in its parallel Convention of 1986 on treaties made by international organisations. They are, however, not only far from a complete code on the subject, they are also not free from continuing controversy even in respect of matters which they do deal with (such as the vexed topic of reservations, which the International Law Commission is presently studying once again, having previously reported

on the matter in 1951). Moreover, as is so often the way, new issues have arisen which were not envisaged when the principal Vienna Convention of 1969 was concluded. A new book on the law of treaties, surveying the subject some thirty years after the Vienna Convention was concluded, is timely.

What, however, makes the present volume particularly welcome is its manifest concern with the practical aspects of the law of treaties. Undoubtedly the law of treaties exercises a great intellectual fascination. Many issues directly or indirectly raise large questions of legal theory. Furthermore, some treaties are of enormous historical significance, like the Peace of Westphalia of 1698 and the Treaty of Rome of 1957. But it must always be recalled that treaties are essentially instruments for regulating by agreement the myriad day-to-day affairs of states. International travel and broadcasting, international posts and telecommunications, international trade – these and many other matters, which are usually taken for granted, are dependent upon a network of often very detailed treaties, both bilateral and multilateral.

For this array of treaties – essential for the conduct of international relations, but seldom eye-catching – the negotiating process is well established. So too are most of the relevant legal rules. But however well developed international rules and processes may be, they have a practical dimension to which much less attention is usually paid. This is doubly unfortunate. The true significance of many rules is illuminated by being seen in the perspective of their application in practice, while the steps which need to be taken in applying the rules can be as important as the rules themselves, going far to explain why many things are as they are.

It is the great virtue of this volume that, in looking at the law *and* its practical context, it grounds the treatment of the law of treaties firmly in the real world of international relations, foreign ministries and diplomacy. That is the world about which Mr Aust is exceptionally well qualified to write. As one of the senior legal advisers in the Foreign and Commonwealth Office, who has served not only in London but also in diplomatic posts abroad (including as Legal Adviser to the United Kingdom Mission to the United Nations in New York from 1988 to 1991), he brings to this book a wealth of experience on all aspects of treaty law and practice. That experience, and the insights which flow from it, pervade every chapter.

Everyone concerned with treaties and the law relating to them, whether on a day-to-day basis, occasional practitioners in the field, or as outside observers of the treaty process, will benefit greatly from Mr Aust's up-to-date and practical treatment of the subject. I warmly commend this volume, which is a welcome addition to the literature in this field.

Sir Arthur Watts KCMG QC
London, January 1999

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Next I must express my great appreciation to Arthur Watts, not just for the foreword, but for suggesting that I write this book. Without his encouragement I doubt it would have been written.

Although this book reflects my own experience, in certain areas I have inevitably also drawn upon that of my colleagues past and present in the Foreign and Commonwealth Office (FCO). Several of them have supplied texts or taken time to read and comment on various parts. It is always invidious to pick out names, but special thanks must go to Michael Wood for reading the complete manuscript (twice), and making many helpful suggestions to improve it. My youngest colleague at the time, Ruma Mandal, also read the whole text. Her searching questions showed me where I had to explain rather better what I had assumed the reader would know. The book has benefited also from the fruits of the superlative research into some of the more perplexing treaty questions done for the FCO legal advisers by Susan Hulton; as well as Andrew Young's special knowledge of Hong Kong. And, of course, my thanks must go to Frank Berman for supporting me in this endeavour.

No lawyer can work effectively without a well-run library. Susan Halls, the librarian, as well as Anne Sutton, Jane Crellin and other staff of the FCO Legal Library, helped enormously by searching out material for me. Isabel Warner and her staff of the FCO Treaty Section read the draft and contributed much practical information from their personal and collective knowledge.

Others, both at home and abroad, commented on certain passages in the manuscript or supplied material. They include Andrew Barlow,

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Needless to say, the opinions expressed in this book do not necessarily reflect those of the British Government.

TABLE OF TREATIES

Where appropriate either a treaty is listed under the name or acronym by which it is commonly known, or the subject matter is mentioned first. If a UN registration number is given, but no UNTS reference, the treaty will not have been published in the UNTS at the time of writing (December 1998).

Multilateral treaties

Additional Protocols of 1977 to the Geneva Conventions (1125 UNTS 3 (No. 17512); ILM (1977), p. 1391; UKTS (1999) 29 and 30)

AETR II Agreement 1970 (993 UNTS 143 (No. 14533))

American Convention on Human Rights 1969 (ILM (1970), p. 673; UKTS (1980) 58)

Antarctic Marine Living Resources Convention (CCAMLR) 1980 (402 UNTS 71; ILM (1980), p. 837; UKTS (1982) 48; TIAS 10240)

Antarctic Mineral Resources Activities Convention (CRAMRA) 1988 (ILM (1988), p. 865)

Antarctic Treaty 1959 (402 UNTS 71 (No. 5778); UKTS (1961) 97)

Antarctic Treaty, Environmental Protocol 1991 (ILM (1991), p. 1460; UKTS (1999) 6)

ASEAN Framework Agreement on Intellectual Property Cooperation 1995 (ILM (1996), p. 1074)

ASEAN Framework Agreement on Services 1995 (ILM (1996), p. 1077)

Austrian State Treaty 1955 (217 UNTS 223 (No. 2249); UKTS (1957) 58; TIAS 3298)

Bribery Convention 1997 (ILM (1998), p. 1)

Cambodia Agreement 1991 (ILM (1992), p. 1820)

CEDAW (Convention on the Elimination of Discrimination Against Women) 1979 (1249 UNTS 13 (No. 20378); ILM (1980), p. 33; UKTS (1989) 2)

CERD (Convention on the Elimination of All Forms of Racial Discrimination) 1966 (660 UNTS 195 (No. 99464); UKTS (1954) 39)
CFE (Conventional Forces in Europe) Treaty 1990 (ILM (1991), p. 6)
CFE, Document of the States Parties 1993 (UKTS (1994) 21)
CFE, Document Agreed 1996 (ILM (1997), p. 878)
Chemical Weapons Convention 1993 (CWC) (ILM (1993), p. 804; UKTS (1997) 45; UN Reg. No. 33757)
Chicago Convention 1944 (15 UNTS 295 (No. 102); UKTS (1953) 8)
Chicago Convention, Article 3*bis* Protocol (ILM (1984), p. 705; UKTS (1999) 68)
CITES (Convention on International Trade in Endangered Species) 1973 (993 UNTS 243; ILM (1973), p. 1085; UKTS (1976) 101)
Climate Change Convention 1992 (ILM (1992), p. 851; UKTS (1995) 28; UN Reg. No. 30822)
Commonwealth of Independent States (CIS) Charter 1993 (ILM (1995), p. 1282)
Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT) (ILM (1996), p. 1443)
Congress of Vienna, Acts (64 CTS 454)
Constantinople Convention 1888 (171 CTS 241)
Conventional Weapons Convention 1980 (1342 UNTS 137 (No. 22495); ILM (1980), p. 1523; UKTS (1996) 105)
Dayton Agreement 1995 (ILM (1996), p. 75)
EMEP Protocol 1984 (ILM (1988)), p. 701; UKTS (1988) 75)
ENMOD Convention 1977 (1108 UNTS 151; ILM (1977), p. 16; TIAS 9614)
Espoo Convention 1991 (ILM (1971), p. 802)
Estonia Agreement 1995 (*Finnish Treaty Series* 1995, No. 49) and with Additional Protocol 1996 (UKTS (1999) 74)
Eumetsat Convention 1983 (UKTS (1990) 32)
Eurocontrol Convention 1960 (523 UNTS 117 (No. 7557); UKTS (1963) 39)
Eurocontrol Convention, Amending Protocol 1981 (UKTS (1987) 2)
European Convention on Extradition 1957 (359 UNTS 273 (No. 5146); UKTS (1991) 97)
European Convention on Human Rights (ECHR) 1950 (213 UNTS 221 (No. 2889); UKTS (1953) 71)
European Convention on Human Rights, Protocol No. 11 (ILM (1994), p. 960)
European Convention on Nationality 1997 (ILM (1998), p. 44)
European Convention for the Peaceful Settlement of Disputes (820 UNTS 102)

European Convention on State Immunity 1972 (ILM (1972), p. 470; UKTS (1979) 74)
European Convention on the Suppression of Terrorism 1957 (1137 UNTS 93; UKTS (1978) 93)
European Energy Charter 1994 (ILM (1995), p. 373)
European Space Agency (ESA) Convention 1975 (1297 UNTS 161 (No. 21524); ILM (1975), p. 864; UKTS (1981) 30)
European Union, Decision of the Edinburgh Summit 1992 (UKTS (1994) 2)
Europol Convention 1995 (Cm 3050)
FAO Compliance Agreement 1993 (ILM (1994), p. 968)
FAO Constitution (UKTS (1961) 11)
GATT (General Agreement on Tariffs and Trade) 1947 (55 UNTS 187 (No. 814 I(b)))
GATT Protocol of Provisional Application 1947 (55 UNTS 308 (No. 814 I(c)))
General Act for the Pacific Settlement of International Disputes 1928 (93 LNTS 343)
Geneva Conventions 1949 (75 UNTS 3 (Nos. 970–3); UKTS (1958) 39)
Genocide Convention 1948 (78 UNTS 277 (No. 1021); UKTS (1970) 58)
Hague Convention on Child Abduction 1980 (1343 UNTS 89 (No. 22514); UKTS (1986) 66)
Hague Conventions for the Pacific Settlement of International Disputes 1899 and 1907 (187 CTS 410 and 205 CTS 233; UKTS (1971) 6)
Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 UNTS 105; UKTS (1972) 39)
Hostages Convention 1979 (ILM (1979), p. 1460; UKTS (1983) 81)
Illicit Traffic in Narcotic Drugs and Psychotropic Substances Convention 1988 (ILM (1989), p. 493; UKTS (1992) 26; UN Reg. No. 27627)
Inmarsat Convention 1976 (1143 UNTS 105 (No. 17948); ILM (1976), p. 1051; UKTS (1979) 94; TIAS 9605)
Intelsat Agreement 1971 (ILM (1971), p. 909; UKTS (1973) 80)
International Atomic Energy Agency (IAEA) Statute 1956 (276 UNTS 3 (No. 3988); UKTS (1958) 19)
International Covenant on Civil and Political Rights 1966 (ICCPR) (999 UNTS 171 (No. 14668); ILM (1967), p. 368; UKTS (1977) 6)
ICCPR Optional Protocol 1966 (999 UNTS 171 (No. 14668))
ICCPR Second Optional Protocol 1989 (ILM (1990), p. 1465; UN Reg. No. 14668)
International Criminal Court Statute 1998 (ILM (1998), p. 1002)

International Labour Organisation (ILO) Constitution (15 UNTS 35; UKTS (1948) 47, (1961) 59 and (1975) 110)
International Sale of Goods, Convention on Contracts for, 1980 (1489 UNTS 3 (No. 25567); ILM (1980), p. 671)
International Telecommunications Union (ITU) Convention 1992 (UKTS (1996) 24)
Internationally Protected Persons Convention 1973 (1035 UNTS 167 (No. 15410); UKTS (1980) 3)
Investment Disputes between States and Nationals of other States, Convention on the Settlement of, 1965 (575 UNTS 159 (No. 8359); ILM (1965), p. 524; UKTS (1967) 25)
Kellogg–Briand Pact 1928 (94 LNTS 57; UKTS (1929) 29)
Kuwait Regional Marine Environment Convention 1978 (ILM (1978), p. 511)
Lake Victoria Fisheries Organisation Convention 1994 (ILM (1997), p. 672)
Landmines Convention 1997 (ILM (1997), p. 1509; UKTS (1999) 18)
Locarno Pact 1925 (54 LNTS 305)
London Agreement 1945, establishing the Nuremberg Tribunal (82 UNTS 279)
Maastricht Treaty on European Union 1992 (UKTS (1994) 12)
Maintenance, Convention on Recovery Abroad of, 1956 (268 UNTS 3 (No. 3850); UKTS (1975) 85)
Maintenance Obligations, Convention on Recognition and Enforcement of, 1973 (1021 UNTS 209; UKTS (1980) 49)
Memorandum of Understanding establishing the Inter-Organisation Programme for the Sound Management of Chemicals 1995 (ILM (1995), p. 1315)
Memorandum of Understanding on the Application of the MFN Agreement 1949 to the Western Sectors of Berlin (42 UNTS 356; UKTS (1950) 7)
Memorandum of Understanding regarding German Assets in Italy 1947 (138 UNTS 111; UKTS (1947) 75)
Memorandums of Understanding on the Avoidance of Overlaps and Conflicts in Deep Sea-Bed Areas, 1991 and 1995 (UKTS (1991) 52 and UKTS (1995) 4)
Memorandum of Understanding relating to the Implementation of the Guidelines for Transfers of Nuclear-Related Dual-Use Equipment 1992 (ILM (1992), p. 1097)
Meuse, Agreement on Protection of, 1994 (ILM (1995), p. 854)

