1 The Transformation of EU Treaty Making

Treaties are written agreements under which states and other actors bind themselves in law to act in a particular way or to create certain relations between themselves.[1] From the Peace of Westphalia[2] to the Treaty of Versailles,[3] from the Covenant of the League of Nations[4] to the Charter of the United Nations (UN),[5] from the Ottawa Treaty[6] to the Paris Agreement,[7] the history of the international system is punctuated by treaties. The United Nations Treaty Series records more than 250,000 treaties or treaty actions since 1946.[8] *Pacta sunt servanda* – whereby every treaty in force is binding upon the parties to it and must be performed by them in good faith[9] – is not only a founding principle of international law. It is, for some scholars, akin to an ethical rule or a self-evident truth.[10]

Treaty making is not simply a technocratic exercise. It is – and has long been – a site of struggle for those who claim authority to speak and act on international matters. Treaty making is, in this sense, about the exercise and control of power. Being closely connected to questions of war and peace, the power to make treaties in the medieval period lay to a large extent in the hands of monarchs.[11] Today, treaties are negotiated by states, although not exclusively so. International organisations can and do conclude treaties with states and with one another.[12] Regions, territories, indigenous people, insurgent groups and, sometimes, private actors are involved in the processes through which treaties are made.[13] The principle of consultation with non-governmental organisations (NGOs) in treaty making has been championed by the UN.[14] In negotiations over the UN Framework Convention on Climate Change at the Rio Earth Summit in 1992, more than 1,400 NGOs were invited to attend as observers and to make oral and written statements.[15] The Paris Climate Change Conference in 2015 had 25,000 official delegates

and a dedicated 'village' to accommodate a further 25,000 participants from NGOs and civil society.[16]

Who makes treaties and how such actors are held to account in doing so is a recurring concern in the study of international law.[17] Treaty making begins with the negotiation and conclusion stages, in which agreement on a final text is sought and secured. Negotiation typically takes place in a diplomatic conference,[18] while conclusion includes the production of full powers and the adoption, authentication and signature of the treaty.[19] Before a treaty can enter into force, it must pass through what we call the consent stage. Consent is sometimes equated with ratification, but ratification is just one of several means through which states can give their consent to be bound by a treaty.[20] Other means include signature, the exchange of instruments constituting a treaty, acceptance, approval or accession or any other agreed means.[21] Ratification also has internal and external faces. It refers to an internal act of approval under domestic constitutional law and the international procedure that brings the treaty into force, e.g. the depositing by states of instruments of ratification.[22]

The consent of states to be bound remains a classic principle of treaty making that is closely connected to the idea of state sovereignty.[23] The Vienna Convention on the Law of Treaties – which codifies international treaty making law – allows states to agree on the means through which they express their consent to be bound but it requires an expression of some sort.[24] Multilateral treaties sometimes include provisions that allow for treaty amendment without the consent of all parties.[25] For instance, three-fifths of International Monetary Fund (IMF) members can amend aspects of the Fund's Articles of Agreement.[26] However, the Vienna Convention makes clear that a treaty amendment cannot bind a state unless the state is party to this amendment.[27] Treaty making practices sometimes diverge from this provision, as in the Rome Statute's provision that amendments of an exclusively institutional nature can be adopted by a reinforced majority vote by state parties.[28] However, such practices arguably rework rather than reject the need for states to express their consent to be bound.[29]

The consent stage of treaty making is, to a large extent, a matter for domestic law, usually governed by state constitutions. Whether and what checks and balances should be placed on treaty-making power is a matter of debate among constitutional theorists. John Locke saw treaty making as an instance of federative rather than executive power and argued that the former should be 'left to the prudence and wisdom of

those who have the power to exercise it for the public good'.[30] Alexander Hamilton disagreed on the grounds that 'the operation of treaties as laws, pleads strongly for the participation of the whole or a portion of the legislative body in the office of making them'.[31] Today, treaty making is most commonly an executive function, but other actors play a role. Parliaments participate in the consent stage of treaty making in most democracies, thus providing democratic oversight of executives' treaty-making powers.[32] This does not prevent executives from taking steps to curtail such checks and balances. Had the Paris Agreement (2016) been a treaty, it would have required the advice and consent of the US Senate by a two-thirds majority of its members.[33] By avoiding the 'T' word and relying on existing legal authority, President Barack Obama circumvented the need for congressional approval.[34] This move was merely the latest attempt by the executive branch to work around treaty-making powers that have, Oona Hathaway argues, been 'overtaken by actual political practice'.[35]

