

MODERN TREATY LAW AND PRACTICE

This new edition of a textbook first published in 2000 provides a comprehensive account of the law of treaties from the viewpoint of an experienced practitioner. As such, it is the first, and only, book of its kind. Aust provides a wealth of examples of the problems experienced with treaties on a daily basis, not just when they are the subject of a court case. He explores numerous precedents from treaties and other related documents, such as memorandums of understanding, in detail. Using clear, accessible language, the author covers the full extent of treaty law, drawing examples from both treaties and memorandums of understanding. *Modern Treaty Law and Practice* is essential reading for teachers and students of law, political science, international relations and diplomacy who have an interest in treaties.

ANTHONY AUST was a visiting professor at University College London, the School of Oriental and African Studies, London, the London School of Economics (his alma mater) and Notre Dame University at London. For thirty-five years he worked in the legal division of the British Foreign and Commonwealth Office, ending as deputy to the Legal Adviser. He is now a consultant on public international law to law firms in London and abroad, governments and international organisations.

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THIRD EDITION

ANTHONY AUST

*Formerly Deputy Legal Adviser,
Foreign and Commonwealth Office, London*



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FOREWORD TO THE FIRST EDITION

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 Anthony Aust is exceptionally well qualified to write. As one of the former senior legal advisers in the Foreign and Commonwealth Office,¹ 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 Anthony 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

¹ He retired as Deputy Legal Adviser in 2002.

PREFACE TO THE THIRD EDITION

I am, in plainer words, a bundle of prejudices – made up of likings and dislikings.

Charles Lamb, *Essays of Elia* (1823), 'Imperfect Sympathies'

A first edition of this book was written and published when I was still employed by the British Diplomatic Service. Although I was generally allowed to express my own views, being still a public servant I had sometimes to exercise restraint. Since retiring in 2002, I have been free to say and write what I like. Although I hope I am no more prejudiced than anyone else, in this edition I can give more of my personal views. Identifying them is a simple matter; merely compare what I said in the first or second edition with what I say now.

Although this edition may look much like the first or second, since it follows its general form and layout, every page has changes, some substantial; and even a few corrections. A lot of the material has been updated. Some arguments have been refined, for example, I have learned a lot from Daniel Hollis about the legal rationale for memorandums of understanding (MOUs). New material has been added. Given its increasing importance for treaties, there is an attempt to explain the sometimes baffling role in treaty making played by the European Union. Even some of the quotations are new. A bibliography has been omitted.

In response to popular request, the treaties, MOUs and cases list the pages where each instrument or decision is referred to. They are also listed using the name by which they are more commonly known, thereby making them that bit easier to find. Knowing how most people work today, whenever possible a reference to an online source is given, whether it be the registration number of a treaty published in the UNTS, ILM or a website.

Unless otherwise indicated, all views expressed in this book are my own. But, for this edition, various people have provided valuable facts and material, Duncan Hollis in particular, and also James Ding. I am sorry if I have omitted anyone who should be mentioned.

No lawyer can work effectively without a well-run library. I therefore wish to thank the staff of the FCO Legal Library, as well as of the Library of the Institute of Advanced Legal Studies, London. I also owe a big debt to Nevil Hagon and his colleagues in the FCO Treaty Section, and Arancha Hinojal of the United Nations Treaty Section for

helping me with information, finding material, and for reading and commenting on drafts on the practical aspects of treaties.

My thanks also go to Sinead Moloney of Cambridge University Press, and Judy Oliver for compiling the index.

I must again express my appreciation to the following for giving permission to reproduce certain of the Appendices: A, B and E (the Controller of the Her Majesty's Stationary Office); C (the Austrian and British Ministries of Defence); H, I and L (the Foreign and Commonwealth Office); and K and P (the United Nations).

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AJIL	<i>American Journal of International Law</i>
ATS	<i>Australian Treaty Series</i>
CoE	Council of Europe
CTS	<i>Consolidated Treaty Series</i>
EHRH	European Human Rights Reports
ETS/CETS	<i>European Treaty Series / Council of Europe Treaty Series</i>
<i>Hertslet</i>	<i>Hertslet's Commercial Treaties</i>
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
LNTS	<i>League of Nations Treaty Series</i>
TIAS	<i>Treaties and Other International Acts Series</i> (United States)
OJ	<i>Official Journal of the European Community/Union</i>
UKTS	<i>United Kingdom Treaty Series</i>
UNTS	<i>United Nations Treaty Series</i>

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