Missing Persons, Convention on the Declaration of the Death of, 1950 (119 UNTS 99 and 258 UNTS 392 (No. 1610))
Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft 1971 (974 UNTS 177 (No. 14118); UKTS (1974) 10)
Montreux Convention 1936 (173 LNTS 213; UKTS (1937) 30)
National Minorities, Council of Europe Framework Convention on, 1995 (ILM (1995), p. 353; UKTS (1998) 42)
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (330 UNTS 38 (No. 4739); UKTS (1976) 26; TIAS 6997)
North Atlantic Treaty 1949 (34 UNTS 243 (No. 541); UKTS (1949) 56)
Nuclear Material, UN Convention on Physical Protection, 1980 (ILM (1979), p. 1419; UKTS (1995) 61)
Nuclear Non-Proliferation Treaty (NPT) 1968 (729 UNTS 161 (No. 10485); ILM (1968), p. 809; UKTS (1970) 88; TIAS 6839)
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Outer Space Treaty 1967 (610 UNTS 205 (No. 8843); ILM (1967), p. 386; UKTS (1968) 10; TIAS 6347)
Ozone Layer, Vienna Convention on the Protection of, 1985 (1513 UNTS 324 (No. 26164); ILM (1987), p. 1529; UKTS (1990) 1)
Ozone Layer, Montreal Protocol on Substances that Deplete, 1987 (1522 UNTS 3 (No. 26369); ILM (1987), p. 1550; UKTS (1990) 19)
Partial Test Ban Treaty 1963 (480 UNTS 43 (No. 6964); UKTS (1964) 3; TIAS 5433)
Plastic Explosives, Convention on the Marking of, 1989 (ILM (1991), p. 726)
Provisional Understanding on Deep Sea-Bed Matters 1984 (ILM (1984), p. 1354; UKTS (1985) 24)
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Refugees Convention 1951 (189 UNTS 137 (No. 2545); UKTS (1954) 39)
Refugees Convention, Protocol relating to, 1967 (606 UNTS 267 (No. 8791); ILM (1967), p. 6; UKTS (1969) 15)

Revised General Act for the Pacific Settlement of International Disputes 1949 (71 UNTS 101 (No. 912))
Rights of the Child Convention 1989 (ILM (1989), p. 1448; UKTS (1992) 44; UN Reg. No. 27531)
Seabed Arms Control Treaty 1971 (955 UNTS 115 (No. 13678); ILM (1971), p. 145; UKTS (1973) 13)
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South Pacific Commission Agreement 1947 (97 UNTS 227 (No. 1352); UKTS (1952) 21)
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Suez Canal Convention (171 CTS 241)
Svalbard Treaty (2 LNTS 8; UKTS (1924) 18)
Synchrotron Radiation Facility Convention 1988 (Cm 911)
Terms of Reference establishing the International Copper Study Group 1989 (1605 UNTS 211 (No. 28026))
Terrorist Bombing Convention 1997 (ILM (1998), p. 251)
TIR Convention 1975 (1079 UNTS 89 (No. 16510))
Torture Convention 1984 (465 UNTS 85 (No. 24841); ILM (1984), p. 1027; UKTS (1991) 107)
Treaty of Amsterdam 1997 (ILM (1998), p. 56; UKTS (1999) 52)
Treaty of Rome 1957 (298 UNTS 3 (No. 4300))
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Algerian Declaration (Iran–US) 1981 (ILM (1981), p. 230; AJIL (1981), p. 422)
Argentina–UK Exchange of Notes on Communications with the Falkland Islands 1971 (825 UNTS 143 (No. 11824); UKTS (1972) 64)
Azerbaijan–UK Air Services Agreement 1994 (UKTS (1995) 20)
Bahrain–UK Air Services Agreement 1998 (UKTS (1999) 4)
Belgo-Luxembourg Union–Turkey Modus Vivendi on MFN Treatment 1947 (37 UNTS 223)
Brcko Arbitration Agreement (Bosnia–Federal Republic of Yugoslavia) 1995 (ILM (1996), p. 75)
Brent Spar Agreement (Norway–UK) 1995 (UKTS (1995) 65)
Brent Spar Agreement (Norway–UK) 1998 (UKTS (1998) 46)
British–Irish Agreement on Northern Ireland 1998 (ILM (1998), p. 777)
Canada–EC Agreed Minute on the Conservation and Management of Fish Stocks 1995 (ILM (1995), p. 1262)

Canada–UK Social Security Convention 1997 (UKTS (1998) 43)
Channel Tunnel Treaty 1986 (UKTS (1992) 15)
Chapeau Agreement (UK–US) 1993 (UKTS (1993) 69)
Chile–UK Drug Trafficking Mutual Assistance Agreement 1995 (UKTS (1997) 63)
China–UK Exchange of Notes on Consulates-General 1996 (UKTS (1996) 100)
China–UK Joint Declaration on Hong Kong (1984) (1399 UNTS 33 (No. 23391); ILM (1984), p. 1366; UKTS (1985) 26)
Denmark–Malawi Loan Agreement 1966 (586 UNTS 3 (No. 8493)
Egypt–Israel Treaty of Peace 1979 (ILM (1979), pp. 362–89 and 530–6)
Egypt–UN Emergency Force (UNEF) Agreement 1957 (260 UNTS 62 (No. 3704))
European Space Agency–UK Agreement on Ariane Downrange Station on Ascension Island 1989 (UKTS (1990) 27)
Finland–Netherlands Cultural Agreement 1988 (1540 UNTS 257 (No. 26718))
Finland–Saudi Arabia Air Services Agreement 1985 (1480 UNTS 143 (No. 25244))
France–Germany High Flux Reactor Convention 1967 (UKTS (1976) 31)
France–UK Continental Shelf Arbitration Agreement 1975 (999 UNTS 137 (No. 14664); UKTS (1975) 137)
France–UK European Air Group Agreement (UKTS (1999) 10)
France–UK Film Co-Production Agreement 1994 (UKTS (1995) 82)
France–UK Maritime Delimitation (Guadeloupe/Monserrat) (UKTS (1997) 28)
Greece–Macedonia Interim Accord 1995 (ILM (1995), p. 1497)
Hong Kong–Japan Investment Protection Agreement 1997 (ILM (1997), p. 1425)
Hong Kong–UK Air Services Agreement 1997 (UKTS (1999) 27)
Hong Kong–UK Fugitive Offenders Agreement 1997 (UKTS (1998) 30)
Hong Kong–UK Transfer of Prisoners Agreement 1997 (UKTS (1998) 51)
Hong Kong–US Fugitive Offenders Agreement 1996 (ILM (1997), p. 844)
Hong Kong–US Transfer of Prisoners Agreement 1997 (ILM (1997), p. 860)
Iceland–UK Interim Agreement on Fisheries Dispute (UKTS (1973) 122)
Iran–US Treaty of Amity 1955 (284 UNTS 93 (No. 4132); TIAS 3853)
Iraq–Kuwait Agreed Minutes 1963 (485 UNTS 321)
Iraq–UK Extradition Treaty 1932 (UKTS (1933) 13)
Iraq–UK Treaty of Alliance (UKTS (1931) 15)

Iraq–UN Memorandum of Understanding on Oil Exports 1996 (ILM (1996), p. 1097)
Iraq–UN Memorandum of Understanding on UNSCOM 1998 (ILM (1998), p. 501)
Israel–Holy See Fundamental Agreement 1993 (ILM (1994), p. 154)
Israel–Jordan Treaty of Peace 1994 (ILM (1995), p. 43)
Japan–Pakistan Cultural Agreement 1957 (325 UNTS 22 (No. 4692))
Lithuania–Russia Timetable on Withdrawal of Russian Forces 1992 (UN Reg. No. 29146)
Netherlands–Saudi Arabia Air Transport Agreement 1985 (1480 UNTS 143 (No. 25244))
Netherlands–UK Agreement on a Scottish Trial in the Netherlands 1998 (ILM (1999), p. 926; UKTS (1999) 43)
New Zealand–UK (Channel Islands) Social Security Agreement 1994 (UKTS (1995) 92)
Nicaragua–US Treaty of Friendship, Commerce and Navigation 1956 (367 UNTS 3 (No. 5224))
Norway–UK Agreement on the Murchison Field 1979 (UKTS (1981) 39)
Qatar–UK Treaty of Friendship 1971 (824 UNTS 93 (No. 11810); UKTS (1972) 4)
Russia–UK Agreement on Leases of New Embassy Premises 1996 (UKTS (1997) 1)
Slovenia–UK Cultural Cooperation Agreement 1966 (UKTS (1996) 14)
South Africa–UK Investment Promotion and Protection Agreement 1994 (UKTS (1998) 35)
South Africa–UK Scientific and Technology Cooperation Agreement 1995 (UKTS (1995) 62)
START Treaty (US–USSSR) 1991 (ILM (1992), p. 246)
Switzerland–UK Treaty for Conciliation, Judicial Settlement and Arbitration 1965 (605 UNTS 205 (No. 8765); ILM (1965), p. 943; UKTS (1967) 42)
Tutankhamen, Egypt–UK Treaty 1971 (824 UNTS 71 (No. 11809); UKTS (1972) 19)
UK–US Air Services Agreement 1977 (Bermuda 2) (1079 UNTS 21 (No. 16509); UKTS (1977) 76)
UK–US Cayman Islands Mutual Legal Assistance Treaty 1986 (UKTS (1990) 82; UN Reg. No. 28332)
UK–US Exchange of Notes regarding Ascension Island 1985 (1443 UNTS 25 (No. 24571); UKTS (1985) 39)
UK–US Extradition Treaty 1972 (UKTS (1977) 16)

UK–US 'Jay' Treaty 1794 (52 CTS 243)
UK–US 'Lend-Lease' Agreement 1940 (203 LNTS 201 and 204 LNTS 15)
UK–US Mutual Legal Assistance in Criminal Matters Treaty 1994 (UKTS (1997) 14)
UK–US Polaris Sales Agreement 1963 (474 UNTS 49 (No. 6871); UKTS (1963) 59)
UK–US Supplementary Extradition Treaty 1985 (UKTS (1988) 6; TIAS 12050)
UK–USSR Exchange of Notes on INF Treaty Inspection Rights 1987 (UKTS (1991) 30; UN Reg. No. 28537)
UK–Venezuela Investment Promotion and Protection Agreement 1995 (UKTS (1996) 83)
Unification Treaty (FRG–GDR) 1990 (ILM (1991), p. 457)

TABLE OF MOUs

For an explanation of the term 'MOU' see pp. 17–18 below.

Multilateral

Commonwealth Secretariat Agreed Memorandum 1965 (ILM (1965), p. 1108)
Helsinki Final Act 1975 (ILM (1975), p. 1293)
Memorandum of Understanding on Port State Control in the Caribbean Region 1996 (ILM (1997), p. 237)
OSCE Charter of Paris 1990 (ILM (1991), p. 193)
OSCE Document on Confidence and Security Building Measures and Disarmament in Europe 1987 (ILM (1987), p. 191)
Paris Memorandum of Understanding on Port State Control 1982 (ILM (1982), p. 1)
Rio Declaration on Environment and Development 1992 (ILM (1992), p. 876)
UNCED Non-Legally Binding Authoritative Statement of Principles regarding Forests (ILM (1992), p. 882)

Bilateral

The shortness of this list is merely due to the fact that, although there are many more bilateral than multilateral MOUs, very few are published even if they are not confidential.