The European Union – the subject of this book – is fertile ground for students of treaty making. This is so because EU treaties – a term that encompasses Community treaties – are in flux. The EU was established by the Maastricht Treaty (1992),[36] which in turn was built on a triumvirate of treaties that formed the European Communities: the Treaty of Paris (1951),[37] the Rome Treaty (1957)[38] and the EURATOM Treaty (1957).[39] These founding treaties have been amended fifteen times since 1951 (see Appendix 1.1). The most important EU treaty amendments have taken place since the mid-1980s. The Single European Act (1986)[40] was the first full-scale revision of the treaties, and there have been four further amendments since then: Maastricht (1992), the Amsterdam Treaty (1997),[41] the Nice Treaty (2000)[42] and the Lisbon Treaty (2007).[43] The European Constitution[44] was a more ambitious project that would have replaced this patchwork of treaties with a single legal text, but it never entered into force. Lisbon was supposed to draw a line under this intense period of treaty change, but there have been several amendments since, the most significant of which was the Article 136 TFEU amendment, which allowed for the creation of a stability mechanism for the eurozone.[45]

EU treaty making is also the site of a pronounced, public struggle between competing actors over who has the right to negotiate treaties. In 1950, the representatives of six sovereign states met in a tightly sealed intergovernmental conference (IGC) initiated by the French government to negotiate the Treaty of Paris.[46] The European Parliament has long

sought a role in EU treaty negotiations, and today it has the authority, alongside the European Commission and individual member states, to initiate treaty amendments.[47] For major treaty changes, member states are expected to hold a Convention – a forum including representatives of national parliaments, the European Parliament, the European Commission and EU heads of state or government – to consider treaty changes prior to an IGC.[48] In this respect, the EU is in the vanguard of participatory approaches to treaty making.

The increased involvement of parliaments, the people and courts over time in the consent stage of EU treaty making is also striking. The Treaty of Paris was approved by national parliaments on the basis of a simple majority.[49] Today, most member state parliaments require a reinforced majority in one or more chamber, and the number of chambers involved has increased with each enlargement of the EU.[50] In Belgium, subnational parliaments are routinely given a say on EU treaties.[51] Referendums on treaties are rare worldwide but they have become routine in relation to EU treaties.[52] In February 1986, Denmark became the first member state to hold a referendum on an EU treaty amendment; EU member states have held fifteen such referendums since. No less than ten member states announced referendums on the European Constitution.[53] National higher courts are also now routinely involved in EU treaty making. The Article 136 TFEU amendment led to constitutional challenges in six member states[54] and a preliminary reference to the Court of Justice of the EU.[55] Through its landmark judgments on Maastricht[56] and the Lisbon[57] treaties, Germany's Federal Constitutional Court is a prominent actor in the process through which EU treaties are changed.[58]

Few other instances of treaty making can match the EU for intensity or controversy. During the period 2010–2011 alone, EU member states launched a combined 105 national ratification procedures connected to treaty amendments.[59] Once thought of as epoch-making events, treaty amendments are now part of the 'everyday politics' of the EU, argues Thomas Christiansen.[60] And yet treaties are no less controversial for this. The troubled passage of the Maastricht Treaty, which was rejected by Danish voters in a referendum and only narrowly endorsed by their French counterparts, intensified popular concerns over EU treaty change.[61] Thirteen years later, referendums on the European Constitution in France and the Netherlands produced a popular backlash against a treaty that was designed to bring the EU closer to its people.[62] The United Kingdom had planned to hold a referendum on this treaty, but its

failure to do so on earlier or later agreements goes some way towards explaining why Prime Minister David Cameron called and lost a referendum in 2016 on the United Kingdom's continued membership of the EU.

