MODERN TREATY LAW
AND PRACTICE
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What is a treaty?

the intolerable wrestle with words and meanings.\(^1\)

Like the Vienna Convention, this book is concerned primarily 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 that Convention, and is limited to treaties between states, its elements now represent customary international law (see previous chapter). As with so many legal questions, the difficulty is not the definition itself, but whether a particular instrument or transaction falls within it.\(^2\) An examination of the elements of the definition illustrates some of the key principles underlying the law of treaties.

But, first a warning. The law of treaties is extremely flexible and can accommodate departures from normal practice.\(^3\) That is its strength. But most treaties are drafted according to standard forms and processed according to long-established procedures. One should therefore think very carefully before departing from them. But, provided there is a good reason for a departure, and one knows exactly what one is doing and any legal implications, there should be no problem. Difficulties can arise when there is an honest, but misguided, wish to speed up the process; the initiative often coming from the state promoting the negotiation of a multilateral treaty.\(^4\)


\(^3\) See p. 7 above, n. 5.  \(^4\) See p. 325 below.

\(^5\) See pp. 58-9 below.

\(^6\) But see *McNair*, pp. 739-54, on the differing character of treaties.

\(^7\) See p. 18 below.

\(^8\) For example, the *Estonia Agreement 1995* (1890 UNTS 176 (No. 32189), with Additional Protocol 1996 (1947 UNTS 404 (No. 32189); UKTS (1999) 74)). \(^9\) See p. 139 below.

\(^10\) See p. 393 below. \(^11\) See p. 10 above.

\(^12\) See commentary on draft Article 2 in (1966) *YBILC*, II, 173, at 188-9 or www.un.org/law/ilc/.
the 1960s there was no longer any doubt on the matter. Because there is no intention that an MOU should create obligations in international law, it is also a mistake to think it is a treaty in simplified form.  

‘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 (see Chapter 22). But, an agreement between so-called international or multinational companies, or even between a state and such a company, is not a treaty. In 1952, the International Court of Justice in Anglo-Iranian Oil Company (United Kingdom v. Iran) (Preliminary Objections) 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. 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. There is, however, a small number of treaties between states to which certain non-state entities can also be parties, but this does not affect their status as treaties.

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, were often drawn in the same form as a treaty and described as such. But, since the land occupied by such peoples was, at the time, not considered to be a state, such agreements were not treaties, even if they had, and continue to have, effects in domestic law.

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 organ or agency of the state has to act on its behalf. A treaty may therefore be expressed to be concluded by heads of state, governments, ministries or other state organs or agencies.

‘in written form’

The Convention does not apply to oral agreements. 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 an 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’. In September 1998, US President Clinton and Irish Prime Minister Ahern issued, by electronic means, a Communiqué on Electronic Commerce. They did so by each operating a separate computer terminal and, using electronic signatures, that is data in electronic form which is attached to or logically associated with other electronic data and serves as a method of authentication. The ‘signature’ must therefore be uniquely linked to the signatory, identify him, be created by means under his sole control and linked to the data in a way which would reveal if it were to be subsequently changed. This be can be done by use of a so-called smart card. Although the Communiqué was not a treaty and the two leaders were in the same room, 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 numerous

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13 See pp. 20–1 and 32 et seq. below.
14 On subjects of international law, see Aust Handbook, pp. 13–5.
16 See C. Greenwood, ‘The Libyan Oil Arbitrations’ (1982) BYUL 27–81. See p. 30 below about agreements between states which are governed by domestic law, and treaties which refer to domestic law.
17 See p. 73 below.
18 6 Hertslet 579; 29 BFSP 1111.
19 See the 1815 Treaty between the United States and the Sioux and other Indian tribes (65 CTS 81). See also the Treaty of Protection between Great Britain [sic] and the Kings and Chiefs of Old Calabar 1884 (1 HCT 131). In Cameron v. Nigeria (ICJ Reports (2002), paras. 200–9) the Court held that, as with some 350 other treaties with chiefs in the Niger Delta, it was not a treaty in international law.
21 See also pp. 58–9 below.
22 See p. 9 above.
25 See the Financial Times, 7 October 1998, IT Review, p. xv, which, uncharacteristically for that excellent newspaper, misdescribed the document as a treaty.
mistakes in treaties and treaty procedures made even today, there is no reason to suppose that the latest information technology will necessarily improve matters.\textsuperscript{26}