Argentina–UK Joint Declarations on the Falkland Islands 1989 and 1995 (ILM (1990), p. 129 and ILM (1996), p. 304)
Austria–UK Memorandum of Understanding on Defence Contracts and Cooperation (see Appendix C)
Israel–US Declaration on Trade in Services (ILM (1985), p. 679)
NATO–Russia Founding Act 1997 (ILM (1997), p. 1007)
Russia–US Charter of Partnership and Friendship 1992 (ILM (1992), p. 782)
UK–US Memorandum of Understanding on User Charges 1983 (102 ILR 561)

TABLE OF CASES

Permanent Court of International Justice and International Court of Justice

Aegean Sea Continental Shelf (Greece *v.* Turkey)(Jurisdiction), *ICJ Reports* (1978), p. 3

Anglo-Iranian Oil Company (UK *v.* Iran) (Preliminary Objections), *ICJ Reports* (1952), p. 89

Certain Expenses of the UN, *ICJ Reports* (1962), p. 151

Chad *v.* Libya, *ICJ Reports* (1994), p. 4

El Salvador *v.* Honduras, *ICJ Reports* (1990), p. 3

ELSI (US *v.* Italy), *ICJ Reports* (1989), p. 15

Fisheries Jurisdiction (UK *v.* Iceland; Germany *v.* Iceland), *ICJ Reports* (1974), p. 3

Free Zones, *PCIJ Reports* (1932), Series A/B, No. 46

Gabcikovo (Hungary *v.* Slovakia), *ICJ Reports* (1997), p. 7; ILM (1998), p. 162

Genocide Convention (Bosnia *v.* Yugoslavia) (Preliminary Objections), *ICJ Reports* (1996), p. 595

Genocide Convention (Bosnia *v.* Yugoslavia) (Provisional Measures), *ICJ Reports* (1993), p. 3; ILM (1993), p. 888

Germany *v.* United States (ICJ), ILM (1999), p. 308

Lockerbie (Libya *v.* United Kingdom) (Provisional Measures), *ICJ Reports* (1992), p. 3; ILM (1992), p. 662 (US case)

Lockerbie (Libya *v.* United Kingdom) (Preliminary Objections), *ICJ Reports* (1998), p. 9; ILM (1998), p. 587 (US case)

Nicaragua *v.* US (Merits), *ICJ Reports* (1986), p. 14

Paraguay *v.* United States, *ICJ Reports* (1998), p. 248; ILM (1998), p. 810

PLO (UN Headquarters Agreement), *ICJ Reports* (1988), p. 12; ILM (1988), p. 808

Qatar *v.* Bahrain (Jurisdiction and Admissibility), *ICJ Reports* (1994), p. 112; ILM (1994), p. 1461

Qatar *v.* Bahrain (Jurisdiction and Admissibility), *ICJ Reports* (1995), p. 6; ILM (1995), p. 1207
Reparations for Injuries, *ICJ Reports* (1949), p. 174
Reservations to the Genocide Convention, *ICJ Reports* (1951), p. 15
Temple of Preah Vihear (Preliminary Objections), *ICJ Reports* (1961), p. 17
US Nationals in Morocco, *ICJ Reports* (1952), p. 176

Other international courts and tribunals

Belilos, (1988) ECHR Pubs. Series A, vol. 132
Dorca Marina, [1982] ECR 3949
France *v.* Commission, [1994] ECR V-3641
International Fruit Company, [1972] ECR 1219
Loizidou (Preliminary Objections), (1995) ECHR Pubs. Series A, vol. 310
MV Saiga, ILM (1998), pp. 364 and 1202; 110 ILR 736
Peralta, [1994] ECR I-3453
Racke, ILM (1998), p. 1128

Arbitrations

Egypt *v.* Israel (Taba), 80 ILR 224
France–UK Continental Shelf, 54 ILR 6
Rainbow Warrior (New Zealand–France), 82 ILR 499
US–France Air Services (1964), 38 ILR 182
US–France Air Services (1978), 54 ILR 303
US–Italy Air Services, 45 ILR 393
US–UK Heathrow User Charges, 102 ILR 215

National courts

Breard *v.* Greene, ILM (1998), p. 826
Commonwealth *v.* Tasmania (Tasman Dam), (1983) 158 CLR 1
Kleinwort Benson *v.* Lincoln City Council, [1998] 3 WLR 1095
Pinochet (R. *v.* Bow St. Metropolitan Stipendiary Magistrate (No. 3)) [1999] 2 All ER 97; ILM (1999), p. 581
R. *v.* Burgess, ex parte Henry, (1936) 55 CLR 608
R. *v.* Lambeth Justices, ex parte Yusufu, [1985] TLR 114
Sidhu *v.* British Airways, [1997] 1 All ER 193

GLOSSARY OF LEGAL TERMS

The terms used most frequently in this book are italicised.

acceptance, approval	Same effect as ratification (q.v.).
accession	Same effect as ratification (q.v.), but not preceded by signature.
adherence	Shorthand term for consent to be bound (q.v.).
consent to be bound	To sign a treaty not subject to ratification or to ratify, accept, approve or accede to a treaty.
contracting state	A state which has consented to be bound by a treaty, *whether or not the treaty has entered into force* (Article 2(1)(f)).
customary international law	Rules derived from general practice among states together with *opinio juris* (q.v.), and see p. 10 below.
domestic law	Law of a state (sometimes called 'municipal' or 'national' law).
erga omnes	Valid for all.
estoppel	The principle that a state cannot act inconsistently with what it has acquiesced in or taken a particular position with respect to (see p. 45 below).
exchange of notes	Two or more instruments which constitute either a treaty or an MOU.
Final Act	Formal document recording the results of a diplomatic conference, especially one to adopt a multilateral treaty (see p. 73 below).
full powers	Formal document authorising a person to sign a treaty or do other acts with respect to a treaty (Article 2(1)(c)) (see Chapter 5).

international law	The body of rules binding on states and other subjects of international law (q.v.) in their relations with each other.
international legal personality	Being a person or legal entity to which international law attributes legal rights and obligations (mainly states and international organisations).
jurisdiction	The right in international law for a state to exercise authority over its nationals and persons and things in its territory, and sometimes abroad (extraterritorial jurisdiction).
memorandum of understanding	Name given to both treaties and MOUs (see p. 20 below).
MOU	A non-legally binding instrument (see Chapter 3).
negotiating state	A state which took part in the drawing up and adoption of the text of a treaty (Article 2(1)(e)).
opinio juris	General belief by states that a non-treaty rule is legally binding on them (see p. 10 below).
party	A state which has consented to be bound by a treaty *and* for which the treaty is in force (Article 2(1)(g)).
primary legislation	Law made by a national legislature (cf. secondary legislation (q.v.)).
private international law	The domestic law dealing with cases with a foreign element (also known as conflict of laws).
ratification	Following signature, the expression of a state's consent to be bound by a treaty.
reservation	A unilateral statement, however phrased or named, made by a state when consenting to be bound by a treaty by which it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state (Article 2(1)(d)) (see Chapter 8).

secondary legislation	Legislation by the executive under power given by primary legislation (q.v.).
signatory	Not a precise term. Should only be used to describe a state which has signed a treaty which is subject to ratification but has not yet ratified; but best avoided (see p. 91 below).
sovereignty	The right of a state to act independently of other states, subject only to such restrictions as international law imposes.
state	See p. 47.
state responsibility	Responsibility of a state in international law for its wrongful acts (see p. 300 below).
subject of international law	Possessor of rights and obligations in international law (mainly states and international organisations).
subordinate or subsidiary legislation	Secondary legislation (q.v.).
third state	A state which is not a party (q.v.) to a treaty (Article 2(1)(h)) (see Chapter 14).
travaux préparatoires (or travaux)	Preparatory work of a treaty (see pp. 197–9 below).
treaty	See Chapter 2.

ABBREVIATIONS

Most often used in this book

'the Convention'	Vienna Convention on the Law of Treaties 1969
'the 1969 Convention'	Vienna Convention on the Law of Treaties 1969
'the Convention itself'	Vienna Convention on the Law of Treaties 1969
'the Vienna Convention'	Vienna Convention on the Law of Treaties 1969
'the 1978 Convention'	Vienna Convention on Succession of States in respect of Treaties 1978
'the 1986 Convention'	Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986
'Article'	An article of the 1969 Convention (unless otherwise indicated)
Blix and Emerson	H. Blix and J. Emerson, *The Treaty Maker's Handbook* (1973)
ILC Commentary	Commentary of the International Law Commission on its final draft articles on the Law of Treaties (YBILC (1964), II, pp. 173–274)
ILM	*International Legal Materials* (published by the American Society of International Law)
McNair	A. McNair, *Law of Treaties* (2nd edn, 1961)
MOU	Memorandum of understanding (see pp. 17–18 below)
Oppenheim	*Oppenheim's International Law* (9th edn, 1992)

Sinclair	I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984)
UKTS	*United Kingdom Treaty Series*
UN Depositary Practice	*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (1994)
UN Multilateral Treaties	*Multilateral Treaties Deposited with the Secretary-General*
UNTS	*United Nations Treaty Series*

Other abbreviations

AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
All ER	*All England Law Reports*
ASIL	American Society of International Law
Aust YBIL	*Australian Yearbook of International Law*
BFSP	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CLR	*Commonwealth Law Reports*
Cm, Cmd, Cmnd	Command Papers (official UK publication)
CMLR	*Common Market Law Reports*
CoE	Council of Europe
CTBT	Comprehensive Nuclear-Test-Ban Treaty 1996
CTS	*Consolidated Treaty Series*
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council
ECR	*European Court Reports*
ECSC	European Coal and Steel Community
EEC	European Economic Community
EJIL	*European Journal of International Law*
EURATOM	European Atomic Energy Community

FAO	Food and Agriculture Organisation
FCO	Foreign and Commonwealth Office, London
Hague Recueil	*Recueil des cours, Académie de Droit International de la Haye*
Hansard	Record of UK Parliamentary debates (Lords or Commons)
Hertslet	Hertslet, *Commercial Treaties* (reprinted in ten vols., 1970)
HKSAR	Hong Kong Special Administrative Region
HMSO	Her Majesty's Stationery Office
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organisation
ILR	*International Law Reports*
ITU	International Telecommunications Union
LNTS	*League of Nations Treaty Series*
LQR	*Law Quarterly Review*
MacLeod	MacLeod, Hendry and Hyett (eds.), *The External Relations of the European Communities* (1996)
MLR	*Modern Law Review*
Monroe Leigh	M. Leigh (ed.), *National Treaty Law and Practice* (1995)
NATO	North Atlantic Treaty Organisation
NILR	*Netherlands International Law Review*
NYIL	*Netherlands Yearbook of International Law*
O'Connell	D. O'Connell, *International Law* (2nd edn, 1970)
OECD	Organisation for Economic Co-operation and Development
OJ	*Official Journal of the European Communities*

OSCE	Organisation for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organisation
Reuter	P. Reuter, *Introduction to the Law of Treaties* (2nd English edn, 1995)
Satow	*Satow's Guide to Diplomatic Practice* (5th edn, 1984)
SI	statutory instrument (UK secondary legislation)
TIAS	*Treaties and other International Agreements Series* (US)
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCIO	UN Conference on International Organisation
UNCLOS	UN Convention on the Law of the Sea 1982
UN Doc.	UN official document
UNESCO	UN Educational, Scientific and Cultural Organisation
UNGA	UN General Assembly
UNJurYB	*UN Juridical Yearbook*
Whiteman	M. Whiteman, *Digest of International Law*
WLR	*Weekly Law Reports*
YBIL	*Yearbook of International Law*
YBILC	*Yearbook of the International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Introduction

Experience is the name everyone gives to their mistakes.[1]

In writing this book my purpose is to meet a long-felt need for a new work on the law of treaties which deals with the subject in a comprehensive, up-to-date and practical way. The making and operation of treaties is a daily occurrence. Understanding treaty practice enhances knowledge of the law of treaties. With very few exceptions, international law cannot be practised full-time except in a foreign ministry or an international organisation. Just as with domestic law, legal concepts and rules only become truly meaningful when one has drafted and worked with legal texts. A close involvement in the practice of treaties and the intricate procedures surrounding them leads to a fuller appreciation of their true nature.

I am very fortunate to have been able to practise international law in a foreign ministry. My perspective is therefore that of a practitioner; and this book is very much a distillation of some thirty years' experience. My aim is to inform the reader about all aspects of treaty law and practice by collecting the necessary information in one place. Although I have tried to avoid using too many British precedents, many examples are drawn from personal knowledge and experience. Whenever possible I have used primary sources. I have also tried to present the material, including the index, in a way which will help to answer questions like: What is an MOU? Where can I find the text of a treaty? Can part of a state make a treaty? When are full powers needed? What is consensus? What does Article 18 mean? How does 'dualism' work? Can a state withdraw an instrument of ratification? What is the status of treaties in the law of the United States? What does a depositary do? Can Hong Kong enter into treaties? How do I to set about drafting a treaty?

But this is not just a book by a legal practitioner for legal practitioners.

[1] Oscar Wilde, *Lady Windermere's Fan*, Act I.