This book seeks to understand the transformation of EU treaty making over the period 1950–2016. Our overarching aim is to discover how and why parliaments, the people and courts came to play a role in a domain once dominated by national governments and what the consequences of this shift are. We consider how the European Parliament, national parliaments and – to a lesser extent – the Court of Justice of the EU became part of the process through which the EU negotiates treaty amendments. We investigate changing constitutional laws and practices in each of the EU's member states to understand how parliaments, the people and courts acquired a greater say in the process through which such treaty amendments are accepted. We consider what effect such changes had on the rate of EU treaty amendment and examine the case for reforming EU treaty making yet further. In the light of these findings, students of international law and international relations can learn about the increasing frequency and complexity of EU treaty making.

In this introductory chapter, we set the scene for what follows by situating this six-decade study of EU treaty making in a wider historical context in the first section before discussing the theoretical and methodological approach of our study in the second section. The third section introduces our central argument. The fourth presents a plan of what follows.

A Brief History of Treaty Making, 1416–2016

The treaty-making powers of monarchs in the medieval period were sweeping but by no means absolute. Treaties at this time were essentially private contracts between rulers rather than the territories they ruled,[63] although these agreements frequently imposed obligations on the latter.[64] For this reason, the consent of nobles, prelates and towns for treaties was periodically sought, this process of 'co-ratification' serving as a precursor to parliamentary involvement in the consent stage of treaty making.[65] In fact, parliaments occasionally participated in medieval treaty making, albeit on an ad hoc basis.[66] In England, for instance, the Treaty of Canterbury (1416) was approved by parliament after being read aloud in both its houses.[67] In France, Assemblies of Estates played a comparable role on occasion.[68] Treaties were otherwise ratified by rulers through solemn oaths, the exchange of hostages, the

kiss of peace and written texts.[69] Confirmation by an oath in a religious ceremony was the most common way of ratifying a treaty, a process that gave the pope and papal courts an important, indirect role in the legitimation of treaties.[70]

The Peace of Westphalia (1646–1648) did not, it is now widely recognised, found the international state system.[71] Nevertheless, Westphalia was a significant episode in the history of treaty making, which reflected the gradual secularisation of the treaty ratification process while foreshadowing the emergence of diplomatic conferences in the nineteenth and twentieth centuries. The ratification of treaties via religious oaths died out after the Reformation, as did references to canon law, with treaties being ratified instead by rulers.[72] The norm by this point was that rulers were obliged to ratify agreements negotiated by their representatives unless these representatives had exceeded their full powers. Today, full powers designate the authority of individuals to negotiate and sign treaties on behalf of a state, but then they came with detailed instructions from rulers and 'wide authority to negotiate and a promise to accept as binding anything signed as a result of these negotiations'.[73] For this reason, verifying full powers was a critical and, at times, laborious part of treaty making. At Westphalia, it took several months of diplomatic exchanges before Spain's full powers, which had initially been vested in a double delegation, were revised to the satisfaction of other parties.[74]

The obligation to ratify in early modern treaty making jarred with the emerging domestic constitutional requirements for treaty ratification. For example, the Peace of Münster (1648)[75] – an agreement negotiated at Westphalia – was put to the Estates General of the Dutch Republic.[76] The Treaty of Münster (1648), another Westphalian agreement, gave the 'Emperor, the most Christian King, the Electors of the Sacred Roman Empire, the Princes and States' eight weeks to prepare and present solemn Acts of Ratification at Munster.[77] The Treaty also provided for the transposition of its provisions into the 'other fundamental Laws and Constitutions of the Empire in the Acts of the next Diet of the Empire', an early example of constitutional amendment being linked to treaty making.[78]

Westphalia prefigured the modern treaty conference by bringing together the representatives of rulers in a treaty-making congress to which interested parties were invited.[79] This was not a gathering of the victors of war or even its victims but an assembly of those with a stake in the future of Europe. The delegations at Westphalia included noblemen and jurists and other experts,[80] accompanied by a coterie of

'noble companions, guards, pages, lackeys, grooms, cooks [and] tailors'.[81] All told, the negotiations lasted five years.[82] In contrast to today's treaty-making forums, the delegates never met in plenary, but the interaction between them was intensive, sustained and structured. Venice and a papal nuncio acted as mediators in Münster, while negotiations took place without mediation in Osnabrück.[83]

