UK Treaty Practice Made Clear

An article by Anneli Sarkanen on a presentation by Paul Barnett and Nevil Hagon of the Legal Information Group of the Foreign and Commonwealth Office (FCO) treaty section - 24 February 2009

The presentation offered an interesting insight into the work of this Section, with amusing anecdotes such as problems in getting Her Majesty the Queen to sign in the correct place and upside-down flags.

The seminar was in three parts:

- Purpose and function of the Treaty Section
- Key elements of Treaty practice
- Parliamentary scrutiny of treaties

The word treaty in this article is used interchangeably with convention, agreement and protocol.

Purpose and function of the Treaty Section

The section deals with all international agreements, for all government departments. The FCOs legal advisors ensure treaties are drafted in accordance with UK practice and do not conflict with existing domestic, or international laws. Non-legal section staff confine themselves to treaty procedure and administration and handle queries internally and from outside the department. They do not offer legal advice, including interpreting treaty provisions.

Treaty procedure

The section advises the FCO and other government departments on the form of draft treaties, Memoranda of Understanding (MoUs), and related documents, such as Full Powers and instruments of ratification. The section:

- produce treaties for signature
attends signature ceremonies and advise on procedures for overseas signings

- Publishes treaties as Command Papers - these go to Parliament for the explanatory memorandum and then are registered with the United Nations

**Command Papers**

These are laid before Parliament in 4 series. The first three are laid before parliament with an explanatory memorandum ("Lester EM"):  

- Country Series - for 'bilaterals', which do not enter into force on signature  
- Miscellaneous Series - for 'multilaterals', which do not enter into force on signature  
- EC Series - European treaties, which do not enter into force on Signature  
- Treaty Series - for all Treaties once they have entered into force for the UK

An Annual Treaty Index is published for Treaties and also a Supplementary List. The latter lists every action related to a Treaty since coming into force but is not currently indexed, nor very accessible. The section is working to improve this.

**Treaty Information**

The section:

- maintains and updates information on all UK treaty commitments
- coordinates the UK's role as depositary for 36 international agreements
arranges for treaties that are in force for the UK to be transferred to the National Archives at Kew

- provides an information service to the FCO, other government departments, Foreign Embassies and the public. Law firms & librarians can use the service but, unfortunately, law firms come far down in the pecking order for responding to enquiries! Nevertheless, the section staff are extremely helpful and aim to respond to "easy" enquiries in an hour.

- covers everything from extremely old treaties to the topical and new such as cluster bomb treaties

The Treaty Database

The section maintains an internal database of Treaty information. It began as a handwritten database but is now fully electronic. It is not yet publicly accessible. The database:

- includes treaties from 1835 to the present day

- contains approximately 14,000 records of bilateral, multilateral and EC treaties

- gives the current status of the UK's position for each treaty

- gives publication references

- lists, where known, parties and extensions to overseas territories

- provides references to Declarations, Reservations and the like

Treaties are never deleted. An archive is kept. This can be important for overseas territories that become independent and contact the FCO Treaty Section for information on their own treaties.

The database does not contain the full text of Reservations and Declarations for all treaties. That is the responsibility of the depositary for each treaty.
Many staff are not legally trained, so don't interpret declarations - they can, however, confirm what happened and when.

**FCO Website - Treaty pages**


- treaty pages are currently undergoing a revamp. Section staff freely admit the UK's is not the best website, but the Australian equivalent is considered a model example; which will be studied closely when the UK's is re-designed

- the website contains the full text of Command Papers from 1997, plus explanatory memorandums.

- the website includes links to other states' multilateral treaties. The team are happy to accept suggestions for other website links

- the website contains links to the full text and status lists of treaties the UK is a depositary for.

- most Full Text is not electronic - the FCO plan to scan in and digitise all treaties to 1892 in the near future

Note: some links currently do not work, however work is being done to address this

**STOP PRESS:** The FCO plan to make the Treaty Section database available to the public soon. Their developers are looking for volunteers to take part in a user survey to help design this. If you would be interested in volunteering contact: [Nevilk.Hagon@fco.gov.uk](mailto:Nevilk.Hagon@fco.gov.uk)

**Treaty practice**

The Treaty Section is not involved in the negotiations of treaties, they only involve themselves in the treaty once it is in its final stages of negotiation. The section advises on the proper form the treaty should take, including, precedents, testimony and signature of the treaty. It also deals with queries on overseas territories (OTs) and crown dependencies.
Signing a Treaty

Only 3 people can sign Treaties or delegate full powers for others to sign on their behalf. The Prime Minister (whom only occasionally signs treaties), Her Majesty the Queen (rarely or never signs treaties) and the Foreign Secretary (occasionally signs). The issue then is who usually signs and here the concept of Specific Full Powers comes into play. These can be given to anyone though establishing who is so empowered can only be done by HM the Queen.