Although legal advisers in foreign ministries and international organisations will, it is hoped, find it helpful, it has been written with a particular eye to the needs of diplomats generally. All of them have to deal with treaties. Some will have had legal training; many not. Yet, there are few foreign ministries which have a legal department staffed by professionally qualified, full-time lawyers. Many will have diplomats with varying degrees of legal training, but who will during their career do other jobs with little legal content; and a lot of legal work has to be done by diplomats with no legal training at all. Inevitably, their work will include treaties.

Like contracts in ordinary life, treaties are an indispensable tool of diplomacy. Although the concepts of sovereignty and jurisdiction are basic to a proper understanding of international law, problems involving them do not constantly arise in the work of a diplomat. But every day a treaty is being drafted, negotiated, concluded, signed, ratified, interpreted and – it is hoped more rarely – breached. Many ordinary human activities are governed by treaties, although usually without those affected (including most diplomats) being aware of it. Some activities are possible only because they are authorised by treaties. The operation of civil aircraft engaged in international transport is regulated by a vast and complex network of multilateral and bilateral treaties.

Although this book does not presume to be a scholarly work, I hope it will be of value to writers, teachers and students of international law. Those who deal in specialised subjects, such as economic law, environmental law, EU law and human rights law, may also find things to interest them. They, and students of politics and international relations, need to have an understanding of the international legal framework within which their field of study operates, and treaties are an essential part of that framework.

Existing works in English on the law of treaties are either out-of-date, cover only certain aspects of the subject, or are largely theoretical. The scholarship and lucid style of McNair's *Law of Treaties* (2nd edn, 1961) can still be read for its brilliant insights, but relies heavily on precedents from the distant past, and from my country. McNair also published just five years before the draft of what was to become the Vienna Convention emerged from the International Law Commission. O'Connell's *International Law* (2nd edn, 1970) suffered the disadvantage of being published just after the adoption of the Vienna Convention; and his chapters on treaties rely heavily on judicial decisions rather than the practice of

states. Nevertheless, it is a masterly summary of the essentials of the law of treaties, and of problems which are still with us today. Blix and Emerson's *The Treaty Maker's Handbook* (1973) is limited to precedents of treaty forms and clauses, and is now rather dated. The chapters on treaties in *Satow's Guide to Diplomatic Practice* (5th edn, 1979) cover only a small part of the subject, and often more from an historical perspective. Sinclair's *The Vienna Convention on the Law of Treaties* (2nd edn, 1984) is an essential guide to the negotiation of the Convention, and explains with characteristic clarity the difficult issues which faced the negotiators and how they were dealt with, if not always resolved. But it is not, and does not purport to be, a comprehensive guide to treaty law and practice. Reuter's *Introduction to the Law of Treaties* (2nd English edn, 1995) is good to read and thought-provoking, but idiosyncratic. The best concise modern guide to the law of treaties is in Jennings and Watts' ninth edition of *Oppenheim's International Law* (1992), but, although the incomparable footnotes are a valuable source of material, many practical aspects are not covered. I have, however, benefited greatly from that work and Sinclair's.

As far as possible this book illustrates law and practice by reference to precedents drawn from the last quarter of the twentieth century. Older precedents are cited only if they are still clearly relevant or instructive.

The Vienna Convention on the Law of Treaties is now thirty years old, and is likely to remain unchanged for many decades yet. Like the United Nations Charter, the intelligence of its drafting has enabled states to adapt their practice without distorting or departing from the Convention. The Convention codified, and to some degree developed, the law as it had evolved through the practice of states. But practice has not stood still since 1969. The Convention's rules provide a framework which is sufficiently flexible to accommodate important developments in state practice. Many of the provisions expressly envisage states agreeing to depart from the rules of the Convention. Article 7(1) requires the representative of a state to produce full powers in order to adopt the text of a treaty, but then immediately makes an exception in recognition that states may agree to dispense with full powers. This is just one, small example; in many other places the Convention recognises that states will depart from the Convention's rules.[2] The rules are thus largely residual, leaving treaty

[2] See also Articles 9(2), 10(a), 11, 12(1)(b), 13, 14(1)(b), 15, 16, 17(1), 20(1), (3) and (4)(b), 22, 24, 25, 28, 29, 33(1) and (2), 36(1), 37(1), 39, 40, 41, 44(1), 55–60, 70(1), 72(1), 76–78 and 79(1).

practice very much in the hands of states – as it should be. I do not therefore subscribe to the view that the Convention has had its day, that it is incapable of coping with the demands of the twenty-first century. In my experience, which I believe is shared by other practitioners for whom the Convention is their 'bible', it does not need mending, or rather, amending. As I will seek to demonstrate, it has proved itself to be a most adaptable tool, well able to deal with the challenges to treaty-making presented by the changes in international life in the last thirty years.

Because of the central role played by the Convention, a good deal of the book is a commentary on it. I know only too well the frustration of trying to find out – and under pressure – precisely what an article of the Convention means and how it has been applied. I hope this book will go some way to help.

How to use this book

Unless the context indicates otherwise, references to 'the Convention', 'the Vienna Convention', 'the 1969 Convention' or 'the Convention itself' are to the Vienna Convention on the Law of Treaties 1969; and, unless otherwise indicated, a reference simply to, for example, 'Article 18' is to an article of the Convention. The term 'MOU' refers to a non-legally binding instrument.[3] There is a list of other abbreviations at pages xxxvi–xxxix above.

The footnotes

The footnotes are for the most part not substantive, but are there to make it as easy as possible for the reader to check a statement or follow up a point by further reading. The book can be read and understood without reading any of the footnotes.

Other aids

A glossary of legal terms on pages xxxiii–xxxv above has been included to help those who are not lawyers, or at least not international lawyers. The table on page 432 below lists where in this book particular articles of the

[3] For a fuller explanation of the term, see pp. 17–18 below, and Chapter 3.

Vienna Convention on the Law of Treaties are cited, and may prove useful when the reader is in a hurry.

Emphasis

When words in a quotation are *emphasised*, the emphasis is mine unless otherwise indicated.

Errors and omissions

Inevitably you will find mistakes and omissions, and no doubt disagree with my views. Your suggestions and comments would be much appreciated, and can be sent to me at home or at work, or c/o CUP, Publishing Division, Cambridge CB2 2RU, United Kingdom (fax ++44 (0)1223 315052; e-mail information@cup.cam.ac.uk).

1

The Vienna Convention on the Law of Treaties

> The Convention clearly marked the beginning of a new era in the law of treaties.[1]

A large part of this book is necessarily devoted to the Vienna Convention on the Law of Treaties. Although the Convention does not occupy the whole ground of the law of treaties, it covers the most important areas and is the starting point for any description of the modern law and practice of treaties. It thus merits a short introduction. The other purpose of this chapter is to define the scope of this book by mentioning briefly those aspects of the law of treaties which the Convention does not deal with, but which will be covered in this book.

The Convention is one of the prime achievements of the International Law Commission. The Commission was established by the UN General Assembly in 1947 with the object of promoting the progressive development of international law and its codification. The law of treaties was one of the topics selected by the Commission at its first session in 1949 as being suitable for codification. A series of eminent British international legal scholars (James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock) were appointed as Special Rapporteurs. The Commission adopted a final set of draft articles in 1966. They were considered by the United Nations Conference on the Law of Treaties in Vienna in 1968 and 1969. The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980. By the end of 1998 it had only eighty-four parties out of the some 190 states there are today.[2] Some of the reasons for this will be discussed below.

The full text of the Convention is at Appendix A.

[1] P. Reuter, *Introduction to the Law of Treaties* (2nd. English edn, 1995), para. 32.

[2] The 188 members of the United Nations do not include, for example, the Holy See, Switzerland or Tuvalu, although Andorra, Liechtenstein, Monaco and San Marino became members in the early 1990s and Kiribati, Nauru and Tonga in 1999.

Scope of the Convention

The Convention sets out the law and procedure for the making, operation and termination of a treaty. The Convention does not apply to all international agreements, only those between states (Article 1). Nor is it concerned with the substance of a treaty as such. That is a matter for the parties to the treaty.

Oral agreements

For reasons of clarity and simplicity oral agreements were excluded from the Convention. But this does not affect their legal force, or the application to them of any of the rules in the Convention to which they would be subject under international law independently of the Convention, such as customary international law[3] (Article 3(a)). Oral agreements between states, although rare, are not unknown even today. The dispute between Denmark and Finland about the construction of a Danish bridge across the Store Bælt (Great Belt) was settled in 1992 by a telephone conversation between the Danish and Finnish Prime Ministers, in which, in return for a payment by Denmark, Finland agreed to discontinue its case before the International Court of Justice. There is no joint record of the agreement.[4] US law requires an oral agreement to be reduced to writing by the US Government.[5]

Treaties with or between other subjects of international law

States do not enter into treaties only with other states; they enter into treaties with other subjects of international law, in particular international organisations; and international organisations enter into treaties with each other. The Convention does not apply to such treaties, which are the subject of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986,[6] which, in effect, applies to such treaties the provisions of the 1969 Convention, suitably adapted. Although the 1986 Convention is not yet in force, there can be little doubt that its provisions,

[3] See p. 10 below for an explanation of customary international law

[4] *Finnish Yearbook of International Law* (1992), pp. 610–13, and ILM (1993), p. 103.

[5] See pp. 32–3 below. [6] ILM (1986), p. 543.

following closely as they do those of the 1969 Convention[7], are generally accepted as the applicable law. Although the 1969 Convention does not apply to treaties between states and international organisations, such as a host country agreement, in so far as the rules of the Convention reflect the rules of customary international law applicable to treaties with international organisations, they will apply (Article 3(b)). Where states which are parties to the 1969 Convention are parties to a treaty to which other subjects of international law, in particular international organisations such as the European Community are also parties, *as between the states parties* it is the 1969 Convention which applies, not customary international law (Article 3(c)).

No retrospective effect

The Convention applies to only those treaties which are concluded by states after the date the Convention enters into force for those states (Article 4).[8] There is no problem in applying this rule to bilateral treaties. In the case of a multilateral treaty, the Convention will apply to those states which participated in the conclusion of the treaty after the Convention entered into force for them, but not for other states.[9] The Convention entered into force on 27 January 1980. The UN Convention on the Law of the Sea (UNCLOS) was concluded on 10 December 1982. Thus for those states which were parties to the Convention on that date, its rules will apply as between them with regard to UNCLOS. Article 4 provides, however, that the rule against retrospection is without prejudice to the application of any rules in the Convention to which treaties would be subject under international law independently of the Convention. Thus, those rules of the Convention which reflect customary international law apply (but as customary law) to treaties concluded before the entry into force of the Convention, or concluded afterwards but before the Convention entered into force for parties to those treaties.[10]

[7] The first seventy-two articles deal with the same subjects as Articles 1–72 of the 1969 Convention.

[8] For an account of the negotiation of Article 4, see Sinclair, p. 230. See also P. McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', ICLQ (1986), pp. 499–511; and E. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty', BYIL (1988), pp. 75–111. [9] See Sinclair, pp. 8–9. [10] As to the *Gabcikovo* case, see p. 11 below.

International organisations

Since the constituent instrument (i.e., the constitution) of an international organisation and a treaty adopted *within* the organisation are made by states, the Convention applies to such instruments, but this is without prejudice to any relevant rules of the organisation (Article 5). Those rules may, for example, govern the procedure by which treaties are adopted within the organisation, how they are to be amended and the making of reservations.[11]

State succession, state responsibility and the outbreak of hostilities

For the avoidance of doubt, Article 73 confirms that the Convention does not prejudge any question that may arise in regard to a treaty from a succession of states,[12] from the international responsibility of a state (for breach of a treaty),[13] or from the outbreak of hostilities.[14] The Convention does not deal with these matters, which are largely governed by customary international law, and are discussed here in later chapters.

Bilateral and multilateral treaties

The term 'bilateral' describes a treaty between two states, and 'multilateral' a treaty between three or more states. There are, however, bilateral treaties where two or more states form one party, and another state or states the other party.[15] For the most part the Convention does not distinguish between bilateral and multilateral treaties. Article 60(1) is the only provision limited to bilateral treaties. Articles 40, 41, 58 and 60 refer expressly to multilateral treaties, and the provisions on reservations and the depositary are relevant only to such treaties.