The negotiation of treaties by the plenipotentiaries of heads of state or government became the norm in the eighteenth and nineteenth centuries, although the inclusivity of treaty-making conferences varied. The Treaty of Paris (1814) invited 'all the powers engaged on either side' of the War of the Sixth Coalition to send plenipotentiaries to Vienna.[84] Although there were 216 states represented at the Congress of Vienna (1814–1815), its deliberations were dominated by the great powers. 'The Congress never formally opened', as Genevieve Peterson notes; 'credentials were never officially verified, and there was no plenary session'.[85] 'The Congress dances', said Prince de Ligne of the lavish entertainment offered to him and his fellow delegates, 'but it doesn't advance'.[86]

The first Hague Peace Conference (1899) demonstrated a clearer commitment to the equality of states in treaty negotiations after Tsar Nicholas II invited fifty-nine of the world's sovereign states to discuss 'the most efficacious means for assuring to all peoples the blessing of real and lasting peace'.[87] Twenty-six nations small and large participated in the decision-making structures of the conference, with the appointment of Auguste Beernaerts, a Belgian, as chair of one of the conference's three commissions, reinforcing this point. The presence of delegates from Brazil, China, Japan, Persia, the United States and Siam embodied a less Eurocentric vision of multilateral treaty making, albeit one in which European states remained firmly in the majority. Forty-three states participated in the second Hague Peace Conference (1907), which was convened, in part, due to the efforts of the American Peace Society. This society was kept away from the conference, which nonetheless marked the beginning of systematic efforts by NGOs to shape the course of treaty negotiations.[88]

The Paris Peace Conference (1919) harkened back to an earlier period of treaty making as well as ushering in a new one. The participation of Australia, Canada, India and South Africa as delegates showed the increasing influence of smaller powers.[89] As at Vienna a century earlier, however, the most important negotiations played out in the margins of the conference among the most powerful states. Germany and other Central Powers, meanwhile, were entirely excluded until the Treaty of

Versailles and related agreements had been negotiated. In spite of its secretive working methods, the Paris Peace Conference was committed to a new era of transparent treaty making. The Covenant of the League of Nations (1919) required all treaties or international engagements entered into by League members to be registered with the League's secretariat.[90] A response to the role played by secret treaties in the run-up to the First World War, this provision spoke to Leon Trotsky's vision of 'democratic foreign policy'[91] as much as to Woodrow Wilson's aim of 'open covenants of peace, openly arrived at'.[92]

So long as the traditional doctrine of full powers prevailed, instances of non-ratification were rare. The Dutch Republic's failure to ratify the Treaty of Elbing (1656) after the United Provinces objected was treated not as a constitutional right but, in the words of Dutch diplomat Abraham de Wicquefort, as an act that ridiculed the power of ambassadors.[93] A failure to ratify was, as one scholar put it, treated as an unfriendly act.[94] The American and French Revolutions were turning points in this respect, the US constitution (1789), as noted above, making the US president's treaty-making powers subject to the advice and consent of the Senate,[95] and the French constitution (1793) giving the power to authorise treaties to the legislature.[96] Thereafter, it gradually came to be accepted that states had discretion over whether and how to give their consent to be bound to treaties. The Treaty of Frankfurt (1871), for example, recognised the need for its approval by the French Assembly and Chief Executive of the French Republic.[97]

By the twentieth century, parliamentary involvement in the consent stage of treaty making was commonplace. Even in the United Kingdom, where treaty making fell, and still falls, under the royal prerogative, the government agreed in 1924 to lay treaties before both houses of parliament so as to provide an opportunity for discussion.[98] The interwar period also saw the first modern European referendum on treaty making, when the people of Luxembourg voted in 1919 against economic union with Belgium.[99] In a harbinger of controversy to come, the Belgium–Luxembourg Economic Union went ahead regardless. In 1921, the Swiss constitution was amended to allow citizens to petition for a referendum on treaties of an unspecified duration or which could not be renounced, this amendment coming one year after Switzerland held a referendum on joining the League of Nations.[100] To this day, Switzerland remains one of the few non-EU states in which treaty-related referendums are a regular occurrence, although a significant share of these are related to the state's relationship with the EU.