\textit{‘governed by international law’}

According to the International Law Commission’s Commentary, the phrase ‘governed by international law’ embraces the element of an \textit{intention to create obligations under international law}. If there is no such intention, the instrument will not be a treaty. In the \textit{Aegean Sea Continental Shelf} case in 1978,\textsuperscript{27} 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 international agreement to submit to the jurisdiction of the Court. Intention must therefore be gathered from the terms of the instrument itself and its circumstances of its conclusion, not from what the parties say afterwards was their intention.\textsuperscript{28}

The intention to create obligations under international law also distinguishes treaties from agreements between states governed by domestic law.\textsuperscript{29} It is the negotiating states which decide whether they will conclude a treaty, or something else. Although the law of treaties does not require a treaty to be in any particular form or to use special wording,\textsuperscript{30} lawyers practising in foreign or other ministries deliberately use instruments which employ carefully chosen terminology to indicate that, rather than intending to create international legal rights and obligations, the participants merely wish to record their mutual \textit{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 states, has until recent years not been well known outside government circles.\textsuperscript{31} In fact, a large number of such instruments, bilateral and multilateral, are concluded every year covering a wide range of subjects.\textsuperscript{32} Most are never published. A (published) example of such a multilateral instrument is the Memorandum of Understanding on Port State Control in the Caribbean Region 1996.\textsuperscript{33} The United Kingdom–Jordan Memorandum of Understanding on deportations 2005,\textsuperscript{34} and similar ones with Libya (18 October 2005) and Lebanon (23 December 2005), are more widely publicised examples, and have been rightly described as no more than ‘diplomatic assurances’.

Such instruments have also been variously described as ‘political agreements’, ‘gentlemen’s agreements’, ‘non-legally binding agreements’, ‘non-binding agreements’, ‘de facto agreements’, ‘non-legal agreements’. Diplomats – who are well aware of the instrument – generally refer to it, and not only in English, as an ‘MOU’. This is short for ‘Memorandum of Understanding’, since this is the name most often given it. However, as will be explained shortly, calling an instrument a ‘Memorandum of Understanding’ does not, in itself, determine its status, since – most confusingly – some treaties are also given that name.\textsuperscript{35} By defining a treaty as an agreement governed by international law, the International Law Commission excluded MOUs from its draft articles.\textsuperscript{36} It should therefore be made clear that an MOU may often be loosely referred to as an ‘agreement’, since it represents a deal between states, even if there is no intention that it should be legally binding.

The fact that some treaties, bilateral or multilateral have little substance, ‘hard’ obligations or enforcement mechanism, does not affect their treaty status.\textsuperscript{37} How to distinguish more easily 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.

\textsuperscript{26} See pp. 335–8 below on the problem of errors.


\textsuperscript{28} Qatar v. Bahrain (Jurisdiction and Admissibility) IJC Reports (1994), p. 112, paras. 26–7; ILM (1994) 1461; 102 ILR 1. See also pp. 51–2 below.\textsuperscript{29} See p. 30 below.

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.). 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). When there are only two parties it may also be necessary to make clear whether the treaty can be terminated by only one of the parties, or whether one of the states constituting the (collective) party can, by withdrawing from the treaty, bring about its termination.

An exchange of notes on the interpretation of a treaty may be subsidiary to it and concluded at the same time. It does not itself have to be a treaty, though sometimes it is.

The drafting of (normal) exchanges of notes is discussed in the final chapter.

‘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 convincingly, why certain names are given to particular categories of treaty. 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 and early twentieth centuries, in itself the name does not determine the status of the instrument; what is decisive is whether the negotiating states intend the instrument to be (or not to be) binding in international law. Thus, just as one should never judge a book by its cover, one should never assume that the name given to an international instrument automatically indicates its status either as a

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39 For an example of a triple exchange, and other multiple exchanges, see Satow, para. 29.38.


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


43 See, for example, the Australia–UK Exchange of Notes about the Double Taxation Convention 2003 (UNTS No. 40224; UKTS (2004) 5).