The Convention and customary international law

The various provisions mentioned above, and the preamble to the Convention, confirm that the rules of customary international law continue

[11] See, for example, p. 109 below on the rules for reservations to ILO Conventions.
[12] See pp. 305–31 below.
[13] See pp. 300–4 below, and the *Gabcikovo* judgment, para. 47 (ILM (1998), p. 162).
[14] See pp. 243 below. [15] See p. 19 below.

to govern questions not regulated by the Convention. Treaties and custom are the main sources of international law. Customary law is made up of two elements: (1) a general convergence in the practice of states from which one can extract a norm (standard of conduct), and (2) *opinio juris* – the belief by states that the norm is legally binding on them.[16] Some multilateral treaties largely codify customary law. But if a norm which is created by a treaty is followed in the practice of non-parties, it can, provided there is *opinio juris*, lead to the evolution of a customary rule which will be applicable between states which are not party to the treaty and between parties and non-parties. This can happen even before the treaty has entered into force.[17] Although many provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS) went beyond mere codification of customary rules, the negotiations proceeded on the basis of consensus, even though the final text was put to the vote. It was therefore that much easier during the twelve years before UNCLOS entered into force in 1994 for most of its provisions to become accepted as representing customary law.[18] This was important since even by the end of 1998 UNCLOS still had only 127 parties.

An accumulation of bilateral treaties on the same subject, such as investment promotion and protection, may in certain circumstances be evidence of a customary rule.[19]

To what extent does the Convention express rules of customary international law?[20]

A detailed consideration of this question is beyond the scope of this book, but it is, with certain exceptions,[21] not of great concern to the foreign ministry lawyer in his day-to-day work. When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it. The writer can recall at least three bilateral treaty negotiations when he had to respond

[16] See M. Shaw, *International Law* (4th edn, 1998), pp. 54–77.

[17] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1990), p. 87.

[18] See T. Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer', *Hague Recueil* (1990), IV, vol. 223, pp. 25–60; and H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal', AJIL (1985), pp. 871–90.

[19] See Thirlway, 'Law and Procedure', at p. 86. [20] See Sinclair, pp. 10–24.

[21] See p. 127 below about the time limit for notifying objections to reservations.

to arguments of the other side which relied heavily on specific articles of the Convention, even though the other side had not ratified it. When this happens the justification for invoking the Convention is rarely made clear.

Whether a particular rule in the Convention represents customary international law is only likely to be an issue if the matter is litigated, and even then the court or tribunal will take the Convention as its starting – and normally also its finishing – point. This is certainly the approach taken by the International Court of Justice, as well as other courts and tribunals, international and national.[22] In its 1997 *Gabcikovo* judgment (in which the principal treaty at issue predated the entry into force of the Convention for the parties to the case) the Court brushed aside the question of the possible non-applicability of the Convention's rules to questions of termination and suspension of treaties, and applied Articles 60–62 as reflecting customary law, even though they had been considered rather controversial.[23] Given previous similar pronouncements by the Court, and mentioned in the judgment, it is reasonable to assume that the Court will take the same approach in respect of virtually all of the substantive provisions of the Convention. There has been as yet no case where the Court has found that the Convention does not reflect customary law.[24] But this is not so surprising. Despite what some critics of the Convention may say, as with any codification of the law the Convention inevitably reduces the scope for judicial law-making. For most practical purposes treaty questions are resolved by applying the rules of the Convention. To attempt to determine whether a particular provision of the Convention represents customary international law is now usually a rather futile task. As Sir Arthur Watts has said in the foreword to this book, the modern law of treaties is now authoritatively set out in the Convention.

Effect of emerging customary law on prior treaty rights and obligations

Most treaties are bilateral, and most multilateral treaties are also contractual in nature in that they do not purport to lay down rules of general

[22] Numerous examples, particularly concerning Articles 31 and 32 (Interpretation) are to be found in *International Law Reports* (see the lengthy entry in the ILR Consolidated Table of Cases and Treaties, vols. 1–80 (1991), pp. 799–801).

[23] At paras. 42–6 and 99 (*ICJ Reports* (1997), p.7; ILM (1998), p. 162).

[24] M. Mendelson in Lowe and Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996), at p. 66, and E. Vierdag (note 8 above) at pp. 145–6. See also H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1991), p. 3.

application. But, since 1945 so-called 'law-making' treaties have become so numerous that a sizeable number of topics have come to be regulated by both customary law and treaty law. Whether the emergence of a new rule of customary law can supplant a prior treaty rule seems to have been studied in depth only quite recently.[25] The view has been expressed that international law has no hierarchy of sources of law, custom and treaty being autonomous; and that, even when custom has been codified, it retains its separate existence. This is a controversial theory,[26] and does not reflect the approach to legal problems taken by foreign ministry legal advisers, who, when dealing with an actual problem, naturally give more weight to an applicable treaty rule than a different customary rule. Nevertheless, new customary rules which emerge from economic changes or dissatisfaction with a treaty rule can result in a modification in the operation of a treaty rule. In the *Fisheries Jurisdiction* cases (*United Kingdom* v. *Iceland*; *Federal Republic of Germany* v. *Iceland*) in 1974, the International Court of Justice decided that, since the adoption in 1958 of the High Seas Convention, the right of states to establish twelve-mile fishing zones had crystallised as customary law, despite the provisions in that Convention regarding freedom of fishing on the high seas.[27]

Nor does international law contain any *acte contraire* principle by which a rule can be altered only by a rule of the same legal nature. Article 68(c) in the International Law Commission's 1964 draft of the Convention provided that the operation of a treaty may be modified by the 'subsequent emergence of a new rule of customary international law relating to matters dealt with in the treaty and binding upon all the parties'.[28] Although the article was not included in the final text of the Convention, this was only because the International Law Commission did not see its mandate as extending to the general relationship between customary law and treaty law.

Reference material on the Convention

The single most valuable source of material on the meaning and effect of the articles of the Convention remains the Commentary of the

[25] See M. Villiger, *Customary International Law and Treaties* (2nd edn, 1997); K. Wolfe, 'Treaties and Custom: Aspects of Interrelation', in Klabbers and Lefeber (eds.), *Essays on the Law of Treaties* (1998), pp. 31–9; and *Oppenheim*, pp. 31–6.

[26] See *Nicaragua* (*Merits*), *ICJ Reports* (1986), p. 92, paras. 172–82; and H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1989), pp. 143–4.

[27] *ICJ Reports* (1974), p. 3 at pp. 13 and 37. [28] YBILC (1964), II, p. 198.

International Law Commission on its draft articles and contained in its final report on the topic.[29] The history of the drafting of the articles is in the Yearbooks of the Commission beginning in 1950. However, since the Vienna Conference naturally made changes to the draft articles, one needs to refer also to the summary records of the Conference.[30] A comprehensive guide to the negotiating history (*travaux*) has been produced by Rosenne.[31] This should be used in conjunction with Wetzel's book, which has the text, in English, of all the most important *travaux*.[32] There are useful accounts of the negotiations in Sinclair and by Kearney and Dalton,[33] who took part in the Vienna Conference.

[29] YBILC (1966), II, pp. 173–274. See now A. Watts, *The International Law Commission, 1949–1998* (1999), vol. II, Chapter 8.

[30] UN Doc. A/Conf. 39/11 and Add. 1. The *documents* produced at the Conference are in A/Conf. 39/11/Add. 2. [31] S. Rosenne, *The Law of Treaties* (1970).

[32] Wetzel and Rausching, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978). [33] AJIL (1970), pp. 495–561.

2

What is a treaty?

the intolerable wrestle with words and meanings.[1]

Like the Vienna Convention, this book is primarily concerned with treaties between *states*. Article 2(1)(a) 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.

As with most of the Convention, although the definition is expressed to be for the purposes of the Convention and is limited to treaties between states, its elements now represent customary law. As we shall see, the difficult question is not with the definition itself, but whether a particular instrument or transaction falls within the definition.[2] An examination of the elements of the definition will go some way to answer that question, as well as illustrating some of the key principles underlying the law of treaties.

Definition of 'treaty'

'an international agreement'

To be a treaty an agreement has to have an international character. When we examine the other elements of the definition we will see what that means. The Convention uses 'treaty' as a generic term. The constitution, law or practice of some states divide treaties variously into categories such as inter-state, inter-governmental, inter-ministerial or administrative.[3]

[1] T. S. Eliot, *East Coker*, Part 2.

[2] H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1991), pp. 4–5.

[3] See Chapter 10 on treaties and domestic law.

The Convention does not recognise such distinctions. Treaties can also be described as 'universal' or 'regional', but this has no legal significance.[4] The term 'plurilateral' is, however, relevant in relation to reservations to treaties.[5]

The International Law Commission's Commentary makes it clear that the definition of treaty includes those international agreements which by the 1960s were increasingly being drafted in a less formal manner.[6] For example, there is no difference in legal effect between a treaty contained in a single instrument and one constituted by an exchange of notes, provided it satisfies the other elements of the definition (see the examples in Appendices B and E). In 1945 there was still some uncertainty whether international agreements drafted in a less formal way could properly be called treaties, and this was reflected in Article 102 of the United Nations Charter which requires the registration of 'every treaty and every international agreement'. By the 1960s there was no longer any doubt on the matter.

'concluded between states'

A treaty can be concluded between a state and another subject of international law, in particular an international organisation, or between international organisations, but this is outside the scope of the Convention, and of this book. An agreement between international or multinational companies, or even between a state and such a company, is not a treaty. The International Court of Justice has held that an oil concession granted by a state to a foreign company was not a treaty because the state of nationality of the company was not party to the concession.[7] Even when, as sometimes happens, an agreement between a state and a company provides that it shall be interpreted in whole or in part by reference to rules of international law, that does not make it a treaty.[8] There are, however, a small number of agreements between states to which non-state entities are also parties, but this does not affect their status as treaties.[9]

[4] But see McNair, pp. 739–54, on the differing legal character of treaties.

[5] See p. 112–13 below. [6] YBILC (1966), II, p. 173 at pp. 188–9.

[7] *Anglo-Iranian Oil Company* (*United Kingdom* v. *Iran*) (*Preliminary Objections*) *ICJ Reports* (1952), p. 93 at p. 112.

[8] See C. Greenwood, 'The Libyan Oil Arbitrations', BYIL (1982), pp. 27–81. See pp. 24–5 below about agreements between states which are governed by domestic law. [9] See p. 53 below.

In the nineteenth century agreements between imperial powers and the representatives of indigenous peoples, such as the Treaty of Waitangi 1840 by which Maori chiefs ceded New Zealand to the British Crown,[10] were often drawn in the same form as a treaty and described as such.[11] But, since the land occupied by such peoples was not considered at the time to be a state, such agreements are not treaties, even if they had, and continue to have, effects in domestic law.[12]

But a treaty does not have to be expressed to be between states as such. Since a state is a legal concept, not a natural person, its head of state, its government or some other agency of the state has to act on behalf of the state. A treaty may therefore be expressed to be concluded by heads of state, governments, ministries or other state agencies.[13]

'in written form'

The Vienna Convention does not apply to oral agreements.[14] But, even though the modern practice is for the original text of a treaty to be typed or printed, there is no reason why a treaty should not be contained in a telegram, telex, fax message or even e-mail, or, rather, constituted by an exchange of such communications. Provided the text can be reduced to a permanent, readable form (even if this is done by down-loading and printing-out from a computer), it can be regarded as in written form. The absence of original signed copies is not a problem, provided there is a means of authenticating the 'signature'.[15] In September 1998 a Communiqué on Electronic Commerce was issued by US President Clinton and Irish Prime Minister Ahern by electronic means. They did so by each operating a separate computer terminal and, using an electronic signature, that is a signature in digital form which is in, attached to or associated with the data (in this case the Communiqué) and used to indicate the approval by the 'signatory' of the content of the data. The 'signature' must therefore be uniquely linked to the signatory, identify him, be created by means under his sole control and connected to the data in a way

[10] 6 Hertslet 579; 29 BFSP 1111.

[11] See the 1815 Treaty between the United States and the Sioux and other Indian tribes (65 CTS 81).

[12] See McNair, pp. 52–4; *Oppenheim*, para. 595, note 2; D. O'Connell, *International Law* (2nd edn), vol. 1, p. 440. [13] See also pp. 47–8 below. [14] See p. 7 above.