The involvement of higher courts in treaty making is more tentative, with treaty making being widely seen as a matter for the executive. In 1858, a controversy over whether a Latin American border treaty was compatible with Nicaragua's constitution was settled not in the Nicaraguan courts but by US President Grover Cleveland, acting as an arbiter.[101] The US Supreme Court itself has treaded cautiously in relation to treaties. Although it made clear in 1870 that 'a treaty cannot change the Constitution or be held valid if it be in violation of that instrument',[102] the Supreme Court had yet to strike down a treaty as unconstitutional at the time of writing.[103] National constitutions that expressly provide for the constitutional review of treaties are an altogether more recent phenomenon. The introduction of constitutional reviews in France's constitution of 1958, Mendez suggests, encouraged constitution makers in Europe, Latin America and Africa to introduce similar provisions from the 1970s onwards.[104]

States dominate modern treaty making, but they have faced competition from new actors since the late nineteenth century. From the Treaty of Bern (1874) onwards, treaties began to create international organisations and some of these organisations eventually acquired a treaty-making role. The Universal Postal Union created at Bern can enact changes to the Postal Convention in plenary sessions of its congress before its members have submitted their instruments of ratification.[105] The League of Nations was a tentative participant in treaty making, but an early success was the Åland convention (1921), which ensured the non-fortification and non-militarisation of Finland's autonomous Swedish-speaking region. The treaty was negotiated between Sweden, Finland and six other states, but these states met at the request of the League, responded to its recommendations and signed the final agreement in Geneva.[106] Also significant was the League's development of the first rules of procedure for treaty-making, rules that continue to shape the conduct of treaty-making conferences today.[107]

The United Nations Charter (1945) gave little indication of the UN's prolific role to come in treaty making.[108] The Charter invited the General Assembly to initiate studies and make recommendations 'for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification'.[109] To this end, the General Assembly created the International Law Commission (ILC), which in 1949 began preparatory work on codifying the law of the sea. Following this work, the General Assembly sponsored a convention of eighty-six states in Geneva, which agreed

on four treaties that entered into force once twenty-two states had deposited their instruments of ratification. This model of treaty making, one of several followed by the General Assembly, produced twenty-one other treaties in this way over the next forty-eight years, including the Vienna Convention on the Law of Treaties (1969) and the Rome Statute of the International Criminal Court (1998).

By 2015, more than 560 multilateral treaties had been negotiated under the auspices of the UN.[110] In most of these cases, the UN served as an initiator and enabler of negotiations rather than an actor in negotiations themselves. The final text of UN-sponsored multilateral treaties is typically signed by representatives of states, which alone give their consent to be bound by such agreements. A rare exception in this regard is the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which was signed and subject to an act of formal confirmation by the UN and other international organisations.[111]

As the title of this last convention suggests, international organisations can be parties to treaties in their own right. Although this convention has not yet entered into force,[112] its recognition that 'international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purpose',[113] reflects international customary law.[114] The World Health Organization (WHO), for example, was party to nearly 800 treaties by 2009.[115] And yet the treaty-making powers of international organisations fall well short of those enjoyed by states. The International Court of Justice (ICJ) has noted that international organisations do not possess the 'general competence' enjoyed by states in international law. They can participate in treaty making, the Court concluded, but only if they act in accordance with 'common interests whose promotion those States entrust to them'.[116]

Since the Second World War, NGOs have made significant inroads into treaty making. An early indication of this trend was the Congress of Europe (1948), organised by the International Committee for Movements for European Unity. This umbrella group of pro-European pressure groups gathered in The Hague to discuss plans for post-war European unity. The Congress of Europe produced a political resolution rather than a draft treaty, but its ideas for a European Assembly, a Charter for Human Rights and a Supreme Court were taken up in the Treaty of London (1949), which created the Council of Europe. The Congress of Europe reconvened in The Hague in 1953 but was less influential. This experiment in NGO-led treaty making had run its course.