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 is notable in that it makes no mention of signature; and it is apparent from other provisions, such as Articles 12 and 13, that signature is not a necessary requirement for a treaty. For example, a treaty can be constituted by an exchange of third-person diplomatic notes, which, according to long-standing diplomatic practice, are initialed but not signed; and are usually expressed to be between, say, the foreign ministry (or one of its departments) and a foreign embassy, not between individuals.

Indeed, there can be circumstances when the use of an unsigned (or even an uninitialed) instrument is preferable for political reasons. The Decision of the Heads of State and Government, adopted at a meeting of the European Council at the Edinburgh Summit on 12 December 1992, concerning certain problems raised by Denmark about the (Maastricht) Treaty on European Union, is not in customary treaty form, but is regarded by the Member States as a treaty, and has been registered and published as such. Given the particular circumstances, some of the less confident leaders were reluctant to be seen signing it. They were skilfully advised that signature was not necessary.

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Memorandum of Understanding

One must be extremely careful in assessing the status of any instrument called a 'Memorandum of Understanding'. This designation is most commonly used for MOUs in the sense described above, but sometimes one will find a treaty called a Memorandum of Understanding. 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 that an instrument designated Memorandum of Understanding must be a treaty because several bearing that name have been registered as treaties. Only by studying carefully all the terms of an instrument called a 'Memorandum of Understanding' can one determine its status.

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 Italy. The reason may have been a desire, perhaps for political

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53 See, for example, the so-called Compliance Agreement 1993 (2221 UNTS 120 (No. 39486); ILM (1994) 968), Article X. See also the Privileges and Immunities of the United Nations Convention 1946 (1 UNTS 15 (No. 4); UKTS (1950) 10). On acceptance, see p. 109 below.
54 606 UNTS 267 (No. 8791); UKTS (1969) 15.
55 189 UNTS 137 (No. 2545); UKTS (1954) 39. 56 See p. 28 below.
57 See p. 66 below.
58 258 UNTS 372 (No. 3679); UKTS (1956) 52 and 283 UNTS 138 (No. 4113); UKTS (1957) 51. See also the Memorandum of Understanding regarding German Assets in Italy 1947 (138 UNTS 111 (No. 1863); 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 (No. 296)).

An even more misleading name for a treaty is the Provisional Understanding regarding Deep Seabed Matters 1984. On the other hand, the Paris Memorandum of Understanding on Port State Control 1982 is unquestionably an MOU.

The United States concludes many bilateral treaties called Memorandums of Understanding as does the European Union. The United Nations frequently concludes bilateral treaties called Memorandum of Understanding, for example, the (ill-fated) Iraq–UN Memorandum of Understanding 1998 concerning weapons inspections. But the UN Treaty Handbook is quite wrong in implying to regard MOUs (as defined in this book) as treaties. This does not reflect the intention and long-established practice of states. In fact, the UN Treaty Section makes an analysis of every instrument submitted for registration, whatever its designation, to see whether it constitutes a treaty in international law.

Occasionally, an international organisation or a state will be asked by a state (and may even agree) to call a treaty a Memorandum of Understanding so that the requesting state can try to avoid a constitutional requirement that it put treaties to its legislature for prior approval before they are ratified.

Since an instrument called Memorandum of Understanding may be a treaty or an MOU, occasionally it will make its status clear by a specific provision, such as that it shall be legally binding on the parties.

Exchange of notes

Exchanges of notes (or letters) pose the same problem as the name Memorandum of Understanding since they may constitute either a treaty or an MOU. Many 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 use 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 United Kingdom–United States Lend-Lease Agreements 1940–1, under which the former was lent sixty badly needed destroyers in return for leases of bases, were constituted by exchanges of notes.

Guidance on drafting both types of exchange of notes is at pages 445–6 below.

Protocol

Although some stand-alone treaties have been called Protocols, nowadays that name is generally used for supplementary treaties (such as an Optional Protocol on dispute settlement – see below) or amending treaties. However, it is also used for other quite different purposes, such as for documents which are annexed to a treaty and are an integral part of it. The word should therefore be used (and read) with care.