[15] Cf. section 5 of the (UK) Arbitration Act 1996 (ILM (1997), p. 165); and see p. 24 below.

which would reveal if it were to be subsequently altered unilaterally. This can be done with a 'smart card'.[16] Although the Communiqué was not a treaty, it may not be too fanciful to envisage full powers, instruments of ratification or even treaties being signed and deposited electronically. One should not, however, get too excited with such developments. Given the mistakes made now in treaties and treaty procedures, there is no reason to suppose that information technology will necessarily improve matters.[17]

'governed by international law'

According to the International Law Commission's Commentary, the phrase 'governed by international law' embraces the element of an *intention to create obligations under international law.* If there is no such intention the instrument will not be a treaty. In the *Aegean Sea Continental Shelf* case, the International Court of Justice considered the terms of a joint communiqué issued by the Greek and Turkish Prime Ministers, and the particular circumstances in which it was drawn up, in order to determine its nature. The Court found that there had been no intention to conclude an agreement to submit to the jurisdiction of the Court.[18] Thus intention must be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention.[19]

Although the law of treaties does not require a treaty to be in any particular form or to use special wording,[20] lawyers practising in foreign or other ministries deliberately utilise instruments which employ carefully chosen terminology to indicate that, rather than creating international legal rights and obligations, the intention of the participants is to record no more than mutual *understandings* as to how they will conduct themselves (see Appendices C and D). The existence of such instruments, and the extent to which they are a significant vehicle for the conduct of business between

[16] Unfortunately the President and the Prime Minister were in the same room: see *Financial Times,* 7 October 1998, IT review, p. xv, which, uncharacteristically for that paper, described the 'document' as a treaty. The European Community is drafting a directive on a common framework for electronic signatures, from which these technical details have been taken.

[17] See pp. 270–3 below on the problem of errors.

[18] *ICJ Reports* (1978), p. 3 at pp. 39–44. See H. Thirlway 'The Law and Procedure of the International Court of Justice', BYIL (1991), pp. 13–15.

[19] *Qatar* v. *Bahrain, ICJ Reports* (1994), p. 112 at paras. 26–7.

[20] See the *Temple of Preah Vihear (Preliminary Objections) ICJ Reports* (1961), pp. 31–2.

states, is not well known outside government circles. In fact, a large number of such instruments, bilateral and multilateral, are concluded every year covering a wide range of subjects. Most are never published. A recent (published) example of such a multilateral instrument is the Memorandum of Understanding on Port State Control in the Caribbean Region 1996.[21]

Such instruments have been variously described as 'gentlemen's agreements', 'non-binding agreements', '*de facto* agreements' and 'non-legal agreements'. These non-legally binding instruments are most commonly referred to by the initials 'MOU'. This is short for 'Memorandum of Understanding', since this is the name most often given to them. However, as will be explained shortly, calling an instrument a 'Memorandum of Understanding' does not, in itself, determine its status, since – and most confusingly – some treaties are also given that name.[22]

How to distinguish between a treaty and an MOU, how and why MOUs are used, and their possible legal consequences, is discussed in detail in the next chapter.

'whether embodied in a single instrument or in two or more related instruments'

This phrase recognises that the classic form for a treaty – a single instrument (Appendix B) – has for a long time been joined by treaties drawn in less formal ways, such as exchanges of notes. These play an increasingly important role. An exchange of notes usually consists of an initiating note and a reply note (Appendix E). But in 1994, in *Qatar* v. *Bahrain*, the International Court of Justice had to consider the legal effect of a *double* exchange of letters between (1) Qatar and Saudi Arabia and (2) Bahrain and Saudi Arabia.[23] Saudi Arabia, having agreed to use its good offices to help solve certain territorial disputes between the other two states sent each of them letters in identical terms proposing certain settlement procedures. Each wrote to Saudi Arabia accepting the proposal. Saudi Arabia then announced that the two states had agreed to go to arbitration. This complicated scheme was necessary because of political sensitivities, but the text of each letter and of the announcement were agreed in advance;

[21] ILM (1997), p. 237. See also the list of MOUs at p. xxx above

[22] See pp. 20–1 below. [23] *ICJ Reports* (1994), p. 112; ILM (1994), p. 1461 (see para. 17).

and although three states were involved there were only two parties, Qatar and Bahrain. Although the form of a double exchange was unusual, there are several examples of treaties being constituted by three or more principal instruments (important treaties may have several subsidiary instruments).[24] The arrangements for dealing with claims between Iran and the United States, including the establishment of the Iran–US Claims Tribunal, were established in 1981 by (1) a Declaration by the Algerian Government setting out the formal commitments which had been made to it by Iran and the United States (a similar arrangement to that used later by Saudi Arabia); (2) an Iran–US Agreement which entered into force on receipt by Algeria of a 'notification of adherence' by each party; and (3) an Escrow Agreement between the United States, the Federal Reserve Bank of New York, Bank Markazi, Iran and the Central Bank of Algeria, as escrow agent.[25]

A treaty which is part bilateral and part multilateral can be constituted by a series of parallel exchanges of notes, all identical in substance, between one state and a number of states (A–B; A–C; A–D etc.).[26] In such a case it is important to make clear in the notes who are the parties. In an exchange between, say, four states there could be four parties (A, B, C and D), or two (A and B+C+D).[27] In such a case, when there are only two parties it may also be necessary to make clear whether the treaty can be terminated only by one of the parties, or whether one of the states constituting a party can, by denouncing the treaty, bring about its termination.

The drafting of normal exchanges of notes is discussed in the final chapter.[28]

'whatever its particular designation'

One of the most mystifying aspects of treaty practice is the unsystematic way in which treaties are designated (named). Writers have sought to explain, sometimes at great length and not very convincingly, why certain

[24] For an example of a triple exchange, and other multiple exchanges, see *Satow*, para. 29.38.

[25] ILM (1981), p. 230; 62 ILR 599; AJIL (1981), p. 418.

[26] See the six parallel Exchanges of Notes between Germany and Belgium, Canada, France, Netherlands, United Kingdom and United States (ILM (1991), pp. 415 and 417; and McNair, pp. 29–30).

[27] See the two Memoranda of Understanding on the Avoidance of Overlaps and Conflicts relating to Deep Seabed Areas of 1961 (UKTS (1991) 52 and UKTS (1995) 4).

[28] At pp. 355–6 below.

names are given to particular categories of treaty.[29] That task has become even more difficult today, the names chosen being even more confusing, inconsistent and changeable than in the past. It is often more a matter of the practice of international organisations or groups of states, or political preference, which determines how a treaty is named. But, whatever the position may have been in the nineteenth or early twentieth centuries, the name does not, in itself, determine the status of the instrument; what is decisive is whether the negotiating states intended the instrument to be (or not to be) legally binding. Thus, just as one should never judge a book by its cover, one should not assume that the name given to an international instrument automatically indicates its status either as a treaty or an MOU. Although it is reasonable to assume that an instrument called a treaty, agreement or convention is a treaty, one should nevertheless examine the text to make quite sure. Most other names are problematic. Both the UN Charter and the Charter of the Commonwealth of Independent States 1993 (CIS)[30] are treaties, but the OSCE Charter of Paris 1990[31] and the Russia–United States Charter of Partnership and Friendship 1992[32] are MOUs.

Memorandum of understanding

One must be especially careful about the status of any instrument called 'Memorandum of Understanding'. This designation is most commonly used for MOUs in the sense described above, but occasionally one will find a treaty called a Memorandum of Understanding. Only by studying the terms of an instrument can one determine its status. Some have been misled into believing that because an instrument is called a Memorandum of Understanding it cannot be a treaty. Conversely, others have mistakenly assumed an instrument designated Memorandum of Understanding must be a treaty because several bearing that name have been registered as treaties.

The practice of designating a treaty a Memorandum of Understanding appears to have started in a small way after the Second World War, three being concluded in the 1950s in connection with the Treaty of Peace with

[29] See *Satow*, paras. 29.9–29.33, 30 and 31.1–31.22. [30] ILM (1995), p. 1282.
[31] ILM (1991), p. 193; A. Bloed (ed.), *The Conference on Security and Co-operation in Europe* (1993), pp. 537–50. [32] ILM (1992), p. 782.

Italy.[33] The reason may have been a desire, perhaps for political reasons, for a less formal appearance. More recent examples of treaties designated as Memorandums of Understanding are the Memorandum of Understanding relating to the Implementation of the Guidelines for Transfers of Nuclear-Related Dual-Use Equipment 1992;[34] the two Memorandums of Understanding of 1991 on the Avoidance of Overlaps and Conflicts relating to Deep Sea-Bed Areas;[35] and the Memorandum of Understanding concerning the establishment of the Inter-Organisation Programme for the Sound Management of Chemicals 1995.[36] The United Nations frequently concludes treaties called Memorandum of Understanding, for example, the (ill-fated) Iraq–UN Memorandum of Understanding 1998 concerning weapons inspections.[37] An even more misleading name for a treaty is the *Provisional Understanding* regarding Deep Seabed Matters 1984.[38] On the other hand, the Paris Memorandum of Understanding on Port State Control 1982 is unquestionably an MOU.[39]

Exchange of notes

Exchanges of notes (or letters) pose the same problem since they may constitute either a treaty or an MOU. Hundreds, possibly thousands, are concluded each year. If the exchange is intended to be a treaty it is customary to provide expressly that it '*shall constitute an agreement* between our two Governments' (see Appendix E). If intended to be an MOU, it is usual to specify that the exchange '*records the understanding* of our two Governments', or a similar formula (see Appendix F). Although exchanges of notes tend not to be on matters of major political importance, or only supplementary to a treaty, a few have been substantial. The 1940 'Lend-Lease Agreement' between the United Kingdom and the United States, under which the United Kingdom was lent 60 badly needed destroyers in return for leases of bases, was constituted by an exchange of notes.[40]

[33] UKTS (1956) 52 and UKTS (1957) 51. See also the Memorandum of Understanding regarding German Assets in Italy 1947 (138 UNTS 111; UKTS (1947) 75) and the Memorandum of Understanding on the Application of the MFN Agreement 1949 to the Western Sectors of Berlin (42 UNTS 356; UKTS (1950) 7). [34] ILM (1992), p. 1097.

[35] UKTS (1991) 52 and UKTS (1995) 4. [36] ILM (1995), p. 1315.

[37] ILM (1998), p. 501. See also the Iraq–UN Memorandum of Understanding 1996 (ILM (1996), p. 1097). [38] ILM (1984), p. 1354; UKTS (1985) 24. [39] ILM (1982), p. 1.

[40] 203 LNTS 201 and 204 LNTS 15.

Guidance on drafting both types of exchange of notes is at pages 355–8 below.

Less usual treaty names

Treaties have always been given a variety of names, including less usual ones like Compact, Solemn Declaration, Administrative Agreement,[41] Protocol of Decisions, Platform, Concordat,[42] Agreed Minute[43] and Terms of Reference.[44] In 1992 a treaty between Lithuania and Russia on the withdrawal of Russian forces from Lithuania was concluded with the name 'Timetable', its substance consisting of detailed tables of military assets. The document was originally annexed to a treaty on the same subject. There was a political problem over signature of the treaty, but, since it was important that the withdrawal should proceed on a proper basis, the 'Timetable' was signed, and later registered as a treaty with the United Nations.[45] A supplementary treaty to the Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT), adopted by a resolution of the signatory states, is called simply 'Text'.[46]

Titles can be enigmatic, sometimes deliberately. The Joint Declaration of China and the United Kingdom on the Future of Hong Kong 1984 is clearly a treaty, and was registered as such with the United Nations by both parties.[47] The title was chosen for political reasons. On the other hand, since 1989 Argentina and the United Kingdom have made various 'Joint Declarations' and 'Joint Statements' recording the outcome of meetings between their representatives on matters concerning the Falkland Islands, including fishing and oil exploration in the south-west Atlantic. These documents sometimes include substantial provisions. Although they occasionally use some treaty-type terminology ('agree' and 'shall'), they are not otherwise in normal treaty form.[48] Further evidence that these

[41] See UKTS (1999) 5. [42] See *Satow*, paras. 30.11–30.15.

[43] Canada–EC Agreed Minute on Conservation and Management of Fish Stocks 1995 (ILM (1995), p. 1262).

[44] Agreement establishing the International Copper Study Group in 1989 (1605 UNTS 211 (No. 28026)).

[45] UN Reg. No. 29146. Unpublished so far in English; English translation on file with the author.

[46] UKTS (1999) 46.

[47] 1399 UNTS 33 (No. 23391); ILM (1984), p. 1366; UKTS (1985) 26.

[48] See the Argentina–United Kingdom Joint Declaration on Co-operation over Offshore Activities in the Southwest Atlantic 1995 (ILM (1996), p. 304; and p. 301 which refers to earlier Joint Declarations).

Joint Declarations were not intended to create legal obligations is that they usually provide that they will be sent to the UN Secretary-General for distribution as official documents of the General Assembly, thus implying that the two states do not intend that they should be registered with the Secretary-General as treaties,[49] and none have been registered. While Argentina continues to assert its claim to the Falkland Islands it may be reluctant to enter into treaties with the United Kingdom about the territory, even though it did so before 1982.[50]

In the distant past a Final Act occasionally constituted a treaty,[51] but this is no longer so.