When signature is required in the UK it is done on official treaty paper and during a "sealing ceremony". Flags are not usually provided at such ceremonies in case they are flown upside down, as happened in a recent trade agreement signing between the UK and China - http://news.bbc.co.uk/1/hi/uk_politics/7866938.stm.

Signature is only the first stage for treaties. Ratification and accession are also required. Sometimes, though not always, the treaty enters into force upon signature.

The FCO acts as a depositary of Treaties. Thirty-six treaties are currently deposited at the FCO. It bases its functions on the Vienna Convention on the law of treaties - Art. 77 "Functions of depository". Other depositaries include the International Maritime Organisation and the United Nations. The FCO will also provide certified true copies of those it acts as depositary for. Note: acting as a depositary is not indicative that the treaty applies in the country it's deposited in. Even if not a party the UK can act as a depositary for treaties. Compare certain UNESCO treaties deposited in the UK to which this country is not party.

Some treaties remain unsigned such as that established to protect the wreck of the titanic. The parties are the US, UK and Canada - the UK is a depositary but this agreement is still not in force, and remains unsigned by Canada.

Treaty Succession

This happens when a state takes over a treaty when a country becomes divided. For example, with Yugoslavia, all the countries had a right to claim succession, and when one does, they notify the depositary which in turn is obliged to notify the other parties to the treaty.

UK overseas territories (OTs) and treaties

- overseas territories of the UK do not normally sign or ratify treaties on their own behalf - the "metropolitan treaty" signs, ratifies, or accedes on behalf of these

- there will be a consultation with OTs and Crown Dependences to see if they wish a treaty to apply to them. This is usually prior to signature or ratification
treaties will always specify territorial extent. The UK does not normally include the Channel Islands and Isle of Man, unless specified. Until 1950, treaties did apply to Channel Islands and Isle of Man automatically but not anymore

Memoranda of Understanding (MoUs)

Key points about MoUs:

- these are not treaties
- they are not legally binding in international law
- they do not use "treaty language". For example "the parties shall" will be used rather than "the participants will", or "take effect" will be used instead of "enter into force"
- the UK does not publish MoUs as Command Papers or register them with the UN

MoUs are subject to Freedom of Information requests, although some may not be released. It is not usual practice to release these to the public, however the MoU on Iraq and the presence in Iraq after the war is a topical exception, and the MoU on Iranian treasures being exhibited in the UK. Interestingly when it came to the loan of parts of China's Terracotta army, this was done by Treaty, not MoU.

Pop Quiz: MoU or Treaty?

- The Atlantic Charter, 1941 (UK-US) = MoU

- The Lancaster House Agreement, 1979 (Rhodesia Constitution) = MoU - Rhodesia was a crown dependent not its own state at the time
The Single European Act, 17 Feb.1986 - Treaty

- The Good Friday Agreement (British-Irish Agreement, Belfast 1998) - Treaty

- Ramallah Agreement (UK-US arrangement regarding Jericho prisoners, 1 May 2002) - MoU


- The Afghanistan Compact (31 Jan.2006 Afghanistan and the "International Community") - MoU

- The St. Andrews Agreement, 13 Oct.2006 (re. Devolved power in N.Ireland) - MoU

One has to go beyond the name of the Treaty/MoU to work out what it actually is

**Parliamentary scrutiny of treaties**

*Key note: Parliament does not ratify treaties*

- The Ponsonby Rule (1924) states that every Treaty must be laid before Parliament, however this is not set in statute. It is just a convention each government has endeavoured to follow

- treaties are not self-executing in the UK. Parliament has to enact legislation to make international treaties lawful.

Remember, just because a treaty has been ratified does not mean it is UK law. It has to be brought into law through the enactment of an Act or SI.

There have been many debates on the Parliamentary Scrutiny of Treaties, however the subject remains unclear. In 2007 there a further attempt was made to put The Ponsonby Rule on a statutory footing. The consultation document - War Powers and Treaties, which ended in January 2008 suggests it should be mandatory that a treaty be laid before Parliament for 21 days. The Consultation received 11 responses in respect of treaties and became a White Paper leading to the Constitutional Renewal Bill.

**Further reading**

Aust, T. - Modern Treaty Law and Practice
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