Colloquial names

The Convention on International Civil Aviation 1944 was adopted in Chicago, and is more usually referred to as the Chicago Convention.[52] Sometimes a treaty which is adopted in one state but signed in another will be known – at least colloquially – by the name of the place where it was adopted. The General Framework Agreement for Peace in Bosnia and Herzegovina 1995 is generally, and most conveniently, referred to in English as the Dayton Agreement after the place it was adopted, though it was signed in Paris.[53] The Landmines Convention 1997 is known also as the Ottawa Convention, since it was conceived and opened for signature there, although adopted in Oslo.[54] The Locarno Pact 1925[55] was negotiated at Locarno but signed in a room in the Foreign Office in London, and which has been known ever since as the Locarno Room. There are other examples.[56] And the media have much to answer for. A treaty is rarely called a Pact, but this term is regularly used by journalists as convenient shorthand, and who can blame them? The Locarno Pact was a series of treaties. The famous Kellogg–Briand Pact of 1928 was the General Treaty for the Renunciation of War.[57]

Unless it is clear from the context which treaty is being referred to, one should avoid shorthand terms such as 'Hague Convention', 'Geneva

[49] See the first Joint Declaration (of Madrid) 1989 (ILM (1990), p. 129, para. 13).

[50] For example, the Exchange of Notes of 1971 concerning Communications between the Falkland Islands and the Argentine Mainland (825 UNTS 143 (No. 11824); UKTS (1972) 64).

[51] *Satow*, para. 31.11. [52] 15 UNTS 295 (No. 102); UKTS (1953) 8. [53] ILM (1996), p. 75.

[54] ILM (1997), p. 1509; UKTS (1999) 18. [55] 54 LNTS 305.

[56] See the letters page of the London *Times* for 14 December 1995.

[57] 94 LNTS 57; UKTS (1929) 29.

Convention' or 'Vienna Convention' since there are several treaties which have titles starting with those words.

A treaty does not have to be signed

There are other matters which the Convention does not deal with, at least explicitly. For example, the Convention's definition of treaty does not mention signature; and it is apparent from other provisions, such as Articles 12 and 13, that signature is not a prerequisite. A treaty can be constituted by an exchange of third-person diplomatic notes, which, according to long-standing diplomatic practice, are initialled but not signed.[58] There can be circumstances when the use of an unsigned instrument is preferred for political reasons. The Decision of the Heads of State and Government, adopted at a meeting within the European Council at the Edinburgh Summit on 12 December 1992, concerning certain problems raised by Denmark about the (Maastricht) Treaty on European Union, though not in customary treaty form is regarded by the Member States as a treaty and has been registered and published as such. Some of the leaders were reluctant to be seen to have signed it, and they were skilfully advised that they did not have to sign.[59]

A more routine example is to be found in the – otherwise uncommon – practice of the Food and Agriculture Organisation (FAO). Treaties adopted by the FAO Conference are not signed but are subject to 'acceptance' by Member States, which is equivalent to ratification.[60] There may also be a tendency for states to conclude treaties by resolutions. As we have seen, the treaty establishing the Preparatory Commission of the Comprehensive-Nuclear Test-Ban Treaty 1996 (CTBT) was effected by a resolution of states which had signed the CTBT.[61]

Agreements between states governed by domestic law

States can also contract with each other under domestic law. They may do so if the subject matter is exclusively commercial, such as the purchase of

[58] See a China–UK exchange of notes of 1996 (UKTS (1996) 100).

[59] UKTS (1994) 2. It might also be seen as an agreement made in connection with the conclusion of a treaty (Article 31(2)(a)): see pp. 189–91 below.

[60] See, for example, the so-called 'Compliance Agreement' adopted at the FAO Conference in 1993 (ILM (1994), p. 968 (Article X)). See also the Convention on the Privileges and Immunities of the United Nations 1946 (1 UNTS 15 (No. 4)).

[61] See p. 22 above.

commodities in bulk. The law of the contract may be that of a third state. If a state leases land from another state for an embassy there will usually be an instrument under domestic law, such as a lease, though this may be granted pursuant to a treaty.[62] The fact that some of the provisions of a treaty refer to domestic law will not alter the status of the treaty. Treaties concerning loans may provide that the contractual arrangements for the loan shall be governed by the law of the lender state.[63]

Pactum de contrahendo

Latin phrases should always be approached with caution since they can conceal more than they reveal. This is especially so with *pactum de contrahendo*, the exact meaning of which is uncertain.[64] Fortunately, the term is rarely employed. It has been used to refer to an agreement to conclude a treaty; an agreement to include certain clauses in future agreements between the same parties; and an agreement to become party to a treaty which has already been concluded, such as the celebrated undertaking by Poland in the Treaty of Versailles to accede to the Berne Convention on Railway Transport.[65] The term should probably not be used to describe an agreement to negotiate a treaty, even though such an agreement must be carried out in good faith.[66]

Modus vivendi

A treaty is not usually so designated.[67] The term is used more to describe a treaty which is intended to be temporary.[68] It is also used for MOUs, particularly on fisheries matters.

For where to find treaties, see pages 280–4 below.

[62] Russia–UK Agreement on Leases of New Embassy Premises 1996 (UKTS (1997) 1). Contrary to popular belief, the land on which a state's embassy stands is *not* territory of that state.

[63] See the text of the Denmark–Malawi Loan Agreement 1966 (586 UNTS 3 (No. 8493)), Article XII; and F. Mann, *Studies in International Law* (1973), pp. 241–53. Grants by the US Government to other Governments under the Foreign Assistance Act 1961 are made under agreements governed by US federal law.

[64] McNair, pp. 27–9; *Oppenheim*, para. 599; O'Connell, p. 202. [65] McNair, p. 29, note 1.

[66] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1992), pp. 3–10.

[67] But see the Modus Vivendi between the Belgo-Luxemburg Economic Union and Turkey on MFN Treatment of 1947 (37 UNTS 223).

[68] See the Interim Agreement on the Fisheries Dispute between Iceland and the United Kingdom 1973 (UKTS (1973) 122), and *Fisheries Jurisdiction, ICJ Reports* (1974), p. 3 at p. 18.

3

MOUs[1]

> Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

Since President Woodrow Wilson issued this understandable, but slightly unworldly, appeal in 1919,[2] diplomacy has developed many new ways of doing business. Diplomats know that it is impossible for all international transactions, whether important or not, to be embodied in treaties, even when the matter is proper and lawful. Hence the relentless rise of the MOU. As described briefly in the previous chapter, an MOU is an instrument concluded between states which is not legally binding.[3]

But first, a word of warning. Because the use of MOUs is now so widespread, some government officials may see the MOU as the more usual form, a treaty being used only when it cannot be avoided. The very word 'treaty' may conjure up the fearsome formalities of diplomacy. One of the tasks of legal advisers in foreign ministries is to explain the differences between a treaty and an MOU, and why one might be preferable to the other. In general, unless there is a particular advantage in having an MOU, such as confidentiality, there may be no reason not to have a treaty. On the other hand, there is, in principle, no reason to prefer a treaty to an MOU, unless there is a need to create legally binding rights and obligations or, because of the subject, there is a constitutional or other domestic legal requirement for a treaty.

[1] This chapter is a much modified version of the author's 'The Theory and Practice of Informal International Instruments', ICLQ (1986), pp. 787–812.

[2] AJIL (1919), p. 161. As to Wilson's naïve views concerning the Paris Peace Conference, see J. M. Keynes, 'The Economic Consequences of the Peace', in *Collected Writings of John Maynard Keynes*, (2nd edn, 1971), vol. II, pp. 23–34.

[3] See pp. 17–18 above.

Evidence of intention to conclude (or not conclude) a legally binding instrument

The actual practice of states is to indicate their intention to conclude a treaty by consciously employing terminology such as 'shall', 'agree', 'undertake', 'rights', 'obligations' and 'enter into force'. When they do *not* intend to conclude a legally binding instrument, but rather an MOU, instead of 'shall' they use a less imperative term, such as 'will'. Terms like 'agree' or 'undertake' are avoided; the instrument is expressed to 'come into operation' or 'come into effect'; and most of the final clauses usually found in treaties, and the testimonium, are omitted or simplified. The instrument will normally be designated, in English, 'Memorandum of Understanding' or 'Arrangement'. However, as explained earlier, taken on its own the designation of an instrument can be most misleading; a 'Memorandum of Understanding' or an 'Exchange of Notes' may be a treaty or an MOU.[4] The terminology used for MOUs does not reflect practice with domestic law contracts, where the use of 'will' as opposed to 'shall' does not, in itself, necessarily denote an intention not to create a legally binding obligation. But nor should it be assumed that, just because an instrument contains treaty terminology, it is a treaty. A joint governmental statement will often utilise such language even though it is conveying only a political message, political statements being sometimes more impressive if couched in more assertive terms.[5]

A table comparing treaty and MOU terminology is at Appendix G. The main differences are illustrated by the treaty (Appendix B) and the MOUs (Appendices C and D). Guidance on treaty and MOU drafting is in Chapter 23.

Content

The subject matter of an instrument is not a guide to status, since the same subject matter can be found both in treaties and in MOUs. A notable exception is when the instrument contains a clause providing for the settlement of disputes by compulsory international judicial process, the

[4] See pp. 20–1 above.

[5] See the Joint Statement on Terrorism by the Iranian and Russian Foreign Ministers of 26 September 1998 (UN Doc. A/C.6/53/6); the Atlantic Charter 1941 (AJIL (1941), Supplement, p. 191); and McNair, p. 6.

inclusion of such a clause being hardly consistent with an intention to enter into a non-legally binding instrument.[6]

Express provisions as to status

The states which in 1975 adopted the Final Act of the Conference on (now Organisation for) Security and Co-operation in Europe made clear their intention not to enter into a treaty by stating at the end of the Final Act that it was 'not eligible for registration [i.e., as a treaty] under Article 102 of the Charter'.[7] The OSCE Charter of Paris 1990 also provides that it is not eligible for registration.[8] The OSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe 1987 provides that: 'The Measures adopted in this Document are politically binding.'[9] Any doubt as to the status of the Declaration on Trade in Services, signed by Israel and the United States on 22 April 1985, is dispelled by the preamble which declares that: 'the principles set forth below shall not be legally-binding.'[10] An MOU adopted in 1992 by the UN Conference on Environment and Development (UNCED) is engagingly entitled 'Non-legally binding authoritative statement of principles regarding forests'.[11] The NATO–Russia Founding Act 1997 refers in its preamble to 'political' commitments.[12] When transmitting a copy of it to the UN Secretary-General, the NATO Secretary-General stated that it was not eligible for registration under Article 102. A recent (confidential) bilateral MOU included the statement that it 'represents a political commitment by the Sides [i.e. Governments] and does not constitute a legally-binding agreement'.

Such express statements seem to be a growing trend, particularly in MOUs with the United States. They and other categorical statements are conclusive as to the intended status of the instrument. But the use of such formulas is not yet common, and omitting them certainly does not, in itself, indicate that the instrument was intended to be a treaty. One should not therefore equate their use with a formula such as 'subject to contract', which is used constantly by lawyers in common law countries to prevent a document containing proposals from being held to be legally binding.

[6] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1991), at pp. 7–8. [7] ILM (1975), p. 1293. As to Article 102, see pp. 275–80 below.
[8] ILM (1991), p. 193. [9] ILM (1987), p. 191 at p. 195, para. 101.
[10] ILM (1985), p. 679. [11] ILM (1992), p. 882. [12] ILM (1997), p. 1007.

Circumstances in which the instrument was concluded

If the form, terminology or express terms of the instrument do not contain sufficient evidence of the intention of the parties as to its status, it is necessary to consider the circumstances in which the instrument was drawn up, and the subsequent acts of its authors, such as non-registration.

Registration and non-registration

Registration of an instrument with the United Nations pursuant to Article 102 of the UN Charter does not confer on the instrument the status of a treaty if it does not already have that status.[13] Nevertheless, registration is generally good evidence that the states concerned regard it as a treaty. An examination of every tenth volume of the *United Nations Treaty Series* from 1980 to 1989 (inclusive)[14] produces only four instruments which are clearly MOUs. All were registered by the United States, three at the same time.[15] A treaty (usually bilateral) is sometimes registered by one party even though another party does not regard it as a treaty. Although non-registration is less of an indication as to the status of an instrument, in the US–UK Heathrow User Charges Arbitration 1988–1992 the Tribunal held that a UK–US MOU of 1988 was not legally binding, citing, among other factors, that it had not been published or registered with the United Nations or ICAO. But failure to register a treaty does not deprive it of treaty status, even if, in theory at least, the treaty cannot be invoked before an organ of the United Nations.[16]

Disagreement as to status

A nice problem can arise when differing views are held as to the status of an instrument, though this appears to happen chiefly with bilateral instruments. The author is aware of at least two instances of this coming to light when a bilateral instrument was on the point of being signed, and four after it had become effective. In two of the latter cases the disagreement only became apparent once a dispute had arisen, and this may well have been a factor. In both cases the instrument was supplementary to a treaty.

[13] See p. 279 below. [14] Vols. 1160–1550 (Reg. Nos. 18323–26961).

[15] 1550 UNTS 3 (No. 26949); 1180 UNTS 83 (No. 18881); 1180 UNTS 163 (No. 18888); 1180 UNTS 179 (No. 18889). [16] See further pp. 278–80 below.

In 1997 a bilateral MOU concluded by a ministry of the United Kingdom was submitted to the parliament of the other state for approval as a treaty. The misunderstanding about its status was discovered only when the other state asked if the United Kingdom's treaty procedures had been completed.[17]

Difficult problems can arise when an MOU which is subsidiary to a treaty contains provisions purporting to amend, or which are otherwise inconsistent with, the treaty. This raises the question whether the inconsistent provisions have any legal effect. In certain cases the MOU might be regarded as evidence of a mutual waiver of rights under the treaty. But use of MOUs to modify treaty provisions can be dangerous and lead to uncertainty as to the precise effect on the treaty.

It is not usually necessary to determine the precise status of a subsidiary instrument which is in the nature of a statement of interpretation of a treaty. The rules in Article 31 cover most cases adequately.[18]

The practice of states

The widespread use of MOUs results solely from state practice. In the past foreign government negotiators may have been rather bemused by requests, usually from Commonwealth states, to change the title of a draft from 'Agreement' to 'Memorandum of Understanding' or 'Arrangement', and every 'shall' to 'will'. But what may in the past have been seen by some as a slightly tiresome – even quaint – obsession is now firmly established.

Commonwealth states

The fifty-four states which are members of the Commonwealth tend to use MOUs, bilateral or multilateral, even in those cases where other states might employ a treaty. The Commonwealth Secretariat was established in 1965 by an MOU called 'Agreed Memorandum'.[19] Other Commonwealth institutions were similarly established. The 1966 Scheme relating to the Rendition of Fugitive Offenders (i.e. extradition) within the Commonwealth is contained in a document adopted by a Meeting of Commonwealth Law Ministers which uses MOU terminology.[20]

[17] The error was partly due to the British Embassy not reporting that the MOU was being negotiated. [18] See pp. 189–91 below. [19] ILM (1965), p. 1108. [20] Cmnd 3008.

European Union states

In 1996 the Secretariat of the EU Council of Ministers circulated a questionnaire to all fifteen Member States concerning 'The internal procedures of Member States for the conclusion of international agreements approved under a simplified procedure or agreements without legally-binding force'.[21] For almost all the Member States the key factor in distinguishing a 'non-legally binding instrument' from a treaty was the intention of the states. Ireland, which, like the other Member States except the United Kingdom, has a written constitution, replied that if an instrument was not intended to be binding it would be worded to reflect that intention; and that the Irish courts had distinguished between MOUs and treaties on the basis of the intentions of the governments as reflected in the language of the text and the formalities, or lack of them, associated with it. The replies of other EU Member States echoed these points and added further factors which for them distinguished MOUs from treaties: the title of the instrument; the avoidance of mandatory language; the omission of treaty-type final clauses; and, generally, the absence of a parliamentary procedure.[22]

United States

Examining the practice of the United States is valuable because it is better documented. The purpose of the US Federal Regulations dealing with international agreements is to implement the federal law known as the 'Case Act' (see below) by giving guidance to agencies of the US Government as to the types of international instruments which the Act requires to be notified to Congress. The Regulations thus cover those instruments which fall within the definition of treaty (as that term is understood by international law),[23] and lay down criteria by which to judge whether a particular instrument is a treaty.[24] The following extracts are particularly relevant:

[21] The replies are summarised in EU Doc. PESC/SEC 899 of 9 August 1996.

[22] See also the Opinion of the Advocate-General of the European Court of Justice in *France* v. *Commission* [1994] ECR V-3641 at 3654.

[23] See pp. 157–60 for an explanation of treaties and the US Constitution.

[24] 46 FR 35918, as amended by 61 FR 7071, see *Code of Federal Regulations* 22, Part 182, revised as of 1 April 1998.

(1) *Identity and intention of the parties* . . . The parties must intend their undertakings to be legally-binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally-binding, are not international agreements . . .

. . .

(5) *Form.* Form as such is not normally an important factor, but it does deserve consideration. Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, or entry into force dates, may or may not be international agreements. Failure to use the customary form may constitute evidence of a lack of intent to be legally bound by the arrangement. If, however, the general content and context reveal an intention to enter into a legally-binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. Moreover, the title of the agreement will not be determinative. Decisions will be made on the basis of the substance of the arrangement, rather than on its denomination as an international agreement, a memorandum of understanding, exchange of notes, exchange of letters, technical arrangement, protocol, agreed minute, or any other name.

These extracts adopt a not dissimilar approach to that of other states: there must be an intention to enter into legally binding undertakings and use of non-customary treaty form may indicate that the parties did not intend to enter into a legally binding relationship. But it is also clear that in US practice use of non-treaty language does not necessarily preclude the instrument from being an 'international agreement' if 'the general content and context reveal an intention to enter into a legally-binding relationship'. Since less weight is given to terminology, it is more difficult to predict whether a particular instrument will be regarded by the United States as a treaty or an MOU.

But it must be remembered that the purpose of the Regulations is to implement the 'Case Act'.[25] Under the Act every 'international agreement' has to be published annually and the text submitted to Congress within sixty days of entry into force. The term 'international agreement' is defined in the Act so as to exclude 'Treaties', that is those treaties which under the Constitution have to be submitted to the Senate for approval.[26] Furthermore, the Act requires oral agreements (which are not covered by

[25] Public Law 92–403, as amended by Public Law 95–426 (ILM (1972), p. 1117 and ILM (1979), p. 82). [26] See pp. 157–9 below.

the Convention[27]) to be reduced to writing and notified to Congress. Also, the Act excludes any 'agreement' if its public disclosure would be prejudicial to national security. Given the obligation in Article 102 of the UN Charter to register all treaties,[28] this exclusion would seem directed at confidential MOUs.

Nevertheless, in practice the United States – or at least some US agencies – appears to regard some instruments as treaties which other states would see as no more than MOUs. This may, in part, be due to the tendency of the United States to name a treaty 'Memorandum of Understanding'. This has led to some instruments which are clearly MOUs or, perhaps only domestic law contracts, being erroneously regarded as treaties. A 1981 Memorandum of Understanding between the 15th Air Base Wing, Hickham Air Force Base, Hawaii and the Royal Air Force detachment at Hickham is drawn in the form of an agreement. But it is not expressed to have been made on behalf of the UK and US Governments or even departments of them, and the 'final clauses' are not in normal treaty form. It was signed by the US Base Commander and an RAF sergeant. The subject was the supply to the RAF detachment of various goods and services, including fuel and coffins. The preamble cites certain US federal legislation, and the parties are described as 'Host' and 'Tenant'. The inescapable conclusion is that it is no more than a contract drawn up under US law, but the United States registered it as a treaty.[29]

Whereas the practice of other states seems to be fairly consistent as to the use of particular terminology to distinguish MOUs from treaties, US practice is less consistent, and this results in some instruments having indeterminate status. The China–United States Memorandum of Understanding on Protection of Intellectual Property 1992 states that the two governments 'reached a mutual understanding' but includes some treaty language.[30] The Memorandum of Understanding between the same two governments on Prohibitions on Import and Export Trade on Prison Labour Products 1992 says in the preamble that they 'have reached the following understanding', but then says that 'The Parties agree'. The operative provisions use MOU terminology, but the final clauses and testimonium[31] are in treaty form.[32]

Most collaborative defence projects with the United States are effected

[27] See p. 7 above. [28] See p. 275 below. [29] 1285 UNTS 97. [30] ILM (1995), p. 677.
[31] For an explanation of these terms, see pp. 345–54 below. [32] ILM (1992), p. 1071.

by means of MOUs because of the need for confidentiality and the ease with which MOUs can be amended. But, perhaps because of requirements of US federal law, the US Government has sometimes regarded them as treaties. By 1993 the United States had some twenty-two defence memoranda of understanding with the United Kingdom.[33] Some were clearly treaties, but the rest, although only MOUs, had been registered by the United States as treaties.[34] This was unacceptable to the United Kingdom. Australia and Canada had the same problem with the United States. As a result the United States concluded a so-called 'Chapeau Agreement' with each of the three states. This is a treaty containing ready-made provisions on matters such as the legal status of armed service personnel and liability.[35] When an MOU for a collaborative defence project with the United States needs to provide for such matters, it will state that the relevant terms of the Chapeau Agreement will apply; and the United States will not register the MOU as a treaty. In a similar way, an MOU, in providing that persons specified in it will be accorded certain immunities, may make reference to provisions of the Vienna Convention on Diplomatic Relations 1961.[36]

The distinction between treaties and MOUs is reflected in a recent UK–US treaty which expressly replaced a bilateral MOU and preserved a trilateral MOU.[37] In 1991 Japan and the United States concluded a treaty to implement an earlier MOU.[38]

How and why MOUs are used rather than treaties

Today MOUs are employed in most areas of international relations – diplomatic, defence, trade, aid, transport etc. There may, in fact, be no area in which they are not found. In many cases, all things being equal, a treaty could be used. Frequently MOUs supplement treaties, like the MOUs accompanying almost all bilateral air services agreements, and which are treated as confidential. The United Kingdom has over 100 air services

[33] See *Treaties in Force* (1997), Office of the Legal Advisor, US State Dept, Pub. 9433, at pp. 290–3.

[34] See, for example, 1068 UNTS 437.

[35] UK/US Exchange of Notes 1993 concerning Defence Co-operation Arrangements (UKTS (1993) 69). See J. McNeil, 'International Agreements: Recent US–UK Practice Concerning the Memorandum of Understanding', AJIL (1994), pp. 821–6, though his views most be treated with some caution since they were based on a misunderstanding of the approach to Memorandums of Understanding taken by McNair and the ILC.

[36] 500 UNTS 95 (No. 7310); UKTS (1965) 19.

[37] Agreement on Suppression of Illicit Trafficking in the Caribbean 1998 (Cm 4154). See also the text of a UK–US MOU in BYIL (1997), p. 500.

[38] ILM (1992), p. 1079.

agreements, almost all of which are supplemented by confidential MOUs. But the United Kingdom is by no means exceptional in this; it has been normal practice in international civil aviation for decades.

Appendix C contains an example of an MOU which has not been published before. It may be the first time that an MOU on such an ordinary subject has been published. MOUs like the Helsinki Final Act or the NATO-Russia Founding Act were of course disseminated widely because of their political importance. Although it is such instruments which are most often cited as examples of MOUs, they are untypical of the numerous MOUs concluded each year, which are concerned with rather boring matters, and are of little importance outside the narrow circle of those who have to negotiate and implement them, but all who are interested in treaties should be aware that they exist.

The main reasons for using MOUs in preference to treaties are confidentiality and convenience, of which there are various aspects.

Confidentiality

A rather obvious reason for preferring an MOU to a treaty is confidentiality. Since an MOU is not a treaty, there is generally no national or international requirement, or need, to publish it. In the United Kingdom even a non-confidential MOU is not published unless there is a special reason, such as the political importance of the subject matter, or because it is closely associated with a treaty. Being neither a 'treaty' nor an 'international agreement', an MOU is not required by Article 102 of the United Nations Charter to be registered with the United Nations.[39] Of the many thousands of MOUs which have been concluded since 1945, only a handful appear in the *United Nations Treaty Series*, and probably in error,[40] though that does not make them treaties.[41]

Unlike Article 102 of the Charter, Article 83 of the Chicago Convention on International Civil Aviation 1944 provides that:

> **... any contracting State may make *arrangements* not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the (ICAO) Council, which shall make it public as soon as possible.[42]**

[w] **See pp. 275-6.** [40] **See p. 33 above about US practice.** [41] **See p. 279 below.**
[42] **15 UNTS 295 (No. 102); UKTS (1953) 8.**